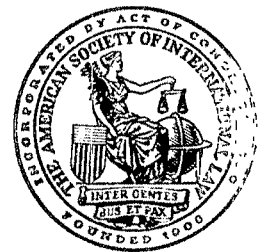


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CONTENTS

103

	PAGE
Of Missionaries, Fanatics, and Lawyers: Some Thoughts on Investment Disputes in the Americas	William D. Rogers 1
Coercion and Foreign Investment Rearrangements	Detlev F. Vagts 17
The Recruitment and Use of Mercenaries in Armed Conflict	H. C. Burmester 37
The Third United Nations Conference on the Law of the Sea: The 1977 New York Session	Bernard H. Oxman 57
Notes and Comments	
Law of the Sea—The Integration of the System of Settlement of Disputes under the Draft Convention as a Whole	A. O. Adede 84
The United Kingdom—France Continental Shelf Arbitration	David A. Colson 95
International Law in War College Perspective	William H. Witt 112
Correspondence	116
Contemporary Practice of the United States Relating to International Law	John A. Boyd 119
Judicial Decisions	Alona E. Evans 147
Book Reviews and Notes	
Reisman, Michael, and Burns Weston (eds.). <i>Toward World Order and Human Dignity. Essays in Honor of Myres S. McDougal.</i>	161
Rousseau, Charles. <i>Droit international public. Tome III. Les compétences.</i>	163
Verdross, Alfred, and Bruno Simma. <i>Universelles Völkerrecht. Theorie und Praxis.</i>	167
Schermers, Henry G. <i>International Institutional Law. Vol. I, Structure; Vol. II, Functioning and Legal Order; Vol. III, Teaching and Materials.</i>	168
Hague Academy. <i>Recueil des Cours, 1974.</i>	170
U.S. Air Force. <i>International Law—The Conduct of Armed Conflict and Air Operations.</i>	174
Rosas, Allan. <i>The Legal Status of Prisoners of War.</i>	176
Giuliano, Mario. <i>Diritto internazionale.</i>	178
Conforti, Benedetto. <i>La Nazioni Unite. Lezioni di Organizzazione internazionale.</i>	179
de Vries, Margaret. <i>The International Monetary Fund, 1966–1971: The System Under Stress. Vol. I, Narrative. Vol. II, Documents.</i>	181
Bloomfield, Louis M., and Gerald F. FitzGerald. <i>Crimes against Internationally Protected Persons: Prevention and Punishment—An Analysis of the UN Convention.</i>	183
Lapidoth, Ruth. <i>Freedom of Navigation, With Special Reference to International Waterways in the Middle East.</i>	184
Churchill, Robin, Myron Nordquist, and S. Houston Lay. <i>New Directions in the Law of the Sea. Vol. V: Documents; Vol. VI: Documents and Index to Volumes I–VI.</i>	185

Gorove, Stephen. <i>Studies in Space Law: Its Challenges and Prospects.</i>	187
Meijers, H., and E. W. Vierdag (eds.). <i>Essays on International Law and Relations in Honour of A. J. P. Tammes.</i>	189
Schermers, Henry G. <i>Judicial Protection in the European Communities.</i>	191
Weber, Nikolaus. <i>Die Richtlinie im EWG-Vertrag.</i>	192
Plouvier, Liliâne. <i>Les Décisions de la Cour de Justice des Communautés Européennes et Leurs Effets Juridiques.</i>	193
Arndt, Claus. <i>Die Verträge von Moskau und Warschau.</i>	194
Bray, Wayne D. <i>The Common Law Zone in Panama: A Case Study in Reception.</i>	195
—, <i>The Controversy Over a New Canal Treaty Between the United States and Panama.</i>	
Kahn-Freund, Otto. <i>General Problems of Private International Law.</i>	196
Guggenheim, Paul (compiler). <i>Répertoire suisse de droit international public. Documentaire concernant la Confédération en matière de droit international public 1914-1939.</i>	197
<i>Soviet Yearbook of International Law 1974.</i>	199
Kavass, Igor I., and Michael J. Blake (compilers and eds.). <i>United States Legislation on Foreign Relations and International Commerce.</i>	200
<i>Chung-hua jen-min kung-ho-kuo t'iao-yueh chi</i> (Compilation of Treaties of the People's Republic of China).	202
Briefer Notices: Melzer, 204; Simmonds, 205; Oda, 206; Papadakis, 206; Klemm, 207; Ringear, 208; Marwah and Schulz (eds.), 208; Tesauro, 209; Plischke, 210; Meissner, 211; Bossuyt, 212; Sundberg-Weitman, 212; Giese, 213; Claude (ed.), 214; Thürer, 215; Davis, 215; Fischer and Vignes, 216; Levin, 217; Freymond and Galvani, 218; Loeber (ed.), 218; Friesen, 219; Gordenker, 220; Picone and Wengler (eds.), 221; <i>The Year Book of World Affairs</i> , 1977, 222.	
Books Received	223

OFFICIAL DOCUMENTS

Panama-United States	
Panama Canal Treaty	225
Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal	238
Protocol to the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal	241
International Legal Materials. Contents, Vol. XVI, No. 5 (September) and No. 6 (November) 1977	243

P913

The views expressed in the articles, editorial comments, book reviews, and notes, and other contributions which appear in the JOURNAL are those of the individual authors and are not to be taken as representing the views of the Board of Editors or of The American Society of International Law.

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OF MISSIONARIES, FANATICS, AND LAWYERS: SOME THOUGHTS ON INVESTMENT DISPUTES IN THE AMERICAS

*By William D. Rogers **

Sir Harold Nicholson had it about right. Diplomacy, he said,

is not a system of moral philosophy; it is, as Sir Ernest Satow defined it, "the application of intelligence and tact to the conduct of official relations between the governments of independent States." The worst kind of diplomatists are missionaries, fanatics and lawyers; the best kind are the reasonable and humane sceptics.¹

Investment disputes have attracted their fair share of missionaries, fanatics, and lawyers in the Western Hemisphere. There may be evidence, though, that some relatively reasonable sceptics are making their voices heard.

I.

In the last half century, a variety of estimable and goodhearted men have been constructing new international institutions at a remarkable rate. Systems, conferences, regularized diplomatic processes, and consultative practices now function in almost every corner of the world order. The past fifty years must represent the greatest international lawmaking, machine-building epoch in man's long effort to live at peace with himself on his planet. Yet none of these new institutions, surprisingly enough, has been able to deal effectively with the endemic controversies between foreign investors and developing host countries.

These investment disputes have scarcely been insignificant to our foreign relations, particularly in this Hemisphere. Quantification is difficult. Gantz reports one count by the Department of State of 87 purported instances of expropriating acts during a two-year period in the early seventies.² The great bulk of the claims may have been small. But whatever the arithmetic, there is little doubt that the issue has been important. Investment disputes, in fact, have been at the very heart of our official relations with the other nations of the Americas for half a century. From the simmering conflict with Mexico over U.S.-national ownership of subsoil petroleum rights in the 1920's and 30's, through the Cuban seizures of U.S.-owned property in the early 1960's, to the nationalizations of the Kennecott and Anaconda copper mines and other properties in Chile by the Allende Ad-

* Of the District of Columbia Bar.

¹ H. NICHOLSON, *DIPLOMACY* 24 (3d ed. 1963).

² D. A. Gantz, *The Marcona Settlement: New Forms of Negotiation and Compensation for Nationalized Property*, 71 AJIL 474 n.2 (1977). See also D. A. Gantz, *The United States-Peruvian Claims Agreement of February 19, 1974*, 10 INT. LAWYER 389 (1976).

ministration in 1970-71, to the International Petroleum Company and Marcona takings in Peru within the last decade, U.S. relations with Latin America have been continually vexed by conflict over the private property rights of U.S. investors. Yet, in spite of the central importance of the issue to inter-American relations, and even in an age of unprecedented mushrooming of institutions of world law, no system has emerged by which those conflicts are remitted to international juridical determination.

II.

The effort to design an international system for the resolution of investment disputes has not failed for want of trying. Missionaries, fanatics, and lawyers have all had a hand in the effort.

For their part, the capital-exporting nations, influenced perhaps by analogies in their domestic legal experience, have argued that investment conflicts should be removed from the processes of municipal law and remitted to international adjudication. The developing world, however, has been slow to embrace the proposals that there should be an independent international authority for the resolution of disputes between nations and the nationals of other states.³ Latin America has been the most reluctant of the developing regions in this respect. And the United States has, by the same token, been the industrial nation most uncomfortable with the lack of effective international machinery.

It has responded, in effect, that, if host nations will not submit their actions to international determination and international standards, then the investor's state has the right and obligation to act, and to act unilaterally as well. One result has been a systematic legislative scheme in this country to the effect that, when host developing nations nationalize and fail to comply with international standards of compensation, the United States will retaliate by blocking further development aid and taking a host of other measures. This is the intentment of the Hickenlooper⁴ and Gonzalez Amendments,⁵ of which more later.

Latin America's response to proposals for international dispute settlement machinery has been deeply rooted in Latin American ideology. The heart of that ideology is the body of doctrine inherited from Calvo, who had, one concludes, attributes of all three of Nicholson's lamentable trio; he was indeed missionary, fanatic, and lawyer.⁶ There are two major themes to Calvo. First, the doctrine insists on the strict abstention by

³ See text accompanying notes 6-9, *infra*.

⁴ Section 620(e)(i) of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. §2370(e)(1) (1970 & Supp. V 1975).

⁵ Section 12 of the International Development Association Act, 22 U.S.C. §284(j) (Supp. II 1972), and Section 21 of the Inter-American Development Bank Act, 22 U.S.C. §283(r) (Supp. V 1975). See also Section 602(b)(4) of the Trade Act of 1974, 19 U.S.C. §1872 (Supp. IV 1974).

⁶ C. CALVO, *LE DROIT THEORIQUE ET PRACTIQUE* §§185-205 (5th ed. 1896). For general discussion of Calvo Doctrine, see D. SHEA, *THE CALVO CLAUSE* (1955); SZASZ, *The Investment Disputes Convention and Latin America*, 11 VA. J. INT. L. 256, 260-62 (1971); Chiriboga, *International Arbitration*, 4 INT. LAWYER 801, 804 (1970).

other nations in what is held to be the sovereign and exclusive responsibility of the host state to adjudicate rights in respect of resources or conduct within their borders and compensation for their public takings. Second, the Calvo doctrine argues for the subjection of foreigners to the laws and juridical regimes of countries in which they are found or invest.

The Calvo doctrine has been embraced and embellished throughout Latin America. It is now a fundamental principle of the jurisprudence of the Hemisphere. Calvo clauses and Calvo progeny appear in a variety of Latin American constitutions,⁷ in international conventions,⁸ and, significantly for purposes of this article, in investment contracts.⁹ The alien, in short, is bound by local rule, even if that rule is a violation of international law.

Calvo invented his defense mechanism in an era when Latin America conceived itself to be threatened by the intrusive power and instinct of North America. But the Americas have changed. In the interdependent world of the last quarter of the 20th century, the Calvo doctrine is no longer either a necessary or a satisfactory prescription for the resolution of foreign investment disputes. So the industrial democracies and the institutions of the international economic system have tried a variety of devices to persuade Latin America to give up its Calvo-induced isolation.

The most ambitious and hopeful of these attempts has been, of course, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, proposed as a part of the World Bank system in 1965.¹⁰ The Convention established an International Centre for Settlement of Investment Disputes (ICSID).¹¹ The history of Latin America's

⁷ See, e.g., CONSTITUCION Art. 32 (Peru 1933, amended 1964). One version of the principle may be found in Article 21, paragraph 1, of the Venezuelan Constitution (1947):

Aliens in Venezuela have, without prejudice to what is provided in international conventions, the duties and rights that this Constitution and the laws grant to them; but neither the one nor the other may be greater than those of Venezuelans. For a discussion of the various forms and phrasings of the doctrine, see Wesley, *The Procedural Malaise of Foreign Investment Disputes in Latin America: From Local Tribunals to Factfinding*, 7 L. & POL'Y. INT. BUS. 813, 820-26 (1975).

⁸ See Andean Foreign Investment Code (Codified Text as of Nov. 30, 1976), Common Regime of Treatment of Foreign Capital and of Trademarks, Patents, Licenses, and Royalties, 16 ILM 138, 153 (1971):

Article 50. Member Countries shall not grant to foreign investors any treatment more favorable than that granted to national investors.

Article 51. In no instrument relating to investments or the transfer of technology shall there be clauses that remove possible conflicts or controversies from the national jurisdiction and competence of the recipient country or allow the subrogation by States to the rights and actions of their national investors . . .

⁹ See DAWSON AND HEAD, *INTERNATIONAL LAW, NATIONAL TRIBUNALS AND THE RIGHTS OF ALIENS* 174-75 (1971). It provides, *passim*, a comprehensive and elegant analysis of Calvo in theory and in practice.

¹⁰ Submitted to members of the World Bank on March 18, 1965, and entered into force on October 14, 1966. 17 UST 1270, TIAS No. 6090, 575 UNTS 159.

¹¹ An excellent discussion of ICSID can be found in Amerasinghe, *Dispute Settlement Machinery in Relations Between States and Multinational Enterprises—with Particular Reference to the International Center for Settlement of Investment Disputes*, 11 INT. LAWYER 45 (1977). See also Szasz, *supra* note 6.

boycott of this worthy venture is well enough known. Enough to recall the now classic Calvo statement by Felix Ruiz, the Chilean IBRD-IMF Governor, as he fired the shot below the ICSID waterline on behalf of the Latin American bloc at the 1964 Tokyo meeting of the Bank-Fund Board:

[T]he foreign investor [under ICSID], by virtue of the fact that he is a foreigner, [is given] the right to sue a sovereign state outside its national territory, dispensing with the courts of law. This provision is contrary to the accepted legal principles of our countries and, de facto, would confer a privilege on the foreign investor, placing the nationals of the country concerned in a position of inferiority.¹²

The Latin American reaction to ICSID chose to ignore the reality that the foreign investor is not in the same position as a citizen of the host country. As an alien element, foreign firms are by tradition nonparticipants in the host country's political processes. It might be too much to suggest that the Calvo doctrine in present circumstances actually encourages foreign investors to attempt improperly to influence the local government and the municipal process of public policy decisionmaking. But it is certainly the case, as most multinational firms will attest, that the suggestion that local and foreign firms are equals in the domestic political forum is no more true in Latin America than it is in any other country, including our own.

More fundamentally, the ICSID would have accomplished a result for which Latin America had been struggling for years—a binding and effective relinquishment by foreign investors of the right to appeal to their home states.¹³ Yet the Latin Americans, for complex reasons of history and attitude, were prepared to forego this advantage as well.

Finally, the modern record of international tribunals and arbitral panels provides no evidence of an automatic preference for the multinational enterprise over the interests of developing nations. The deck is not unalterably stacked against the host country.

Yet despite these considerations, the Latin American nations have remained firm in their refusal to join the ICSID. And they have been equally unwilling to consider other proposals for machinery to help resolve disputes regarding resources or investment within their borders. Secretary of State Kissinger proposed at the Hemisphere meeting of foreign ministers at Tlatelolco, Mexico, on February 24, 1974, that the assembled states agree to at least some factfinding machinery as a way to break out of the ideological stalemate.¹⁴ But even this short step was too much. Thus, that most recent

¹² Doc. 39, Press Release No. 57 (Sept. 9, 1964) in 2(1) INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, HISTORY OF THE CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION 606 (1970).

¹³ Article 27, paragraph 1, of the Convention on the Settlement of Investment Disputes provides:

No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

¹⁴ 70 DEPT. STATE BULL. 257 (1974).

official initiative to lift investment disputes out of local tribunals and away from domestic political pressures failed to prosper.

There have been a few scattered and quite discrete exceptions to the general nonarbitration principle. Some have occurred as part of individual agreements. One example is the Japan-Peru Agreements on Development and Supply of Petroleum.¹⁵ These contain provisions allowing arbitration in England, often applying English law.¹⁶ It may be that such project-related arrangements are easier to accept than general undertakings. The bulk of the contract is to be performed outside of the Latin American nation. The other party, furthermore, is a citizen of Japan, not the United States.¹⁷

Such contracts, however, are out of the mainstream of Latin American practice. There is no present likelihood, despite whatever specific nations may do in special cases, that Latin American nations can be brought to agree upon a general investment dispute mechanism. In fact, the current probabilities are strongly in the opposite direction. Latin America in recent years has bent its efforts to convert the Calvo doctrine into positive international law, binding on all states.

III.

Latin America's attempts to legislate Calvo globally reached a high water mark more than three years ago in the debate over the UN Charter of Economic Rights and Duties of States (CERDS).¹⁸ There was a certain illogic to the venture. The Charter would have made it an international norm that no international legal standard exists with which state authorities must comply in investment controversies. It went so far as to suggest that the failure to recognize and respect the exclusive jurisdiction of a national court in nationalization cases would itself be a violation of world law.

Article 2 of the Charter, as put forth by Mexico, was a classic restatement of Calvo. Paragraph 1 of the article provided that each state shall freely exercise full sovereignty over all its wealth, natural resources, and economic activities.¹⁹ More fundamentally Calvo were paragraphs 2(2)(a) and 2(2)(c). Paragraph 2(2)(a) stated that:

[Each state has the right to] regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment.²⁰

This statement tidily covered both sides of the Calvo doctrine. States are given sole authority over foreign investment disputes; foreign investors are

¹⁵ Agreement dated August 24, 1974, reprinted in 15 ILM 1295 (1976).

¹⁶ Art. IV(2) & (4) of Basic Contract on Loans, *id.* 1299-1300 and Art. XVII(2) of Basic Contract on Sales, *id.* 1340.

¹⁷ See Murphy, *Oil Operations in Latin America: The Future of Private Enterprise*, 9 VAND. J. TRANS. L. 489, 500-02 (1976).

¹⁸ GA Res. 3281, 29 GAOR, Supp. (No. 31) 50, UN Doc. A/9631 (1974).

¹⁹ *Id.* at 52.

²⁰ *Id.*

to be treated no better than nationals and are subject to the same laws and the same courts.

Paragraph 2(2)(c) applied Calvo to nationalization. First, it recognized the right of states to "nationalize, expropriate or transfer ownership of foreign property." Second, compensation for property taken is to be determined under the standard of the nationalizing state "taking into account its relevant laws and regulations and all circumstances that the State considers pertinent." Furthermore, any controversy over compensation is to be settled in the courts of the nationalizing state under that state's domestic law, unless the state has freely agreed otherwise.²¹

The difficulties with the article were evident. It ignored any influence that international law might have in resolving disputes. Nothing in the article, or anywhere in the Charter as a whole, would constrain a state from laying down an arbitrary standard for compensation or discourage the capricious administration of compensation laws by local tribunals. But these reservations failed to persuade the developing nations. The United States joined thirteen other countries in submitting a proposed amendment to Article 2.²² This amendment would have modified Article 2 in two important ways. First, it would have allowed appeals of investment disputes to international tribunals, providing the national jurisdiction of the host country had been exhausted, unless otherwise agreed to by the parties.²³ Second, the standard for compensation for expropriated property was laid down to be "just compensation in the light of all relevant circumstances. . . ." ²⁴ The proposed amendment was defeated by a large margin.

So, on December 12, 1974, the Charter itself went to a vote in the General Assembly. It received the support of an overwhelming majority—124 to 6, with 10 abstentions.²⁵ Thus did the developing countries and the industrialized democracies write their ideological differences on foreign investment disputes into the stone of history.

IV.

But not unlike other ringing statements of high ideals, the Calvo doctrine and the CERDS have been occasionally honored in the breach of late. While Latins have held fast to Calvoism in the abstract, they have, in practice, begun to show some willingness to dilute principle with a dash of self-interest in certain recent foreign investment cases. At the same time, the United States has been more inclined to infuse some practicality into the traditionally stark alternatives of full compensation or Hickenlooper retaliation.

²¹ *Id.*

²² UN Doc. A/C.2/L.1404 (1974).

²³ *Id.* para. 1(e).

²⁴ *Id.* para. 1(d).

²⁵ Provisional Transcript, UN Doc. A/p.v. 2315/Corr. 1 at 43-46 (1974). The "no" votes were all cast by capital exporters—The United States, Belgium, Denmark, the Federal Republic of Germany, Luxembourg, and the United Kingdom.

For an illuminating analysis of CERDS in the context of the general assault on alien protection, see Lillich, *The Diplomatic Protection of Nationals Abroad: an Elementary Principle of International Law Under Attack*, 69 AJIL 359 (1975).

The resolution of the Marcona dispute in Peru in 1976 may be a significant piece of evidence of a new, more pragmatic era.²⁶ As Gantz's excellent article makes clear, the sudden taking by the Government of Peru of Marcona's vast iron ore operations in 1975 could have threatened the entire fabric of our relations, not only with Peru, but elsewhere in Latin America. However, this dispute was not only contained, it was settled.

The settlement would have been impossible if the missionaries, fanatics, and traditional lawyers had prevailed. If Calvo means anything, it must mean that, once a foreign investor is nationalized, such an investor seeks his remedies in the local courts and that his government is excluded from any role in the determination of compensation. Yet in the Marcona case, not only did Peru not force Marcona to court, it insisted that the compensation issue be determined by negotiation. And it insisted, furthermore, that those negotiations be conducted not with the firm but with the U.S. Government.

On their side, the U.S. negotiators played an active role; they were not mere surrogates for the Marcona interests but conducted an autonomous evaluation of the seized properties and rights. And the final compensation which was arranged was, as Gantz characterized it, not an "economically ideal package"²⁷—it was not what classic U.S. compensation doctrine might suggest. But, to the extent the settlement sacrificed principle, it did so for the sake of a continuing and potentially profitable relationship between the company and Peru in the export of iron ore.

In short, the Marcona resolution was the work of reasonable sceptics standing on both sides of the controversy. In major part, the quiet but effective diplomatic efforts of U.S. officials made their contribution. And the fact that Peru was prepared to entertain discussions directly with representatives of the United States was also decisive. Therefore, the resolution of the Marcona dispute in Peru may be a significant indication that something new is at hand.

But perhaps the most important evidence of current practice in investment disputes is the nationalization of the Venezuelan oil industry and the quiet understanding between the United States and Venezuela as to the ways in which the U.S. Government could play a constructive role in resolving that titanic issue.

The Venezuelan oil nationalization of 1974 swept up a vast array of drilling concessions owned by foreign firms, as well as pipelines, storage facilities, and refineries. It may be fairly categorized as the most significant change in asset ownership in the history of the Western Hemisphere. Had it occurred at an earlier time, it is not unlikely that it would have generated a massive dispute between the Governments of the United States and Venezuela, and the conflict would have had a serious effect on U.S. relations throughout the Hemisphere. In fact, however, the transition occurred al-

²⁶ See Gantz, *The United States-Peruvian Claims Agreement*, *supra* note 2.

²⁷ *Id.* at 489.

most without popular notice in this country²⁸ and in a way which gave promise of the continued participation of U.S. firms in the Venezuelan industry.

The Venezuelan legislation authorizing the nationalization provided that the owners of the producing, transmitting, and refining properties, most of which were U.S. companies, should be compensated at book value²⁹. It was on this issue that the possibility of a real dispute arose. The conventional U.S. view, of course, has been that nationalizing nations are obliged to pay investors "the full value of the property taken."³⁰ The commentary states that "full value" means "fair market value if ascertainable." There is a strong preference for a market test as opposed to cost or earnings tests.³¹ Net book value is usually said to be a legally inadequate measure of compensation.³² This standard doctrine, under different circumstances and in an earlier time, might well have set the stage for a showdown with Venezuela's book value standard.

The United States took the occasion of the Venezuelan petroleum nationalization to make clear on the public record that it did not embrace book value as an acceptable general standard for compensation. The point was formally and forcefully communicated to Venezuela by an official note. The note was then released and placed on the public record.³³

But the difficult issue was whether or not to go beyond a reservation of the U.S. position and make a major diplomatic effort to compel the Venezuelan Government to amend its law and provide for a more acceptable standard of compensation. The consequences of such an action would have

²⁸ The New York Times reported the Venezuelan actions in the back pages. Venezuelan President Carlos Andres Perez' announcement of the forthcoming nationalization was mentioned in a small paragraph in the Business Briefs section on page 66. N.Y. Times, Sept. 24, 1974, at 66, col. 3. The presentation of a draft bill to President Perez was likewise reported on page 27. *Id.* Dec. 24, 1974, at 27, col. 3. The formal occurrence of nationalization was noted on page 35. *Id.* Jan. 2, 1976, at 35, col. 5. See also *id.*, Oct. 10, 1974, at 70, col. 2; Oct. 18, 1974, at 70, col. 2; Oct. 18, 1974, at 65, col. 4; Oct. 23, 1974, at 73, col. 7; Oct. 25, 1974, at 61, col. 4; Dec. 2, 1974, at 33, col. 6.

²⁹ A discussion of the law, and the text of the key provision, can be found in an article by Felix P. Rossi-Guerrero, Venezuelan Minister Counselor for Petroleum Affairs, *The Transition from Private to Public Control in the Venezuelan Petroleum Industry*, 9 VAND. J. TRANS. L. 475, 478-79 (1976).

³⁰ See, e.g., RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §188 (1964).

³¹ For general discussions of the alternative approaches, see Weigel and Weston, *Valuation Upon the Deprivation of Foreign Enterprise: A Policy-Oriented Approach to the Problem of Compensation Under International Law*, in 1 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 3, 15-37 (R. Lillich ed. 1972); Smith, *The United States Government Perspective on Expropriation and Investment in Developing Countries*, 9 VAND. J. TRANS. L. 517, 519 (1976).

³² See, e.g., Weigel and Weston, *supra* note 31, at 15-18; McCosker, *Book Values in Nationalization Settlements*, in 2 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 26 (R. Lillich ed. 1973).

³³ See, e.g., United States Department of State Press Release No. 630 of Dec. 30, 1975, reprinted in 15 ILM 186 (1976).

been grave. The United States would have been saying, in effect, that the Venezuelan nationalization program was in conflict with Venezuela's international obligations and that this government intended to bring the full weight of its authority to bear until U.S. investors received what the United States considered to be fair compensation under international law. The other Latin American nations would have quickly taken sides. All, presumably, would have supported Venezuela. The issue would probably have precipitated a major debate in the United Nations and might well have opened a new and brittle chapter in the history of United States-Latin American relations.

The Venezuelan legislation, however, also contained provisions authorizing the government to enter into agreements with various oil companies to continue to assist the Venezuelan oil industry.³⁴ This provision was not included as a particular favor to the oil companies; it was included to further Venezuela's national self-interest. Venezuela lacked the technical expertise, marketing ability, and transport systems necessary to produce, collect, refine, and sell its petroleum. It needed help. The legislation opened the way for that help from the very firms which had the most experience in Venezuela's oil-producing areas. Thus, while Venezuela was in the process of taking over the oil properties, it was also entering into negotiations with the various companies concerning future operations. The negotiations were complex and difficult, particularly with respect to the measure of compensation for the future services to be rendered by the companies. But in the end, the government and the operating firms executed service agreements at the same time the property takeovers took effect.

These developments raised a new issue for U.S. policy toward nationalizations. Clearly the compensation for property by itself was inadequate in the conventional view. But the total package was favorable. Most of the oil companies were prepared to accept it. Only a few companies believed they could enhance their ultimate position if the United States were to lodge a stern official objection to the payments earmarked for the takeovers.

It could be argued—and it was argued—that to fail to protest the compensation award would represent a victory of short term practicality over principle. This was the analysis: The Venezuelan nationalization was scarcely inconsequential on the world scale. Though the issue might not be a matter of public debate in the United States, other nations could not fail to notice the U.S. policy response. If, therefore, that policy response were tepid, it was said, the international community would interpret this as a retreat from the stern rules which the United States had consistently said should govern adequacy of compensation issues in the past. Thus, so shortly after the noisy CERDS debate, where we had stood on principle and paid a diplomatic price for doing so, was not the time for retreat. Indeed, from such a retreat it would be impossible to recover at some later date. In fact, with the Saudi Arabian negotiations for the takeover of

³⁴ See, again, Rossi-Guerrero, *supra* note 29, at 479–80.

Aramco proceeding apace, the precedent of Venezuela was bound to leave its imprint on the appearance of U.S. policy for the foreseeable future. So, some argued, principle would be offended; the United States should use the occasion of the Venezuelan takeover for its instructional value and make Venezuela an object lesson from which we could argue for fair value in later nationalization cases.

But internal argument was not restricted to the United States alone. The reasonable and humane sceptics in Venezuela were having their own debate with the fanatics and missionaries. Throughout the negotiations, the United States had not been an utterly idle, passive, or distant observer. On occasion, most often through the good offices of the U.S. Ambassador in Caracas, the United States played a helpful role in bringing the parties together at difficult turns in the negotiation, pointing out possible compromises and clarifying official views on public policy aspects of the transfer. In general, it acted as a positive element in the search for an accommodation. The official U.S. engagement was not nearly so visible as in the Marcona case. And it was managed with "the application of intelligence and tact" which Nicholson rightly sees as the essential ingredient of all successful diplomacy. Nevertheless, pure Calvoists in Venezuela might easily have been persuaded that even this level of intervention was an infringement of the basic Latin American doctrine. The Venezuelan Government, however, was as prepared to temper principle with practicality as was the United States. It readily accepted the occasional offers of official assistance, in spite of the teachings of Calvo.

The final result was a series of agreements between Venezuela and the petroleum companies, transferring the properties to the nation, paying compensation, and arranging for the future cooperation of the firms in Venezuela's petroleum industry. There was no international confrontation.

This is not to say that either side abandoned its essential positions. The United States preserved, at least on the official record, its commitment to fair value as the appropriate compensation standard. Venezuela preserved its position that it was prepared and obliged to pay only book value and that it would lawfully nationalize its petroleum industry on that basis. The fact is, however, that a massive nationalization had taken place, with a payment for the nationalized property ostensibly below what conventional doctrine would have regarded as fair and adequate, without a noisy, public intergovernmental shoot out. If it is indeed the case that the management of international relations requires compromise and concession, that the real diplomats are the reasonable sceptics as Nicholson suggests, and that the fair test of success in any dispute resolution is whether both sides are only moderately satisfied, then the Venezuelan oil nationalization is an important case in point.

In any event, the Venezuelan transfer, together with the Marcona case and other recent experience, suggests that there may be something new in the air in the Western Hemisphere with respect to investment disputes. On both sides, there is movement away from earlier, rigid positions: in

Latin America, a tip-toeing away from Calvo and its strict insistence that nationalization is the exclusive concern of host countries; and, in the United States, movement away from the conviction that formal international machinery is the only remedy and that the justice of each final result is to be measured by rigid standards of compensation. It may be, in short, that a new reality of practice is evolving in the handling of investment disputes in this Hemisphere quite different from what appears on the verbal surface of, for instance, the CERDS debate. The ideological gap between the United States and Latin America may be as broad as, or broader than ever. But there is some evidence to suggest that the gap is being bridged by an accommodation of diplomatic practice, at least with respect to two recent, and potentially explosive, nationalizations.

V.

But another major test of United States-Latin American investment dispute settlement policy is just around the corner—Cuba. It may be the most challenging of all.

In 1959 and 1960, the Cuban Government expropriated the sugar plantations, nickel mining facilities, utilities and railroads, investment companies, insurance firms, and private homes of North Americans.³⁵ Congress responded with Title V of the International Claims Settlement Act,³⁶ which charged the Foreign Claims Settlement Commission with determining the value of the property taken.³⁷ Title V, as amended in 1965, did not, of course, provide for payment³⁸ but rather authorized the Commission merely to certify to the Secretary of State the amount of each loss.³⁹ Congress conceived that in this way it was compiling a public record while the facts were still fresh and thus laying the groundwork for the negotiation of a comprehensive claims settlement agreement with the Government of Cuba at some later and hopefully happier day.⁴⁰

³⁵ A collection of the various authorizing acts may be found in Sutton, *American Claims Against Cuba*, 3 INT. LAWYER 741, 746-49 (1969).

³⁶ 78 Stat. 1110, *amending* International Claims Settlement Act of 1949, 22 U.S.C. §1621 (1964) (current version at 22 U.S.C. §1643 (1970)). A discussion of Title V may be found in Re, *The Foreign Claims Settlement Commission and the Cuban Claims Program*, 1 INT. LAWYER 81 (1967); and FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES, ANNUAL REPORT TO THE CONGRESS OF THE UNITED STATES, 18, 18-19 (1975) [hereinafter cited as FCSC REP.].

³⁷ International Claims Settlement Act of 1949, 78 Stat. 1110, §503, *as amended* 79 Stat. 988 (1965) (current version at 22 U.S.C. §1643 (1970)).

³⁸ Section 501 specifically stated that "[t]his title shall not be construed as authorizing an appropriation or as any intention to authorize an appropriation for the purpose of paying such claims." *Id.* §501.

³⁹ *Id.* §507.

⁴⁰ See, e.g., *Hearings Before the Subcomm. on Inter-American Affairs of the House Comm. on Foreign Affairs on Claims of U.S. Nationals Against the Government of Cuba*, 88th Cong., 2d Sess. 9 (1964) (statement of Rep. Fascell). Representative Fascell stated that

the proving and determination of claims through the already established channels of the Foreign Claims Commission will also constitute a major step toward the clarification of our position vis-a-vis the Castro government.

The Commission received 8,816 claims and rendered favorable decisions on 5,911. The certified losses amounted to \$1,851,075,358, with interest specified to be at the rate of six percent.⁴¹ In addition, the Government Services Administration had its own claim for well over \$100 million in losses sustained by the United States itself.

The Cuban nationalization is the largest expropriation by a socialist nation since the International Claims Act of 1949 went into effect. In fact, the validated claims awaiting settlement with Cuba far exceed the combined total of the claims the United States has resolved with all the Eastern European states in the last quarter century.⁴²

The Department of State has recently disclosed that the United States held high-level meetings with Cuban officials in 1974 and 1975, exploring the process of normalization.⁴³ The question of compensation for the expropriated properties was discussed in those meetings. The United States emphasized that the issues raised by the Cuban nationalizations would be a major test of the normalization of relations between the two countries. The issue, however, remained far from resolution at the secret 1974-75 talks.⁴⁴ On April 14, 1977, President Carter announced that the United States was prepared to explore openly improvement of relations with Cuba on a "reciprocal" basis.⁴⁵ Since then diplomats of the two nations have had a series of meetings, and Cuba and the United States have opened interest sections in their respective capitals. There is no doubt that the issue of compensation for the expropriated properties is very much on the agenda of these new diplomatic exchanges and will continue to be a central element in the process of normalization for some time to come. It will also be a major challenge to the reasonable and humane sceptics in the diplomatic corps of the two states.

The Cubans have consistently represented that they are prepared to consider compensation for the nationalized properties. But, it is said, the United States must first lift its ban on trade with Cuba. Cuba has put forward its own considerable inventory of counterclaims—for the U.S. trade "embargo," for damage inflicted during the Bay of Pigs incident, and for covert sabotage and assassination efforts.⁴⁶ In all events, Castro has in-

⁴¹ See FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES, SUMMARY OF THE CUBAN CLAIMS PROGRAM (undated). See also FCSC REP., *supra* note 36, at 23.

⁴² See, e.g., FCSC REP., *supra* note 36, at 21-23; SPECIAL STUDY MISSION TO CUBA, REPORT: TOWARD IMPROVED UNITED STATES-CUBA RELATIONS, 95th Cong., 1st Sess. 11 (1977) [hereinafter cited as MISSION REP.].

⁴³ N.Y. Times, March 29, 1977, at 1, col. 2.

⁴⁴ This is based on the personal knowledge of the author, who was the U.S. spokesman at these discussions. See also N.Y. Times, March 29, 1977, at 1, col. 2.

⁴⁵ Address by President Carter before the Permanent Council of the Organization of American States, in Pan American Union Building, Washington, D.C. (April 14, 1977) [hereinafter cited as *Address before OAS*]. Reprinted in 13 WEEKLY COMP. OF PRES. DOCS. 523, 526 (April 18, 1977).

⁴⁶ See MISSION REP., *supra* note 42, at 3, 11-12. Senator McGovern has reported that Castro made similar statements to him in May of 1975. McGovern reported that

sisted that the negotiations be between the Governments of the United States and Cuba; North American investors, he says, will have to settle their claims with their own government.

The Cuban willingness to negotiate may be something of a positive sign. The road ahead, however, will be difficult. The Cuban expropriations will be an acid test of the putative new era in investment dispute settlements in the Western Hemisphere. Ideologically, the two parties are poles apart. Congress has made clear that it will be reluctant to accept a settlement which fails to return to the investors a considerable proportion of what the Commission has determined they lost. Cuba's opening position is equally unaccommodating. Not only has Castro embraced the classic Calvo/CERDS principal that it is for each state alone to determine whether to nationalize and how much to pay; he has, in addition, opened up the controversy to argument on counterclaims which are quite without precedent; and he has made certain that those counterclaims are considered by neatly forcing all negotiations into official channels.

There are major practical difficulties as well. Cuba is not a rich economy. It depends largely on sugar for its foreign exchange. Sugar prices have fallen drastically in recent years. Even if Castro were anxious to settle and pay, it is hard to see how he would find the resources to do so.

It would be wise, therefore, not to underestimate the difficulties at hand. Resolution of the Cuban issue will be particularly thorny, for doctrinal, for quantitative, and for practical reasons. The negotiators will be forced to exercise their imaginations. Politically, it will not be enough, in either country, to negotiate a simple lump sum settlement in the conventional form with immediate cash payment, thereby ending the matter. Cuba cannot and will not pay what the U.S. investor community and Congress demand. And the United States will have grave difficulty accepting any formula which smacks of conscience money or indemnity, even if it is framed as an offset to the payment of the \$1.8 billion in private claims for the nationalized properties.

So the parties will be required to reach for something unconventional and unprecedented. There may be some possibilities at hand: deft manipulation of the terms of payment, the staggering of amounts, or the contingency of the sums to be paid. It is also possible to suggest that, since Cuba is most interested in dropping the ban on two-way trade and has thus linked the two issues, the amount or the terms of the compensation payments should be tied in some way over the next several years to the extent the new trade opportunities create important economic advantages to Cuba. Or one could think about a tithe on Cuban exports to this country, or a set aside from worldwide sales of products originating in the former U.S.-

Prime Minister Castro reiterated to me his government's willingness to discuss legitimate differences, including the question of compensation for property that was expropriated when he took power. But, as he put it, the Cubans "... can't bargain with a knife at our throats."

G. McGOVERN, CUBAN REALITIES: MAY 1975, REPORT TO THE COMM. ON FOREIGN RELATIONS, UNITED STATES SENATE, 94 Cong., 1st Sess. 3 (1975).

owned nickel properties and from the taken properties to build up a fund to which certain U.S. investors would agree to look for payment. Finally, it would certainly strengthen the cause of third-party dispute resolution, which this country has championed for so many years, if the United States and Cuba could agree to remit some or all of the countervailing claims to determination in an independent juridical or arbitral forum.

None of these is exactly dazzling. This catalog of possibilities may only serve to prove that something quite creative still must be found. In all events, elementary pragmatism, and a willingness to sacrifice some of the principle of fair compensation on the altar of hoped-for profit in future trade with Cuba, are not enough. Imagination, as well as diplomatic reason and common sense, will be much in demand in what may be, after all, the stiffest challenge to the gently sceptical investment dispute settlers in our generation.

VI.

Yet it is still fair to suggest, even though the Cuban taking is still unsettled, that a process of ideological detente has set in. The tactful and practical men are beginning to draw up seats at the table, along with the fanatics, the missionaries, and lawyers. And it is the former who, for the moment, seem to be responsible for the actual process of negotiations, even if the latter still have the floor at the United Nations.

This suggests a final word on U.S. policy beyond what has been said about the practice of it. The United States can, and should, make an important contribution to the process. If Latin America is retreating from ideological rigidity, the United States should be prepared to respond in kind.

President Carter has opened the doctrinal issue. Speaking before the Permanent Council of the Organization of American States, in his Pan-American Day statement, he said:

We support your efforts [to encourage private investment] and recognize that a new flexibility and adaptability are required today for foreign investment to be most useful in combining technology, capital management, and market experience to meet your development needs. We will do our part in this field to avoid differences and misunderstandings between your government and ours.⁴⁷

The United States can make no greater contribution to the avoidance of "differences and misunderstandings" in the private investment field than to begin the process of repealing the Hickenlooper and Gonzalez Amendments, and to begin pulling back from the more rigid and uncompromising U.S. public positions toward nationalizations.

The Hickenlooper and Gonzalez Amendments are the highwater mark of U.S. retaliatory policy. They have passed their prime. Both are, in fact,

⁴⁷ Address before OAS, *supra* note 45, at 525.

far from absolute.⁴⁸ There is scope in most cases for the nonapplication or waiver of bilateral and multilateral aid sanctions under Hickenlooper and Gonzalez. But the virtual dormancy of the two clauses is all the more reason for repeal. Since they mean nothing unless the Executive wants them to, they have all the drawbacks of a threat and none of its advantages. They are not credible. Their presence on the statute books is therefore just that much more symbolically offensive to Latin America.

President Nixon greatly added to the offense on January 19, 1972, when he made his hard-line pronouncement on expropriation, which he entitled *Economic Assistance and Investment Security in Developing Nations*.⁴⁹ Billed as "The President's Policy Statement," the document condemned all expropriations and promised an all-out effort by the United States to apply responsive economic pressure at every opportunity. Included in the possible sanctions specifically cited by the President were cutting off direct assistance, withholding support from multilateral aid, and developing common retaliatory practices with the other developed nations of the world. The tone of the address was even more threatening than the substance.

The Hickenlooper-Gonzalez-Nixon doctrine statement of policy has been viewed by some in Latin America as economic coercion, less bloody perhaps than the military intervention, which is thought to have marked earlier U.S. policy in the Hemisphere, but still offensive to Latin American dignity and sovereignty. The depth of feeling is illustrated by the debates in the past three years over the reform of the Charter of the Organization of the American States. A number of countries, particularly Peru, mounted their own campaigns of ideological retaliation for Hickenlooper-Gonzalez-Nixon by proposing a plan of Collective Economic Security which they hoped to include in a wholly new Charter for the OAS.⁵⁰ Essentially, that doctrine would have prohibited retaliation for uncompensated expropriations as a matter of international agreement. The constraint would have been enforced by a judicial procedure for trial of, and imposition of damages against, any violators. The Latin Americans were, in fact, proposing that instead of an international forum for dispute settlement, there should be international machinery to penalize nations that attempted to respond to unilateral determinations of compensation. The bulk of the Latin Americans at the OAS were prepared to support the Peruvian initiative, at least in 1975 and 1976, in the aftermath of the CERDS standoff and before the final, successful resolution of Marcona and the Venezuelan petroleum takeovers.

The OAS debate over Collective Economic Security is quiet at the moment. This is most likely due to firm U.S. opposition to such a radical change in the OAS Charter and to the threat that it would refuse to sign.

⁴⁸ Both, for example, now allow presidential waivers, 22 U.S.C. §2370(e)(2) (1970 & Supp. V 1975), 22 U.S.C. §283(r) (Supp. II 1972).

⁴⁹ Reprinted in 8 WEEKLY COMP. OF PRES. DOCS. 64 (Jan. 24, 1972), 66 DEPT. STATE BULL. 152 (1972).

⁵⁰ Draft Convention on Collective Economic Security for Development, OEA Ser. G./CP/doc. 604/76 rev. 1 (Nov. 19, 1976) (original in Spanish).

a document so clearly directed against itself. The point should not be lost, however. Ill-advised and hopeless as the Collective Economic Security proposal may have been, it accurately measured the profound antagonism to the Hickenlooper-Gonzalez-Nixon doctrine found in Latin America.

The time is now appropriate for the United States to change its position. Statutory antagonism serves no purpose now. The legislation is useless. We should take advantage of the lull in the ideological contest and the recent evidence of increasing pragmatism among the Latin American countries. The Executive should propose to the Congress that the United States allow itself to be flexible. The President should state that the Nixon doctrine is no longer U.S. policy, that the U.S. Government is prepared to work practically and in good faith to resolve private investment disputes in a diplomatic fashion where it can help the parties, and that he will ask Congress to repeal the two virtually meaningless amendments.

Such a departure would represent the application of "intelligence and tact to the conduct of official relations" between the nations of the Western Hemisphere on an issue of commanding consequence. Of course, there would be risk as well as promise. Official efforts to aid the search for investment dispute solutions can be misread as intertwined with other foreign policy purposes or with the narrower corporate interests at stake; U.S. prestige can be damaged by failure; and successful resolutions may be taken as permanently underwritten by the United States. Nevertheless, there is much to be said for a more accommodating and more active role. Repeal of Hickenlooper/Gonzalez would further improve the ideological climate within which new practices and processes of accommodation on Hemispheric investment disputes are already being nurtured.

COERCION AND FOREIGN INVESTMENT REARRANGEMENTS

By Detlev F. Vagts *

Expropriations in the later 1970's often proceed more suavely than in the past. Straightforward seizure, to be sure, still has devotees. However, an increasingly favored approach is to induce the foreign investor to convey his property (or an interest therein) by an instrument that on its face represents an ordinary sale.¹ That sale may be accompanied by a revision of the terms of some underlying contract between the investor and the government. The purpose of this article is to explore whether any body of rules now exists setting limits to the means that a government can use to obtain the investor's consent. It then asks whether that law could be further developed so as to improve the quality of such negotiations and to cause them to produce more equitable results. Thereby it would indirectly improve the security and efficiency of the whole process of foreign direct investment.

There is no point to this article unless one assumes that some rule of international law exists, or should exist, which limits the right of sovereign states to take property. Such a rule might be the rule of prompt, adequate, and effective compensation to which the Department of State and the Congress are committed. The questions would not, however, disappear on the assumption that the prevailing rule was more flexible, that it called for compensation that was merely "just," "appropriate," or "equitable." There appears to be quite general agreement that *some* international restraint exists. Indeed, those states which take the circuitous route of expropriation by consent appear to do so either in recognition of the existence of an international understanding or out of a practical desire not to advertise their defiance of it.

The article will proceed as follows. A brief introduction will describe the context within which these actions take place. The meager direct au-

* Although the author was in 1976-77 Counselor on International Law, Department of State, nothing herein should be construed as reflecting an official position by that Department. I have benefitted from numerous conversations there and from the research efforts of Mr. Joseph Grundfest, then an intern in the Department.

¹ This subject matter has been considered previously in Weston, "Constructive Takings" under International Law, 16 VA. J. INT. L. 103, 133-48 (1975); Christie, *What Constitutes a Taking of Property under International Law*, 38 BRIT. Y.B. INT. L. 307, 324-29. (1962); B. WORTLEY, *EXPROPRIATION IN PUBLIC INTERNATIONAL LAW* 1-2 (1959). Weston (at 148) concludes that involuntary sales should be regarded as "functional equivalents" of simple deprivations but that they should entail only compensation to the extent of the deficiency between the price paid and the price "objectively deserved." Sales in violation of basic human rights should be void. He is critical of Christie's requirements before compensation should be granted: only if there are physical threats or if there is a flat statement no compensation will be paid and even then only if the price is obviously inadequate.

thority is then set forth. Those analogies that can be drawn from the law of coercion and treaties and from the municipal law of duress are then explored. Finally, some suggestions for action are proposed—either on a unilateral basis or by a multilateral agreement. Despite the tensions that surround nationalization, it seems reasonable to hope that some progress can be made to regularize the process.

I.

CONTEXT

A. *Some Actual Cases*

It is not easy to identify and describe episodes of the type we are analyzing. Characteristically, the parties are reluctant to go to the public with their problems. The investor's managers are apt to put the best possible face on the situation, partly out of a desire to look well in the eyes of their stockholders and of the business community as a whole. The government acquiring the property has an interest in not alarming other investors and describes its sale price as "fair" (to say that it was "generous" would alarm its radical opposition). The investor's home government, which may have been hovering in the wings, does not want to set a bad precedent for other negotiations by conceding that the price was inadequate. The generosity of the arrangement may be further obscured by the inclusion of a service agreement that adds to the attractiveness of the settlement in ways that resist valuation.

Consider one situation of which there is some public record.² The Anaconda Company had owned copper mines in Chile for a great many years when in 1969 the Government of Chile under President Frei took the stance that all copper mines must be "Chileanized." Negotiations resulted in an elaborate purchase-by-stages with the price being payable, via securities to be issued by agencies of the Chilean Government, essentially from the proceeds of the mining operations themselves. Anaconda was to retain operational control of the mines until its last 49% ownership had passed to Chile. Was this a voluntary sale? The issue was raised but not decided in the arbitration between Anaconda and the Overseas Private Investment Corporation. It is clear that Anaconda did not seek this sale; it was working comfortably with a setup hammered out with the government only two years before. After the fact, Anaconda proclaimed itself satisfied with what the parties termed a "nationalization by agreement." The negotiations were conducted in an atmosphere of tension and haste, but did not represent an ultimatum situation. The final agreement contained adjustments of taxes and other problems that were requested by Anaconda and in some measure offset the financial impact of the buyout itself. Both parties were aware that expropriation was the likely result of a breakdown of negotiations but it was unclear what the terms of such

² The Anaconda arbitral award is reported at 14 ILM 1210 (1975). It should be noted that the author of this article was a member of that panel. The dispute was ultimately resolved by a settlement. N.Y. Times, April 1, 1977, at D1, col. 4.

expropriation would be. Chile at that time was acting within a set of legal and political constraints that gave some assurances that a reasonable amount of compensation would be forthcoming if compulsory action followed. It also felt that the international consequences of an unamicable outcome would be disruptive of Chile's economic program. Events, of course, rapidly overtook this arrangement and the next government cancelled it as overly favorable to Anaconda; the government after that worked out a new settlement. This then is a model case for considering the problem. It is a model even in that various crucial facts about it are not known and probably never will be—such as the genuine market value of the property and the disparity between that and the worth of the package of securities given in exchange in 1969.

Other episodes of some prominence may fit into this pattern, although less is known about them publicly. The Brazilian state of Rio Grande do Sul in 1962 seized the property of ITT after abortive attempts to form a joint enterprise. It deposited \$400,000 in compensation, though ITT set a value of \$7 to \$8 million on its property. Negotiations followed which resulted in a sale of all ITT facilities in Brazil for about \$12 million, half of it being earmarked for reinvestment in manufacturing facilities in Brazil. ITT described the settlement as "equitable and fair." A similar arrangement was worked out with two electric power companies.³

In 1975 Venezuela enacted legislation nationalizing the oil industry;⁴ prolonged talks eventuated in the acceptance by most of the oil companies of payments calculated with reference to the book value of their tangible assets. The question of adequacy was blurred by the presence of various ancillary arrangements which may have materially enhanced the attractiveness of the deal to some owners while obscuring the amount of the compensation. These "side" arrangements were more beneficial to the major oil firms than to smaller ones less able to take advantage of them—to say nothing of the royalty holders who were entirely frozen out.

B. A Hypothetical Situation

The nature and the variety of the problem may stand out a little more clearly if we take a schematic and hypothetical example. Suppose that the state of Erewhon in the past took a liberal attitude towards foreign investment and has attracted five foreign enterprises into setting up widget producing factories. These enterprises have ranged from mildly to very profitable. A new regime has just taken power which aspires to change the social and economic structure of Erewhon. It announces its intention to

³ These episodes are reported in H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 440-43 (2d ed. 1976).

⁴ A translation of the Venezuelan law appears at 14 ILM 1492 (1975). Other recent oil nationalizations by agreement that might, if all the facts were known, involve "duress" have taken place in Ecuador (N.Y. Times, Aug. 8, 1973, at 47, col. 2); in Kuwait (N.Y. Times, Dec. 2, 1975, at 52, col. 5; *id.* Dec. 22, 1975, at 47, col. 3); and, though not yet completed, in Saudi Arabia (N.Y. Times, March 13, 1976, at 31, col. 1; *id.*, May 20, 1977, at D1, col. 4).

"Erewhonize" the widget industry. This is defined to mean that 60% of the stock of any corporation in the widget industry must be owned by the Government of Erewhon or by Erewhon nationals on the deadline date. Instead of simply taking the 60% interest, the government sits down in more or less protracted sessions with the five foreign companies that constitute the industry and emerges with 60% interests in three of them, with a fourth 60% interest in the hands of local entrepreneurs. It turns out later that somewhat varying prices were paid for each of the interests, although it is somewhat obscure what the bases for valuation were and whether the payment represented what an outside appraiser might have selected. The fifth widget company held out to the very end and was taken over 100% by the government through an executive order. As we examine the situation, the means and extent of any compensation to be paid the holdout firm are still in doubt. One may assume that the government said rather different things to the consenting managements, ranging from a crude threat of physical force to the persons of the managers of one, to a veiled suggestion that the second's license to do business would be revoked, to an intimation to the third that the tax structure would be changed to its disadvantage. In one case Erewhon was more patient, gradually tightening regulations on production, increasing taxes, and fixing lower prices until diminishing profitability broke management's resistance. Meanwhile, the private Erewhon group repeatedly suggested to its bargaining partner that confiscation was the only alternative to its offer. Assume further that the managements resisted with varying degrees of determination. One stubbornly held to a no-sale position, appealed to its home government, gave interviews to the press denouncing the move, and ended by cashing the government check under protest. Another went through the motions of negotiating as though a simple commercial transaction were involved; it announced the final sale to its stockholders, customers, and the general public with apparent satisfaction. The third oscillated between protest and acquiescence.

From this situation numerous legal questions arise. Can any one of the four companies appeal to its home government to espouse its claims against Erewhon, as the fifth one might? Would the United States then be obligated to act by virtue of the Hickenlooper and Gonzales Amendments?⁵ Will investment guaranties against expropriation become payable?⁶ How would an international tribunal deal with such a claim? At what point can it be said that the transfer was the product of duress or coercion and cannot be treated as a voluntary sale but rather as a taking?

⁵ The Hickenlooper Amendment, 22 U.S.C. §2370(e)(1), speaks of "actions, which have the effect of nationalizing, expropriating or otherwise seizing ownership or control," which may cover duress transactions. Similar language appeared in the Sugar Act, 7 U.S.C. §1158(c); in the trade preference portion of the 1974 Trade Act, 19 U.S.C. §2462(b)(4); and in legislation on the Inter-American Development Bank, 22 U.S.C. §283r, Asian Development Bank, 22 U.S.C. §285o, the World Bank and IDA, 22 U.S.C. §284j.

⁶ See note 21, *infra*.

C. The Bargaining Situation

In considering these issues one must understand the bargaining structures that underlie such situations.⁷ The typical case is one that bargaining theorists would regard as representing a bilateral oligopolist-oligopsonist or even monopolist-monopsonist confrontation. There are not enough parties in competition to produce anything like a market in the classic sense. The price of the plant's product will not be a market-determined price and its earnings record may be artificial. *A fortiori* there will not be a set of competing buyers for the plant itself.⁸ Furthermore, government action (or anticipation of it) may already have distorted the earnings record which buyers would use to value it. Thus, indications of the fair market value of the property being transferred will be indirect at best. The way in which the bargaining turns out will be heavily influenced by non-market factors. The government bent upon nationalization will no longer have to take into account the possibility of forcible intervention by the home state. It will, however, have to consider the impact on its international credit rating and the possibility that a clear rupture between itself and the investor may have adverse effects on international monetary institutions, private banks, other potential investors, and purchasers of its products. These agencies may refuse to renew old or extend new credits and may be unwilling to purchase "hot" products, particularly if there is an effective threat of litigation. Domestic political considerations will also affect the leverage the administration can exert; a strong force to its left may compel it to take a hard line, but a large and concerned local business community may be anxious to avoid a precedent that might threaten to engulf them next.

As between the nationalizer and the enterprise, the balance of power typically shifts over time. This is particularly clear in the case of mineral extractive industries. An oil or mining corporation still undecided about entering Erewhon, where there have been no mines and where there is no certainty that any will be found, is in a strong position. Erewhon on the other hand is inexperienced and diffident. The result is apt to be a contract that will work out very much to the enterprises's advantage if minerals in paying quantities are found. Ten years later the bargaining situation is quite different. The mineral operation is in full sway. Erewhon nationals even occupy high positions in the operation and have lost their awe of the expertise involved. The profits being derived by

⁷ See, e.g., D. SMITH & L. WELLS, *NEGOTIATING THIRD WORLD MINERAL AGREEMENTS: PROMISES AS PROLOGUE* (1975); *Symposium, The Changing Framework of Concession Agreements and the Oil Industry*, 7 VAND. J. TRANS. L. 279 (1974); *Symposium, Mining the Resources of the Third World*, 67 ASIL PROC. 227 (1973); Vernon, *Long-Run Trends in Concession Contracts*, 61 ASIL PROC. 81 (1967).

⁸ See the extensive review of valuation problems in 1-3, R. LILlich, *VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW* (1972-75). For a domestic valuation problem that, *inter alia*, raises the question of government action that devalues the enterprise before the taking, see Note, *Valuation of Conrail under the Fifth Amendment*, 90 HARV. L. REV. 596 (1977).

the corporation from this enterprise now seem enormous. Erewhon officials are apt to pay little heed to the fact that the corporation has lost substantial sums in vain efforts in other countries so that its overall profitability is not exceptional. They also ignore the fact that it might have lost substantial sums if the Erewhon endeavor had not turned out as it did. The company may retain some bargaining counters by way of external connections in credit and marketing aspects, as well as the country's hopes for expansion, but its position clearly suffers from the increasing options Erewhon possesses.

It is idle to try to freeze the position of the parties for long periods to conditions that become so out of date. Either parties will include renegotiation provisions in their contracts or they will act as if they were there. In international joint venture relationships with other private parties, there is great instability over time, with a high number of such agreements ending in dissolution or a purchase and sale of one party's interest; indeed, the number of sales of subsidiaries of U. S. based multinationals, wholly or partially owned, is rising rapidly.⁹ Our attention, then, should be focussed not on stopping change but only making it more orderly, more equitable, and less likely to cause the sort of panic that disrupts international economic cooperation.

II.

INVESTOR-STATE COERCION

A. *The Case Law*

There is sparse international authority with which to work in the state-investor coercion field.¹⁰ The leading cases come from national tribunals considering claims asserted under international law. Unfortunately, about all those cases seem to settle is the point, which one hopes is obvious, that raw physical pressure vitiates consent. One such case is the *Bernstein*¹¹ litigation, which is renowned among international lawyers in the United States chiefly for its statement that there is an exception to the act of state doctrine where the Department of State notifies the courts of its willingness to have them proceed to hear the case. Bernstein asserted

⁹ L. FRANKO, *JOINT VENTURE SURVIVAL IN MULTINATIONAL CORPORATIONS* (1971). According to Rose, *Why the Multinational Tide is Ebbing* (FORTUNE, Aug. 1977, at 111), sales of overseas subsidiaries are at a "breakneck pace."

¹⁰ The earlier international tribunal cases cited by the commentators are principally *Gowen & Copeland*, 4 J. B. MOORE, *HISTORY AND DIGEST OF INTERNATIONAL ARBITRATIONS, TO WHICH THE UNITED STATES HAS BEEN A PARTY* 3354 (1898) (after Venezuela seized claimants' guano operations they were forced to make a disadvantageous deal—"in the nature of a forced sale"—with Venezuela's protégé company) and *Ellerman c. Etat Polonais*, 5 TRIB. ARB. MIXTES 457 (1924) (involved expulsion of German landowner but seems not to have directly faced the issue since there never was a sale).

¹¹ *Bernstein v. van Heyghen Freres S.A.*, 163 F.2d 246 (2d Cir. 1947), *cert. denied*, 332 U.S. 772 1948; *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart Maatschappij*, 173 F.2d 71 (2d Cir. 1949); 210 F.2d 375 (2d Cir. 1954).

that he had been coerced into signing over his shipping interests by Nazi officials who had imprisoned him and threatened him with torture and death. A similar coercive atmosphere permeated the background of *Zwack v. Kraus*.¹² There a district court found that Kraus had relinquished his liqueur manufacturing operations to the Communist Government of Hungary in 1948, for a trivial compensation, because he was faced not only with having his property seized willy-nilly, but with being confined to Hungary when he was extremely anxious to depart from what seemed to him a menacing environment. The Court of Appeals sustained that finding. Neither of these cases takes us very deep into the problem of coercion, for they both involve personal, even physical, menaces brandished by governments with which the United States was at odds.

There is also a body of case law emanating from special tribunals established to undo economic injuries caused by Nazism. These agencies carried out a sentence in the Inter-Allied Declaration Against Acts of Dispossession issued at London, on January 5, 1943, and joined in even by the Soviet Union: "This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected." The largest number of such cases comes from the tribunals established under Allied Military Government Law No. 59 which entrusted decisions, in the first instance, to the regular German courts but established a Court of Restitution Appeals¹³ to supervise the process. The U. S. Foreign Claims Settlement Commission decided cases under various agreements with European countries¹⁴ that settled private claims arising out of wartime events and postwar nationalizations. France and Great Britain concluded several lump sum settlement agreements after 1945, and the decisions thereunder awarded compensation for forced sales.

¹² *Zwack v. Kraus Bros. & Co.*, 237 F.2d 255 (2d Cir. 1956) *aff'g* 133 F.Supp. 929 (S.D.N.Y. 1955). *Firma Wichert v. Wichert*, 1948 ANN. DIG. 23 (Fed. Trib. Switz. 1948), similarly ignored a transaction wrested from an accused in prison by the Czech authorities.

¹³ The Declaration of London appears at 1943-1 FOR. REL. U.S. 443. Government Law No. 59 (1947) on the Restitution of Identifiable Property in Article 2 denominated as a "confiscation" any deprivation by a "transaction contra bonos mores, threats or duress." Article 30 made a person who obtained property through "threats made by him or on his behalf" liable not only for restitution of the property but for profits or damages from the taking. Similar rules as to duress transfers formed part of the postwar internal legislation of most occupied countries. Robinson, *War Damage Compensation and Restitution in Foreign Countries*, 16 L. & CONTEMP. PROB. 347, 363, 366, 367, 368, 371, 373 (1951). Rules as to the definition of coercion, the burden of proof, etc. varied.

¹⁴ See FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES, DECISIONS AND ANNOTATIONS 88, 222, 390, 594-95 (1968). The annotations are unfortunately tantalizingly terse. In general the Commission took the position that tense conditions prevailing in Eastern Europe in the 1940's were not sufficient by themselves to establish duress. Inadequacy of price was pointed to as a sign of duress (at 594-95). In some cases the duress argument worked against the U.S. claimant by invalidating the claimant's acquisition of the property on which the claim was based (Claim of F. W. Woolworth, at 595).

While most such decisions have been described as "ill-defined or incompletely recounted," one case under the Franco-Italian treaty is sophisticated and detailed.¹⁵

From these cases some authority against coercion can be extracted. However, when one approaches the more difficult question of drawing a line as to when governmental economic, as opposed to physical, pressures cross the line and become coercion only a few of the Restitution Appeals cases are helpful. Some of them did find coercion in nonphysical pressures. For example, one case involved the denial by Nazi authorities of the right to continue operating an enterprise, because of the anti-Nazi attitudes of the claimant who had bought from an owner of Jewish extraction and was forced to resell.¹⁶ Other cases involved boycotts and other less direct pressures.¹⁷ A common thread in most of these cases is that the price paid for the rights was not merely low but ridiculously so, that is, beyond the range within which reasonable arm's length buyers and sellers might make a deal.¹⁸ The transferability of these cases deal-

¹⁵ I R. LILlich & B. WESTON, *INTERNATIONAL CLAIMS, THEIR SETTLEMENT BY LUMP SUM AGREEMENTS* 171 (1975); see also B. WESTON, *INTERNATIONAL CLAIMS: POSTWAR FRENCH PRACTICE*, 124-26, 154-56 (1971). *Différend Industrie Vicentine Elettro-Meccaniche* (I.V.E.M.), 13 UN REP. INT. ARB. AWARDS 324 (1952), was a case under the Treaty of Paris; there an Italian group was held to have extracted a surrender of the French interest in a troubled firm in Italy so as to require compensation under the treaty's provision on "mesures de force ou de contrainte." I.V.E.M. was in difficulty because (a) it had been sequestered as alien property, (b) wartime conditions made it impossible to carry on its production as before, and (c) it was in default on its obligations. The Italian Government "in a climate created by the armistice with France and by a long exaltation of autarky" pressed for an elimination of the non-Italian interests. The government had, however, proposed a payment of 60 lire per share whereas the Italian firm insisted upon the transfer being gratuitous save for the assumption of certain obligations. The arbitrator noted that the fact that a decision was made because of a state of need (*metus a causa necessaria*) did not render it voidable since "nearly all contracts could be annulled as having been concluded under the iron laws of supply and demand"—citing Italian authority. It found something more not in the sequestration which was legal under international law, but in the special steps Italy took to render the pressure to sell intolerable. See also *Différend Wagons-Citernes* 13 *id.* 212 (1950), holding a transfer of railway cars by the French national railroad to Italy to be the result of "une contrainte moral réelle et inévitable."

¹⁶ *Osthoff v. Hofele* 1 U.S. Ct. Rest. App. 111 (1950) (Germany).

¹⁷ *Stadt Friedberg v. Kasino Friedberg*, 3 U.S. Ct. Rest. App. 680 (1952) (social club forced to sell by pressures on its members); *Poehlmann v. Kulmbacher Spinnerei A.G.*, 3 U.S. Ct. Rest. App. 701 (1952) (boycott of once prosperous hotel forced sale); *Stadt Wuerzburg v. Institut der Englischen Fraeulein*, 3 U.S. Ct. Rest. App. 753 (1952) (official closing of school compelled sale).

¹⁸ See Christie, *supra* note 1, at 328. A few representative cases are *Kleinschmidt v. Liebmann*, 1 U.S. Ct. Rest. App. 104 (1950) (price less than 50% of value); *Hussy v. Stern*, 4 U.S. Ct. Rest. App. 228 (1954) (RM1,000 for house worth RM16,000). In *Kapphan v. Steine und Erden G.m.b.H.*, 5 U.S. Ct. Rest. App. 487 (1955), a price of RM1,000,000 for a quarry though "undoubtedly less than market" was found not to be shockingly low so as to justify a label as confiscation. But some transactions involving proven threats were set aside where the discrepancy was not so great, e.g., *Poehlmann v. Kulmbacher Spinnerei A.G.*, *supra* note 17 (price totaled RM100,000).

ing with totalitarian and terroristic regimes to the run of current expropriation cases is marginal, except in certain countries, which diplomacy restrains one from identifying, where civilization has descended more or less to the Nazi level. Those governments would not usually take the trouble to make their lunge at foreign-owned assets by obtaining a forced consent.

B. Other Authorities

Noncase law authorities do not take us much further. Consider first U. S. statements on the topic. The *Restatement (Second) of Foreign Relations Law of the United States* approaches the question through a related topic: that of "creeping expropriation." If a government harasses a foreign entrepreneur in such a way as to make the enterprise unprofitable, one of two outcomes may follow: (a) the entrepreneur may abandon the property or (b) the entrepreneur may sell the property to the government at a price which reflects only the diminished potential of the firm. The first is usually classified as a "creeping expropriation" and the second becomes our coercion case. The *Restatement* example, in fact, describes the second category:

1. X, an alien corporation, owns a textile plant in state A. The government of A, desiring to nationalize the plant without paying just compensation as required by the constitution of A, enters into negotiations for the purchase of the plant and issues a decree revoking the work permits of all alien supervisory personnel of the plant, doubling the applicable minimum wage scale, and raising the applicable income tax rate from 25% to 75%. Unable to continue its business, X sells the plant to A for a fraction of its reasonable value. A promptly repeals the decree, as regards work permits and wage rates, and operates the plant with most of the same personnel. The decree constitutes a taking of the plant within the meaning of the rules stated in this Section and §185.¹⁹

The Sohn and Baxter draft convention on state responsibility²⁰ approaches the problem from another angle; it analyzes the release by a claimant of a claim for a prior wrong. This could, the context indicates, include a claim for a previous expropriation. There are some differences between a forced sale and a waiver of an expropriation claim. The psychological pressure of the choice may be more intense upon the party faced with an offer of sale if its business is still deteriorating and will be worth less if acceptance is delayed; in the waiver of an existing claim

while value shown about RM120,000). In *Meyer v. Neubeck*, 7 U.S. Ct. Rest. App. 25 (1957), it was held that, where the price was not shockingly low, the general atmosphere in Germany did not prove duress by itself.

¹⁹ RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES §192, illustration 1 (1965) [hereinafter cited as RESTATEMENT].

²⁰ L. SOHN & R. BAXTER, CONVENTION ON THE INTERNATIONAL RESPONSIBILITY OF STATES FOR INJURIES TO ALIENS 26, 191 (12th draft, 1961).

situation, the party who has already lost the property is able to focus more closely on the litigation aspects of the situation. On the other hand, the government may be more willing to pay something for a plant that it wants to have surrendered intact as a going concern than it is to buy peace from a claim. Thus, the situation involving a payment before transfer of control seems as a general matter roughly equivalent to those with a payment after the event. However, the draft is too deliberately delphic in its conclusions to be of great assistance in concrete cases:

4. No claim may be presented by a claimant if, after the injury and without duress, the claimant himself or the person through whom he derived his claim waived, compromised, or settled the claim.

The commentary goes a little further:

The duress proscribed by this paragraph may be either physical or economic. Since economic duress of a sort may be present in virtually any settlement, it must rest with judicial decision to draw the line between, on the one hand, economic compulsion exercised by the respondent State over the claimant in order to force him to settle, and on the other hand, the normal operation of economic forces.

Rather in parallel with the provisions of the *Restatement*, the standard expropriation insurance form used by the Overseas Private Investment Corporation deals with the complex of problems as follows.²¹ First, it excludes from the scope of expropriation "action in accordance with any agreement voluntarily made by the Investor . . ." Second, it attempts to define creeping expropriation through a combination of positive and negative provisions. These clauses bring within "expropriation" those actions which result in preventing "the Investor from effectively exercising its fundamental rights with respect to the Foreign Enterprise" or "the Foreign Enterprise from exercising effective control over the use or disposition" of its property. However, they exclude regulatory actions reasonably related to legitimate government objectives that are not arbitrary or themselves a violation of international law. As a result of these clauses, an insured investor confronted with a basic government renegotiation demand has an option of either (a) accepting it, in which case it becomes a "voluntary" action or (b) resisting it and falling back on its insurance rights.

Finally, one has as a complicating factor the official position taken by the Department of State in its statement of December 30, 1975. That statement said, *inter alia*:

With regard to current or future expropriations of property or contractual interests of U. S. nationals, or arrangements for "participation" in those interests by foreign governments, the Department of State wishes to place on record its view that foreign investors are entitled to the fair market value of their interests. Acceptance by U. S. nationals of less than fair market value does not constitute acceptance of any other standard by the U. S. Government. As a

²¹ The OPIC clause in use in late 1975 (234 KGT 12-70) appears at H. STEINER & D. VAGTS, *supra* note 3, at 474-75.

consequence, the U. S. Government reserves its rights to maintain international claims for what it regards as adequate compensation under international law for the interests nationalized or transferred.²²

The implications of these phrases are ambiguous. They could be taken as simply reaffirming our devotion to the "prompt, adequate, and effective" standard. However, in their context—the negotiations over the buyout of the oil companies in Venezuela—they clearly mean something more. They may imply that in any buyout case the United States will feel free to reopen matters with the foreign government, whatever the course of the negotiations between the foreign government and the investor. It could also mean that the United States was announcing its intention to interpose an objection in selected future cases prior to the conclusion of an agreement with the investor. No further step by the United States has as yet clarified this statement. Some light may, however, be cast on it by the traditional law on private settlements.²³ It has generally been divided into three parts: (1) after a state has espoused a private claim the private party is powerless to settle it by a side deal with the respondent state; (2) between the time that the claim arises and the time of espousal, the capacity to compromise the claim lies in the hands of the injured private party, except in the case of duress or coercion; and (3) prior to the arising of the claim we are in the area covered by the sharply contested Calvo clause. The United States has taken the position that a country may not impose as a condition on a private party's entry a waiver of the party's right to seek diplomatic protection if it is later deprived of a right guaranteed under international law. Meanwhile, Latin American countries continue to use and support the Calvo clause.²⁴ This background tends to support a reading of the 1975 statement as affirming the proposition that claims in category (2) should be treated as category (1) claims once the United States puts in a warning that it is a concerned party.

Note that all of these authorities, and most of the writers that have found some rule against coerced sellouts, are of U. S. origin. One may well wonder whether an impartial tribunal would find that an international consensus existed. Such doubt would be enhanced by the history of the resolution of the UN General Assembly on related topics. The 1962 resolution on Permanent Sovereignty over Natural Resources twice used the adverb "freely" in describing those foreign investment agreements which should be observed.²⁵ It is true that at least some of the repre-

²² 74 DEPT. STATE BULL. 138 (1976).

²³ As to the private power to settle claims, see RESTATEMENT, *supra* note 19, at §203; L. SOHN & R. BAXTER, *supra* note 20, at 190; I. M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 179-87 (1937).

²⁴ D. SHEA, THE CALVO CLAUSE (1955); Graham, *The Calvo Clause: Its Current Status as a Contractual Renunciation of Diplomatic Protection*, 6 TEXAS INT. L.F. 289 (1971); RESTATEMENT, *supra* note 19, at §203.

²⁵ GA Res. 1803, 17 GAOR, Supp. (No. 17) 15, UN Doc. A/5217 (1962). The background is set forth in Schwebel, *The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources*, 49 A.B.A.J. 463 (1963).

representatives who developed this formulation and voted for it had in mind chiefly the pressures which might be exerted upon governments, particularly ones just emerging from colonial tutelage. Still it does read as a statement opposed to coercion on either party. By the same token, the absence of a statement on the observance of agreements in the 1974 Charter of Economic Rights and Duties of States²⁶ disturbed the U. S. delegation and contributed to its decision to withhold assent.

In sum, the present international law on investor coercion is suggestive rather than determinative. Still, the proposition that physical coercion will invalidate a "sale" seems to have substantial support. Indications are that a broader rule might achieve some more generalized assent. For example, the threat of cancellation of the right to do business might well be considered coercion.²⁷ An enormous gap in price will be taken to be indicative of duress. Such coercion might be found even where a "clean" waiver of rights is signed.

III.

COERCION IN THE LAW OF NATIONS

In looking for analogies one turns first of all to the international law pertaining to coercion exercised by one state upon another. We find this body of law to be still in a primitive condition, not too dissimilar from that relating to state-investor pressures. Indeed, the first generally accepted rule in the international regulation of coercion was the Hague Convention of 1907 which codified the Drago doctrine forbidding a country to use force to collect contract claims owing to its nationals.²⁸ The Kellogg-Briand Pact and the UN Charter have codified a much broader prohibition on the use of force between nations. This in turn has been applied to treaties through the Vienna Convention on the Law of Treaties²⁹ which invalidates treaties obtained by the use of force or the threat of force upon government representatives (Article 51) or by the use of force in violation of international law upon governments (Article 52).

When the pressure exerted by one state upon another does not involve the use of armed force, the degree of consensus is appreciably lower. To be sure, the UN Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States does denounce the use of economic, political, or any other type of measures "to coerce another state in order to obtain from it the subordination of the exercise of its

²⁶ GA Res. 3281, 29 GAOR, Supp. (No. 31) 50, UN Doc. A/9631 (1974), 69 AJIL 484 (1975), 14 ILM 251 (1975).

²⁷ The cancellation of an alien's license without cause is strictly controlled by international law according to RESTATEMENT, *supra* note 19, at §196. See also the license cases of the Restitution courts cited in note 17 *supra*.

²⁸ The official name is the Covenant Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, 1907, 36 Stat. 2241, TS 537.

²⁹ UN Doc. A/CONF. 39/27, 63 AJIL 875 (1969).

sovereign rights and to secure from it advantages of any kind.”³⁰ However, efforts to give meaningful shape to this proposition have encountered difficulties. As has been noted, “a great deal of coercion is ‘normal’ or permissible in day-to-day relations”³¹ and the proposition in its literal sense presupposes a world that is far more law abiding than any we have seen. One would have to draw distinctions between different types of economic pressures to get to a workable rule.

The most lively debate about interstate coercion has arisen from the Arab oil embargo of 1973³² and from the Arab boycott of Israel and of firms connected with Israel that has been in progress since well before that time. The result would have to be scored as a standoff by a disinterested observer (if such could be found). In any case the argument has centered about several aspects not found in the typical investment dispute. First, one notes that the embargo was a concerted action by several countries, which may be a significant difference, particularly if one is trying to build on domestic precedents of boycotts, antitrust, and so on. Second, it is apparent that a major point of vulnerability is the fact that the boycott is extraterritorial, extending its impact into foreign countries and disrupting commercial relations within their boundaries. Finally, we note that the network of international agreements and obligations overlying the field of international trade is denser than in the case of investment.

Thus, the international law of interstate coercion provides little guidance towards the formulation of a state-investor rule. Indeed, the circumstances under which disputes arise render it more probable that state-investor relations will generate precedents useful at the state-state level than vice versa.

IV.

DOMESTIC ANALOGIES

A. Coercion between Private Parties

On finding the international law on coercion unsatisfactory as a guide, the lawyer is entitled to ask whether there exist “general principles of law recognized by civilized nations” in their domestic spheres.³³ Such a search would find that some core conception of duress is an almost uni-

³⁰ GA Res. 2625, 25 GAOR, Supp. (No. 28) 121, UN Doc. A/8028 (1970), 65 AJIL 243 (1971), 9 ILM 1292 (1970). See also Article 32 of the UN Charter of Economic Rights and Duties of States, *supra* note 26 and Article VI of the Final Act of the Helsinki Conference (CSCE), [1975] DIGEST OF INT. L. 9.

³¹ Paust & Blaustein, *The Arab Oil Weapon—A Threat to International Peace*, 68 AJIL 410, 413 (1974).

³² A wide variety of articles on international coercion are assembled in *ECONOMIC COERCION AND THE NEW INTERNATIONAL ECONOMIC ORDER* (R. Lillich ed. 1976) and in a symposium at 12 TEXAS INT. L.J. 1 (1977).

³³ Art. 38(c), Statute of the International Court of Justice.

versal feature of national systems of contract law.³⁴ At that core, we find a prohibition on the use of force to intimidate a party into accepting an agreement. In a classical 19th century concept of contract depending on the free will of the parties, it is necessary to exclude contracts that are entered into by means that induce fear on the part of one contracting party. Fear—like fraud, undue influence, infancy, or insanity—vitiates the informed, intelligent, and adult consent which contract theory in its classical forms demanded almost everywhere. Force also is illegitimate in terms of any theory that leaves the settling of terms of trade to the operation of a market; violence is the antithesis of the orderly market. Thus, free-will psychology and market economics combine to leave force and the threat of force outside the scope of tolerable behavior, even while assuming that parties will have to accept painful setbacks as the market seeks its equilibrium, perhaps over the prostrate fortunes of the unlucky or unskillful.

Duress has also been found in various types of manipulations of the judicial system by one private party to put pressure upon another. These abuses rely on the fact that there is a wide gap between one's theoretical legal rights and their realization in fact. Thus, a merchant is apt to agree to a more generous readjustment of a contract with a building contractor who walks off the job just as the merchant's selling season opens rather than conduct a two-year lawsuit. A farmer is likely to pay a disputed claim in full rather than wait while a suit to recover the cattle which were seized from him winds slowly through the courts. Such behavior does nothing to smooth the operations of the market and a good deal to upset the proper workings of the judicial system and the esteem in which the public holds it.

Beyond this point we find less agreement, either within specific legal systems or between them. Policies come into play which go beyond the concept of free will and beyond the image of the market place. The victims of these practices, unlike those of crude coercion, are not usually emotionally upset or distraught by them nor are these practices inconsistent with the clearing of the market. What we have here are the use of excessive degrees of market power in comparison with the coerced party or the use of economic tactics in ways that involve innocent third parties or create public disruption. We find in this quarter rules of antitrust law, limitations on adhesion contracts, and prohibitions on secondary boycotts or sitdown strikes. These rules may not refer overtly to duress, being called antitrust or unfair labor practices laws, but they play much the same role in excluding the use of certain tactics which extract consent by the use of power deemed to be excessive. We go on from there to a

³⁴ The greatest contribution to an understanding of the law of duress is to be found in the work of John Dawson: *Unconscionable Coercion: the German Version*, 89 HARV. L. REV. 1041 (1976); *Economic Duress and the Fair Exchange in French and German Law*, 11 TULANE L. REV. 345 (1937); 12 *id.* 42 (1937); *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947). See also the extended coverage in 5 S. WILLISTON, *CONTRACTS*, Ch. XLVII (rev. ed. 1937).

broader set of interferences with private agreements, to those rules which prevent the parties, whatever their state of mind, from arriving at certain agreements which are substantively regarded as violative of the law's policy. Here we find laws about usury, protective rules for retail buyers or workmen, and other legislation designed to safeguard a "weak" class. Those constitute sets of rules which say that, regardless of the thoughtful and judicious decision by the party to accept a particular settlement, the law will interfere to prevent that choice, acting out of concern either at the weakness of the party that must choose to accept or out of a broader concern for the public interest. This is part of a movement from the market and contract back to status. The further the law moves away from a core conception of physical duress the further it departs from the comforts of an international consensus. While all judges in all countries will disregard consent obtained at gunpoint, they would be less likely to agree about consent obtained by overwhelming economic force and will often regard themselves as incapacitated, without legislative authority, from interfering at all upon grounds of substantive inequity with private decisions.

In this process a rather special and ambiguous role is played by disparities in value between the given and the received. *Laesio enormis* is a concept of considerable standing in the civil law.³⁵ However, its status has varied from one Continental country to another and from one epoch to another. Thus the 18th century French version of the concept was carried forward into the 1804 Civil Code but subjected to restrictive interpretation until the tide turned again in the 20th century. German courts and commentators continued to recognize *laesio enormis* through the 19th century but the 1900 Civil Code dropped it. Later case-law restored some of its substantive effect under different captions. The common law in its 19th century classical form plainly rejected the idea that a discrepancy in consideration, however great, would not, without more, justify the undoing of an agreement. There is, however, earlier authority looking in that direction. To do so would be to involve the judges dangerously in the fixing of prices, in the substitution of their judgment for the market's. However, all systems seem to have permitted the presence of a *laesio* to serve as an entering wedge for other concepts, for duress, undue influence, or breach of trust. Indeed, an enormous gap in price, such as no willing negotiator would have accepted, is as strong an objective indicator as one could imagine that something was wrong with the bargaining process. In special areas courts have approached the topic more directly. Aside from obvious legislative price control mechanisms, including usury rules that represent the oldest and stablest form of pure control, we have

³⁵ The pre-1800 status of the law of duress and unfairness is complex and easy to oversimplify. Indeed, it may be true that the rules on duress expanded somewhat as the older rules permitting the courts to set aside contracts on the basis of inequality of values were cut back. See the writings of Dawson, *supra* note 34; Horowitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 923-36, 950 (1974).

fairness-of-price interference by the courts in cases of bargaining within relations affected by fiduciary duties. Questions of price disparity may have obvious answers or may require expert scrutiny in the light of complex circumstances.

B. State-Private Party Relations

One special type of coercion deserves special consideration as we search for analogies useful to government-foreign investor situations. That is the domestic case law dealing with claims of coercion by the state upon a private party (or occasionally vice versa). From an Austinian point of view, one might say that it is in the nature of the sovereign to command and coerce and that, therefore, a legal doctrine of duress cannot be applied to the relations of the government. However, as soon as a system of law places restrictions on the power of some part of the government to command it must, in order to protect those prohibitions, restrict the power of the agency so restricted to wrest consent, in lieu of obedience, from private parties. We are all familiar with the rules governing the voluntariness of consent in such areas of criminal law as searches and seizures, confessions, and pleas of guilty. There the courts must be alert to prevent the prosecutorial and police branches from seeking to achieve through consent what they cannot achieve by direction. One area in which issues of voluntariness have frequently surfaced is the renunciation of U.S. citizenship; the courts have had occasion to consider the effect of a number of different kinds of government pressures, sometimes those of our own government and sometimes those of other states.³⁶

Of particular importance in the investor-government analogy is that group of opinions which deal with the voluntary nature of payments to state tax officials. In *Union Pacific Railroad v. Public Service Commission*,³⁷ the Supreme Court held that a payment of a tax was not voluntary where the state rules provided that failure to pay the tax would be grounds for denial of a permit to sell the securities in question. The opinion, by Mr. Justice Holmes, says in part:

On the facts we can have no doubt that the application for a certificate and the acceptance of it were made under duress. The certificate was a commercial necessity for the issue of the bonds. The statutes, if applicable, purported to invalidate the bonds and threatened grave penalties if the certificate was not obtained. The Railroad Company and its officials were not bound to take the risk of these threats being verified. Of course, it was for the interest of the Company to get the certificate. It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.³⁸

³⁶ *Jolley v. INS*, 441 F.2d 1245 (5th Cir. 1971); *cert. denied*, 404 U.S. 946 (1971) (pressure of U.S. selective service does not render renunciation involuntary); *Stipa v. Dulles*, 233 F.2d 551 (3d Cir. 1956) (economic duress in Italy may be defense to expatriating conduct).

³⁷ 248 U.S. 67 (1918).

³⁸ *Id.* 70.

This case, frequently cited in a wide variety of situations, would be strong authority, in U. S. eyes, for the proposition that a threat of cancellation of a permit without lawful reason would be a basis for claiming that an agreement resulting from such pressure was the result of coercion. It is by no means clear that such a broad conception of governmental duress would be acceptable in other jurisdictions.

One leading Supreme Court duress case, *Bethlehem Steel Co. v. United States*,³⁹ places the shoe on the other foot. There the government asserted that it had been compelled to contract for the construction of warships at an exorbitant price because no alternative sources were available during wartime. The Supreme Court turned down the government's claim, noting that:

. . . The Master found, and the courts below agreed, that "the contracts resulted from negotiations in which both parties were represented by intelligent, well informed and experienced officers whose sole object was to make the best trade possible, under conditions which included the uncertainties of war-time contingencies, the results from which were not and could not have been known at the time the contracts were made." Two of the three principal negotiators for the Fleet Corporation have testified in the proceedings before the Master. It is abundantly clear from their testimony that, during the course of the negotiations, they did not consider themselves compelled to accept whatever terms the other side proposed. In the disposition of the two main differences between the negotiators, there is no evidence of that state of overcome will which is the major premise of the petitioner's argument of duress.⁴⁰

Here, we have a precedent that is rather limited on its facts to that historical epoch, since explicit statutory renegotiation clauses have accomplished the end sought by the government's lawsuit. It is also rather peculiarly American in flavor. Still, it is a useful reminder that governments, too, can be subject to very great pressures in their negotiations with private parties and that rules which seek to restrain excesses in bargaining tactics should be reciprocal in character. To sum up, then, the domestic authorities as to duress are enlightening analogies on the international front but not conclusive. While strong on issues of violence and the like, they become weak just when one gets to the more difficult issues. They indicate in particular that difficulties crop up when rules about duress move into the area of laying down explicit substantive policies where the parties would otherwise be able to choose their own terms by contract.

V.

CONCLUSIONS

A review of the authorities indicates that there is no very solid or wide consensus on coercion outside of the cases dealing with physical force. Yet, there is a general, inchoate sense that such dealings ought in some

³⁹ 315 U.S. 289 (1942).

⁴⁰ *Id.* 301.

way to be "fair" on both sides. While some spokesmen have singled out pressures by or on behalf of investors, others have been concerned with government tactics. The precedents from municipal law counsel restraints upon extreme tactics by either side but do not point conclusively to any particular criterion. Still, one can expect that claims that sales of investments had been obtained by coercion will be made more frequently and will find some responsiveness on the part of governments and even of international tribunals in these rare cases where one can be seized of jurisdiction.

Significant practical difficulties concerning such claims made after the event make foreign ministries reluctant to press them. The government that now has the property will be enraged both at the challenge to what it deemed to be secure possession and at the insult to its good faith in claiming that the property was regularly purchased. The officials of the espousing state may have an uneasy suspicion that the claimant has been playing a too clever game, first taking what he could get from the deal with the foreign government and then coming for a second bite to his home country. They may fear that, if some claimant of this category succeeds in getting diplomatic support, all sorts of sleeping claims will be revived to plague them. The undoing of sales in Europe after World War II did, after all, occur in the context of a very general overturning of all sorts of past legal arrangements. Indeed, the governments that had supposedly exercised the duress had been replaced by regimes that repudiated most of what they had done. The postwar cases also tended to involve undoing transfers made not to sovereign governments but to private parties. Thus it would be misleading to project those precedents into the less developed country situations that the future is likely to present. There are limits on the extent to which coercion claims are likely to be pressed or to achieve success in obtaining additional compensation in connection with completed transactions.

A more practical focus for a consensus seems to be a group of rules on tactics, debarring those that seem too calculated to produce economically irrelevant and unsound results and to project lingering insecurities on other investors.⁴¹

The elements of a code of unfair bargaining practices during investor-government negotiations might include:

As to the investor, prohibitions on the following:

- Bribery;
- Misrepresentation or omission of material facts;
- Withholding of royalties and other sums not subject to dispute; and
- Collective agreements with other firms to boycott the nation with whom negotiations are in progress.

⁴¹ For recognition of a duty to bargain at an international level, see *North Sea Continental Shelf cases*, [1969] ICJ REP. 4, 47; *Fisheries Jurisdiction case*, [1974] ICJ REP. 175, 201-07.

As to the Government, prohibitions on the following:

- Threats to the personal well-being of the investor's negotiators or other officers;
- Takeovers of the property before agreement is reached, except in case of genuine crisis of a health or defense nature;
- Refusals to listen to reasonable counteroffers by the investors;
- Taking positions as to the terms of sale so publicly as to destroy the government's freedom to bargain in good faith;
- Cancellation of the franchise, permit, or authorization to do business in which the investor relies, except in accordance with its terms; and
- Regulatory action without bona fide governmental purpose (or without bona fide timing) designed to make the investor's business unprofitable.

Such guidelines might be given effect in one of several different ways. Unilaterally, the United States might incorporate them into its policy for dealing with expropriations or transactions resembling them. After announcing the adoption of these guidelines, the Department of State would then follow them in its diplomatic *démarches* on behalf of U. S. investors whose property had been transferred to foreign governments and who claimed duress. Necessarily, it would also be using the standards when it made representations to foreign governments after being advised that coercive negotiations were in progress. Indeed, it would ordinarily encounter less resistance if it advanced these standards *before* the foreign government had committed itself to defend particular terms of sale against a claim of coercion, rather than afterward. However, the proper timing and style of that intervention would require careful coordination between the diplomatic arm and the investor, whereas many an investor feels that he can do better without government interference. Still, there have already been cases of diplomatic good offices being offered and accepted fairly early in the negotiating process.⁴²

Bilateral or multilateral acceptance is also a possibility. A number of investment guarantee agreements have been concluded on a bilateral basis which spell out the prompt, adequate, and effective standard and could be extended to include a treatment of negotiating tactics.⁴³ Guidelines for multinational enterprises have been adopted by the Organisation for Economic Co-operation and Development and are in the process of consideration by the UN Commission on Transnational Corporations.⁴⁴

⁴² For a description of a case in which the United States took over negotiations at an early stage and conducted them vigorously, see Gantz, *The Marcona Settlement: New Forms of Negotiation and Compensation for Nationalized Property*, 71 AJIL 474 (1971). Note, however, that the Peruvian action there was straightforwardly labelled expropriation. During the last few years informal and discrete gestures have been made by the Department of State in several potential forced sale situations.

⁴³ For a review, see INT. CHAMBER OF COMM., *BILATERAL TREATIES FOR INTERNATIONAL PRIVATE INVESTMENT* (1970). For examples, see Egyptian-United Kingdom treaty of 1975, 14 ILM 1470 (1975) and Singapore-United Kingdom of 1975, 15 ILM 591 (1976).

⁴⁴ The OECD guidelines appear at 75 DEPT. STATE BULL. 83 (1976). While the guidelines themselves are addressed to enterprises, they are accompanied by decisions

Rules regulating the conduct of bargaining between nations and multinationals would fit well into the format adopted by the OECD; it is now not clear whether the product of the UN Commission will be such as to restrict the behavior only of corporations and not of governments.

The achievement, through one medium or another, of a better regulated process for the disinvestment of foreign enterprises seems a highly useful objective in a period where rapidly shifting political and economic conditions make such rearrangements inevitable but mutual distrust and antagonism all too often make the changes unnecessarily painful and disruptive.

of the Council on National Treatment and on International Investment Incentives and Disincentives that address state action. On the progress of UN operation, see the UN CENTRE ON TRANSNATIONAL CORPORATIONS, TRANSNATIONAL CORPORATIONS: ISSUES INVOLVED IN THE FORMULATION OF A CODE OF CONDUCT, UN Doc. E/C.10/17 (1976) (paragraphs 137-140 deal with nationalization and compensation).

THE RECRUITMENT AND USE OF MERCENARIES IN ARMED CONFLICTS

*By H. C. Burmester **

Recent events in Angola and Rhodesia have drawn public attention to the problems which arise from the use of mercenaries in armed conflicts and civil wars. Renewed interest in the subject has also been shown by international bodies and conferences, including the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, which recently adopted a treaty article on the status of mercenaries. This article examines the international legal rules applicable to states in relation to the recruitment and organizing of mercenary forces, the appropriate domestic legislation to give effect to such rules, and the status to be accorded mercenaries for the purposes of the laws of war.

I.

PROBLEMS OF DEFINITION

Any attempt to discuss the issues involved immediately confronts the problem of how to define a mercenary. A precise definition is of vital importance if such persons are to be deprived of certain legal rights and protections and if states are to be made subject to obligations with respect to them. It is difficult, however, to give a short definition of a mercenary which is satisfactory for all purposes, for it is essentially a nontechnical expression. In general, a mercenary has been regarded as a volunteer who, for monetary reward, enters into an agreement to fight for the armed forces belonging to a foreign state or an entity purporting to exercise authority over a country or people or a part thereof. In many cases, monetary reward will not be the sole, or even primary, motivation which will lead foreigners to participate in a conflict. Often, foreign volunteers will take part in an armed conflict for political or ideological reasons.

The unsatisfactory nature of any definition which relies on motivation was recognized by the Diplock Report in the United Kingdom, which reported that:

any definition of mercenaries which required positive proof of motivation would . . . either be unworkable, or so haphazard in its application as between comparable individuals as to be unacceptable.

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Mercenaries, we think, can only be defined by reference to what they do, and not by reference to why they do it.¹

Even if one concentrates on the recruitment to fight in a foreign armed force, and not on motivation, the problem remains of distinguishing mercenaries from other volunteers. The international legal policy, it is suggested below, for distinguishing mercenaries who receive some monetary reward, from other volunteers, such as those who fight because of religious conviction, for instance, is not entirely apparent. Nationals of states not parties to a conflict pose, it seems, similar problems for states, whatever the basis on which they take part in a conflict. Nevertheless, the international community appears prepared to treat mercenaries differently from other foreign volunteers. But while the distinction between mercenaries and other volunteers who engage in armed combat may not be easily made on logical or legal grounds, there is some basis for regarding foreign technical advisers, aircraft maintenance teams, and other noncombatant support personnel as not coming within any provisions relating to mercenaries. The same legal considerations are not applicable to such personnel who avoid direct combat roles as apply to those engaged in actual combat.

Any definition will also need to recognize that persons normally resident in a state party to a conflict who, although not nationals of that state, enlist in a regular way in the armed forces of that state should not be regarded as coming within any definition of mercenary. Such persons should be equated with nationals of the state in which they reside. A related problem arises from the use of permanent, integrated foreign elements in the armed forces of some countries, such as the Gurkhas in the British Army. This problem can be overcome in any definition by concentrating not so much on the foreign character of the persons recruited but rather on their recruitment especially for a particular conflict. It is this special recruitment which has the potential for raising all the problems of outside intervention, which can have the effect of aggravating a conflict. One must, in this regard, distinguish the use of forces belonging to a third state, such as the Cubans in Angola, from the use of outside, private armed forces that are not a regular part of, and owe no permanent allegiance or responsibility to, a state. It is this essentially private, non-governmental nature of the intervention which seems to be the basic problem which is raised by the use of mercenaries. It also provides a key to an appraisal of the appropriate international legal response to the problem of mercenaries. The most recent attempt to define and regulate the use of mercenaries seems, however, largely to ignore this wider context and concentrates on the motivation of individuals and not on the nature of their activity.

At the 1976 and 1977 sessions of the Conference on International Humanitarian Law, considerable attention was given to the question of a suitable

¹ Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries, Cmnd. 6569, para. 7 (August 1976).

definition of a mercenary.² While at the 1976 session an agreed definition was not adopted, the Report of Committee III was able to indicate the principal elements in a definition that appeared to be accepted by states.³ At the 1977 session, Nigeria, which had introduced the original proposal at the previous session,⁴ was able by informal negotiations to gain widespread agreement to a definition. Consideration in the Working Group and Committee III led, with little further debate, to the adoption of a provision on mercenaries by consensus early in the session.⁵ This provision was adopted by plenary and, with minor drafting committee changes, became Article 47 of Protocol I.

The definition that states are now invited to ratify as part of the Protocol reads as follows: A mercenary is any person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

The article also provides that mercenaries as so defined shall not have the right to be a combatant or a prisoner of war.⁶

The definition that was adopted is quite narrow, all its components having to be established before a person will come within its scope. It takes account of the special cases outlined above, which it was suggested should fall outside any definition. But it still defines mercenaries by reference to motivation, and the difficulties with such an approach have been indicated above.⁷ The requirement to establish that payment is *in fact* substantially in excess of that paid to combatants of similar rank and function in the armed forces of the party to the conflict introduces a new element. Although it was intended to provide "an objective test"⁸ of motivation, it is likely to be difficult to establish in many cases. The definition was drafted deliberately in such a way as to reduce the risk that the article could be

² For a discussion of the 1976 session, see Van Deventer, *Mercenaries at Geneva*, 70 AJIL 811 (1976).

³ Doc. CDDH/III/361/Add.1 (June 7, 1976).

⁴ Doc. CDDH/III/GT/82 (May 13, 1976).

⁵ See Doc. CDDH/III/374 (April 29, 1977) for text as adopted by the Committee.

⁶ Art. 47(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I). For text of Protocol, see 16 ILM 1391 (1977).

⁷ *Supra* note 1 and accompanying text.

⁸ See the Report of Committee III, para. 26, Doc. CDDH/III/408 (May 12, 1977).

misused;⁹ it represents the first successful attempt to define mercenaries legally, and its narrow scope should help to prevent indiscriminate accusations of mercenary status being made against all but the most traditional of paid foreign volunteers. Yet, one cannot ignore the circumstances that lie behind its adoption. Recent interest in the subject has largely arisen from the use of mercenaries in conflicts on behalf of either racist or colonialist regimes against local national liberation movements. The application of the definition by many states is likely to reflect these ideological overtones. Some concern as to the manner in which the definition will be applied may, therefore, be justified.

Despite the concentration at the Conference on International Humanitarian Law on a satisfactory definition of a mercenary, relatively little attention appears to have been given to the reasons, other than ideological, for singling mercenaries out, in the first place, for treatment different from that accorded to regular armed forces or guerrillas or other outside forces. Yet, if the problem is viewed in a wider context than that of colonialist or racist wars and is seen as part of the broader problem of seeking to regulate outside intervention in armed conflicts in general, it is suggested that a better appreciation of an appropriate legal framework in which to regulate mercenaries may be gained.

It should be remembered that mercenaries have, in fact, long been a subject of legal concern. They have been used in wars down the centuries, and until the growth of the modern nation state with its standing army and universal conscription they were an essential component of any war.¹⁰ They have, however, traditionally been viewed with hostility and suspicion, being regarded as greedy and ruthless men prepared to make a quick fortune by killing. Their use in both internal and international armed conflicts has not gone unnoticed by governments and international organizations which have had to grapple with the problems that they pose. Mercenaries were a subject of complaint as early as the American Declaration of Independence in 1776.¹¹ In the Spanish Civil War, the Non-Intervention Committee spent much time seeking to control the use of foreign volunteers. There the large number of volunteers were involved primarily for ideological reasons and not for monetary reward. In the Congo, the UN Security Council was confronted with problems arising from the use of mercenaries; and Angola put on public trial mercenaries captured during the recent conflict in that country. Even earlier, publicists had written on the subject of mercenaries. Many of these early writings recognized, however, that the treatment to be accorded mercenaries themselves was only one aspect of the problem. By far the more important issue was the question of what obligations a state itself was to assume in order to restrict the recruitment or use of mercenaries in the first place. It is this

⁹ *Id.* para. 25.

¹⁰ A. MOCKLER, *MERCENARIES*, Ch. 1 (1970).

¹¹ "... He is at this time transporting large armies of foreign mercenaries to compleat the works of death, desolation and tyranny ..."

issue, with which the traditional law primarily deals, that this article will first consider.

II.

THE TRADITIONAL LAW

The subject of mercenaries has received the attention of publicists over several centuries. Vitoria, for instance, regarded mercenaries who were prepared to fight in any conflict, regardless of whether it was just or not, as committing a mortal sin.¹² Suarez, in 1621, could undertake a detailed consideration of the moral issue and conclude that there was no objection to the use of mercenaries in situations where there was a great probability that the war was just.¹³ By the time that Bynkershoek wrote in 1737 the moral issue had largely disappeared. He saw no difference between the making of a contract of hire for soldiers in friendly territory and any other contract of hire or sale.¹⁴ Vattel also saw no problem with the recruitment of foreign soldiers provided their sovereign consented or at least left them at liberty to enlist.¹⁵ By the latter part of the 19th century, despite the growth of standing armies and the early development of the law of neutrality, publicists still saw few difficulties in the use of mercenaries. Calvo, for instance, saw no problem in the employment of foreign troops which were to be completely assimilated to national troops for purposes of the laws of war.¹⁶ Twiss, writing in 1863, considered it was permissible to allow recruitment, it being up to the neutral state to consider whether it wished to prevent this.¹⁷ Lorimer appears to have taken a similar view, but suggested that, for the duration of the enlistment, the soldier lost his neutral citizenship and was to be regarded as a citizen of the belligerent.¹⁸ By the early part of this century, however, a distinction was being drawn between the active participation or condonation of recruitment by a state on its territory and the acts of individual citizens leaving to join a force of their own accord.¹⁹ It is essentially this distinction which continues to represent the traditional law on the subject.

The obligation of states under international law to prevent the recruit-

¹² "Those who are prepared to go forth to every war, who have no care as to whether or not a war is just, but follow him who provides the more pay, and who are, moreover, not subjects commit a mortal sin, not only when they actually go to battle, but whenever they are thus willing." F. Vitoria, *De bello*, Art. I, §8. Quoted in 2 J. B. SCOTT, *LAW, THE STATE AND THE INTERNATIONAL COMMUNITY* 328 (1939).

¹³ F. SUAREZ, *DE TRIPLICI VIRTUTE THEOLOGICA* 832-35 (Trans., Classics of International Law ed. (1944)).

¹⁴ C. VAN BYNKERSHOEK, *QUAESTIONUM JURIS PUBLICI LIBRI DUO* 125 (Trans., Classics of International Law ed. (1930)).

¹⁵ E. DE VATTTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW*, 240 (Trans., Classics of International Law ed. reprinted 1964).

¹⁶ 4 C. CALVO, *LE DROIT INTERNATIONAL* 131 (4th rev. ed. 1888).

¹⁷ T. TWISS, *THE LAW OF NATIONS*, 453-54 (1863).

¹⁸ 2 J. LORIMER, *THE INSTITUTES OF THE LAW OF NATIONS* 179 (1884).

¹⁹ See, for instance, W. E. HALL, *A TREATISE ON INTERNATIONAL LAW* 714-75 (8th ed. 1924); 2 C. C. HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE U.S.* 703-04, 758 (1922).

ment or organizing of mercenary forces has generally been discussed by modern publicists in the context of the obligation of a neutral state to be impartial. The view of many publicists²⁰ has been that the customary international law is reflected in the provisions of Articles 4 and 6 of the 1907 Hague Convention regarding the Rights and Duties of Neutral Powers and Persons in Case of War on Land.²¹ These articles respectively provide:

Corps of combatants must not be formed nor recruiting agencies opened on the territory of a neutral Power, to assist the belligerents.

The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separating (*sic*) to offer their services to one of the belligerents.

While, therefore, a neutral state is under an obligation not to allow the formation of armed expeditions or to permit recruiting offices to be opened on its territory, a neutral state appears to have no obligation under customary international law to prevent persons, whether its own or foreign nationals, from crossing its borders to enlist in the armed forces of a belligerent. However, states, both in treaties and by domestic legislation, have at times considered it advisable to control the exit from their territory of individuals having the intention of enlisting in foreign forces and have accepted responsibilities beyond those imposed by customary international law.

As early as the Jay Treaty between the United States and Great Britain,²² concluded in 1794, it was agreed that the subjects and citizens of one state were not to accept commissions to serve in the armed forces of any foreign prince or state, enemies to the other state. A more recent example of a treaty imposing obligations additional to those under customary international law is the 1923 General Treaty of Peace and Amity of the Central American States, which provides that:

None of the Contracting Governments will permit the persons under its jurisdiction to organize armed expeditions or to take part in any hostilities which may arise in a neighboring country.²³

The 1928 Habana Convention on Maritime Neutrality also provides in Article 23 that:

Neutral states shall not oppose the voluntary departure of nationals of belligerent states even though they leave simultaneously in great numbers; but they may oppose the voluntary departure of their own nationals going to enlist in armed forces.²⁴

²⁰ For example, 2 L. OPPENHEIM, *INTERNATIONAL LAW* 703 (7th ed. H. Lauterpacht 1952); 2 J. WESTLAKE, *INTERNATIONAL LAW* 210 (2d ed. 1913); M. GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 546 (1959).

²¹ 36 Stat. 2310; TS No. 540; 1 BEVANS 654; 2 AJIL Supp. 117 (1908).

²² 8 Stat. 116; TS No. 105; 12 BEVANS 13, Art. 21.

²³ *Adopted*, Feb. 7, 1923. 2 M. O. HUDSON, *INTERNATIONAL LEGISLATION* 901 (1932). Art. 14.

²⁴ *Adopted*, Feb. 20, 1928. 47 Stat. 1989, TS No. 845, 2 BEVANS 721, 135 LNTS 187.

These additional obligations on states to control the departure of their own nationals cannot, however, be said to have been clearly embodied in customary international law, which still appears to be limited to the obligations in the Hague Convention set out above. More recent developments in the United Nations appear to support this conclusion.

In the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,²⁵ the following statement appears under the principle that "States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations":

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

This statement continues to limit the obligations of states to control of the actual organization of mercenary and other irregular forces. There is no obligation imposed on states actually to prevent their own nationals from joining a mercenary force. Nor does such an obligation emerge in the definition of aggression adopted by the UN General Assembly in 1974,²⁶ which provides that "the *sending* by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State" of such gravity as to amount to certain prescribed acts shall qualify as an act of aggression (emphasis added). No longer is the actual organization of such forces clearly proscribed. This merely reflects one of the many shortcomings in the definition, which cannot be seen as a full statement of the relevant law.²⁷

While the customary international law may be as set out above, it is necessary to consider whether the maintenance of a peaceful world order does not require an extension of the duties thus far imposed on states. The basis for the obligation of states to control the recruiting and organizing of mercenary and other irregular forces on their territory has traditionally been founded on the duty of impartiality imposed on a neutral state. Any consideration of the problem today cannot ignore, however, the major changes in the legal order that the United Nations Charter has brought about. The right to resort to force and to provide assistance to another state under attack have been severely curtailed in the case of international conflicts. Use of mercenaries in such conflicts may reasonably be regarded as foreign intervention, although no third state may be

²⁵ GA Res. 2625. 25 GAOR, Supp. (No. 28) 121, UN Doc. A/8028 (1970).

²⁶ GA Res. 3314, Art. 3(g). 29(1) GAOR, Supp. (No. 31) 143, UN Doc. A/9631 (1974), 69 AJIL 480 (1975). Compare the most recent resolution which condemned both the recruitment and sending. GA Res. 31/91. 31 GAOR, Supp. (No. 39) 42, UN Doc. A/31/39 (1976).

²⁷ See Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 AJIL 224 (1977).

directly involved or approve of the use of its nationals in a mercenary force. Mercenaries can be seen as private outside forces not under the effective control of any state except that by which they are engaged. If one accepts as a primary goal the minimization of armed conflict, the use of outside private armed force, often in situations where the Charter would prohibit formal state intervention, seems a legitimate matter for concern and legal regulation. Developments in international law since 1945 suggest that a more satisfactory basis for an obligation to control the use of mercenaries may thus be found in the duty of a state to prevent the commission of injurious acts against foreign states rather than in any duty of neutrality. In the case of noninternational armed conflicts, although the appropriate legal norms governing outside intervention by states remain a matter of controversy,²⁸ the use of outside private force appears to raise similar problems to those that arise from its use in international conflicts. Any duty imposed on states not to intervene in the internal affairs of other states is likely to be compromised by the use of outside private force. In these circumstances, while commentators may not be able to agree on the primary legal norms applicable to intervention by states, it would seem reasonable that outside *private* intervention, in a form not under state auspices, should be severely circumscribed, if not completely proscribed. Such an approach would help to minimize any conflict and avoid the unwitting involvement of states, which might otherwise find themselves drawn into a conflict through the presence of their nationals in a mercenary force.

The suggestion that the use of outside private force should be proscribed in both international and noninternational conflicts may be readily accepted in theory, but one cannot ignore the distinction drawn in traditional law between the acts of a state itself and the acts of its nationals in leaving a country to join a foreign force. An important question which must be faced is the extent to which one should impute responsibility to a state in circumstances where the actions of individuals will largely occur outside the territory of the state itself. It is suggested that an examination of conflicts where mercenaries, or other private forces, have been used indicates that a threat to peace and security can be posed by their use and that for this reason, if for no other, states should have a responsibility to control their nationals beyond that recognized under traditional customary international law.

The limited extent of the customary law obligation imposed on states to prevent the recruitment of volunteers and armed bands reflects the hesitation of traditional law to impute responsibility to a state for the actions of individuals except in certain limited circumstances. The Hague Convention of 1907 regarding the Rights and Duties of Neutral Powers (Article 7) and the Convention respecting the Rights and Duties of Neu-

²⁸ See Moore, *The Control of Foreign Intervention*, 9 VA. J. INT. L. 205 (1969); Farer, *Intervention in Civil Wars: A Modest Proposal*, 67 COL. L. REV. 266 (1967).

tral Powers in Naval War (Articles 6 and 7)²⁹ make a similar distinction between the supply of war materials to belligerents by private individuals and by states themselves, imposing restrictions only in the latter case. Such differing rules are based, however, on an outmoded distinction between the governmental sphere and that of the individual.³⁰ Private actions of individuals can, in certain circumstances, have a major impact on interstate relations; and it no longer seems realistic not to impute responsibility to a state for the actions of persons under its jurisdiction and control in situations likely to endanger world peace and security. Such a responsibility could arise not from any implication of complicity by the state in the acts of the individuals but from the recognition that the modern state can, and must, exercise control over its nationals so as to prevent their involvement in activities contrary to international law and, in particular, so as to enable the state to fulfill its own obligation to respect the territorial integrity and political independence of other states. Today, all states, including those which uphold a private enterprise system, have no hesitation in imposing numerous export restrictions, foreign exchange controls, and other government supervision over contracts and enterprises involving the export of war materials.³¹ This illustrates the growing recognition by states that they cannot ignore activities by their nationals which may affect world peace and security.

Even if one accepts a certain responsibility by states to exercise reasonable control over their nationals in circumstances likely to affect peace or security, the question remains how far this duty extends. Traditional law does not normally attribute responsibility to a state for injuries caused by persons under its jurisdiction and control, if it has exercised "due diligence" in the circumstances of a particular case.³² In the case of individuals leaving a country it may be regarded as unreasonable to attribute responsibility to a state for their subsequent actions which may take place without the knowledge, and beyond the control, of the state.³³ This explains why the customary law, as indicated above, looks for some state complicity in the recruitment of mercenaries before attributing responsibility to the state. Yet, such an attitude fails to recognize that the presence of foreign individuals, especially if on a large scale, can have a significant impact on any conflict and may draw into the conflict those states whose nationals are involved. This involvement need not necessarily be as a participant but as an interested party concerned to ensure the protection of its nationals. This conclusion is supported by events in

²⁹ *Supra* note 21.

³⁰ M. GARCIA-MORA, *INTERNATIONAL RESPONSIBILITY FOR HOSTILE ACTS OF PRIVATE PERSONS AGAINST FOREIGN STATES* 68 (1962).

³¹ See, *MANUAL OF PUBLIC INTERNATIONAL LAW* 841 (Sørensen ed. 1968).

³² See, for instance, draft Article 10 of the Harvard Draft Articles on Responsibility of States, *RESEARCH IN INTERNATIONAL LAW*, 23 *AJIL Spec. Supp.* 187 (1929).

³³ *Id.* The comment to that article includes the following:

"Due diligence" assumes that the state has jurisdiction to act. It would usually be impossible for a state to take measures to prevent injuries from being inflicted by its nationals in the territory of other states.

conflicts such as the Congo, which is discussed below. The modern state does have substantial powers at its disposal to control the movement and activities of its nationals. Once a state becomes aware of an international or internal conflict it can, by domestic penal measures and administrative controls, impose considerable controls on its nationals. It no longer seems realistic to enable a state to disclaim all responsibility for the participation of its nationals in situations of armed conflict that may pose a threat to world peace and security.³⁴

Under the United Nations Charter the Security Council can determine the existence of a threat to the peace, breach of the peace, or act of aggression (Article 39) and may decide on measures to be taken to maintain and restore international peace and security. A decision by the Security Council that a threat to the peace exists and that, in order to prevent its escalation, it is necessary to prohibit the use of mercenaries would seem clearly to impose an obligation on states to prevent their nationals from being employed as mercenaries. Only by recognition of such an obligation could effective implementation of such a decision by the Security Council be obtained. Even where no positive finding of a threat to the peace has been made by the Security Council, the same considerations suggest that states should accept that the involvement of their nationals in any armed conflict is a matter for national regulation.

One way in which to exercise control may be for a state to restrict the exit of its nationals. The argument may be made, however, that such a restriction conflicts with the law on human rights that has come to be internationally accepted. The Universal Declaration of Human Rights provides in Article 13, paragraph 2, that "Everyone has the right to leave any country, including his own, and to return to his country."³⁵ Article 12, paragraph 2, of the Covenant on Civil and Political Rights provides in part that "Everyone shall be free to leave any country, including his own."³⁶ Any attempt to prevent persons leaving a country to join a foreign armed force may be met with domestic opposition and may be seen to be contrary to internationally recognized human rights. It should be remembered, however, that these rights are not unlimited³⁷ and that they must be subject to an obligation not to endanger the peace and security of mankind. A prohibition on leaving a country in order to prevent participation in an armed conflict would not seem inconsistent with the principles of the Covenant and Declaration. The difficulty of enforcing any such prohibition is, however, recognized. Individuals could easily leave under the pretense of some legitimate purpose but once

³⁴ Several states at the Conference on International Humanitarian Law would have liked the provision on mercenaries to have dealt with the scope of responsibility of states that encourage or allow recruitment and enlistment of their citizens as mercenaries. See Report of Committee III, *supra* note 8, para. 24.

³⁵ GA Res. 217, UN Doc. A/811 (1948), 43 AJIL Supp. 127 (1949).

³⁶ GA Res. 2200, 21 GAOR, Supp. (No. 16) 54, UN Doc. A/6316 (1966), 61 AJIL 870 (1967).

³⁷ See Art. 12(3) of the Covenant on Civil and Political Rights, *supra* note 36.

abroad enlist as a mercenary. Any attempt to withdraw or restrict the issue of passports to individuals is also unlikely to prevent a potential mercenary from reaching his destination.³⁸

In any case, a state would seem able to penalize an individual's joining a mercenary force in ways which need not necessarily restrict the exit of its nationals. States have a recognized right to exercise criminal jurisdiction over their nationals in respect of offenses committed anywhere, even though in the Anglo-American tradition, extraterritorial jurisdiction has been largely confined to serious offenses.³⁹ Actions by nationals of a state likely to endanger peace and security would seem to be appropriate matters over which to exercise extraterritorial criminal jurisdiction.

While it has been argued above that states should attempt to exercise control over the actions of their nationals in order to prevent their involvement as mercenaries in armed conflicts, it is recognized that any such attempt will be seen as inconsistent with the freedom of the individual. The Diplock Report in Great Britain emphasized this aspect of the problem. The Report considered that protection of the mercenary himself from the risk of death or injury was not sufficient justification for the state to prohibit enlistment.⁴⁰ The principal public interest was seen to be the "maintenance of good international relations," and any restriction on the right of an individual to join a mercenary force was considered to require a "compelling reason of public policy."⁴¹ The Report failed, however, to give any consideration to the broader issue of the consequences to world peace and security which arise from the use of outside, private armed force. Considerations of individual liberty need to be balanced by considerations relating to the minimization and avoidance of armed conflict likely to endanger world peace. Past conflicts provide useful illustrations in this respect.

III.

REACTION OF THE INTERNATIONAL COMMUNITY TO THE USE OF MERCENARIES

A study of conflicts in which mercenaries and other volunteer forces have been used indicates that the world community has not looked kindly on their use but has sought to limit their use in the various conflicts as quickly as possible. This response lends support to the view expressed above that the use of foreign nongovernmental forces draws into the

³⁸ The Diplock Report recognized the unsatisfactory nature of any attempt to control movement by restrictions on passports. *Supra* note 1, paras. 18-23. For a brief discussion of difficulties in the United States of restricting movement by the use of passports, see H. STEINER and D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 130-31 (2d ed. 1976).

³⁹ See, for instance, 2 D. P. O'CONNELL, *INTERNATIONAL LAW* 825 (2d ed. 1970).

⁴⁰ *Supra* note 1, para. 11.

⁴¹ *Id.* paras. 12, 15. The Report did not consider such a high standard had to be met before restrictions on activities connected with the actual recruitment of mercenaries were justified, as distinguished from enlistment.

conflict the states whose nationals are involved. The reactions of states, as illustrated below, strengthens the argument that they should assume a responsibility to control the participation of their nationals in both internal and international armed conflicts. The most recent use of mercenaries in the Angolan conflict produced some international reaction which would no doubt have increased had it not been for the quick end to the conflict. Attention continued to be focused on the subject, however, by the public trial of mercenaries captured by the Angolan Government.⁴² Although mercenaries were used by both sides in the Nigerian civil war, they were not primarily used in a combat role, other than as airmen, and then not on a large scale.⁴³ Their use was not, therefore, a matter for significant international reaction. Mercenaries have also been used in other internal armed conflicts, including those in Oman and Yemen. The Spanish Civil War saw the employment of private foreign forces on a large scale by both sides. Many were motivated by ideological considerations. Others, although called volunteers, were regular soldiers of the Italian and German armed forces. Mercenaries, in the sense of volunteers for monetary reward, were almost wholly absent from this conflict. For this reason, the conflict differs from many of the other conflicts in which mercenaries have been used. Nevertheless, the presence of large numbers of private volunteers in Spain led to positive action on the part of almost every European government to deter the recruitment of volunteers and to restrict the export of war material.⁴⁴

A more recent example of international reaction to the use of outside private forces is provided by the conflicts in the Congo. The employment of mercenaries by the Katanga secessionists in the Congo from 1960 to 1963 and their subsequent use by the Tshombe and Mobutu Governments against the Simbas from 1964 onwards marked the first occasion since the Spanish Civil War that private foreign volunteer forces had been employed on a large scale.⁴⁵ Recruitment for the Congo was both open and widespread. Missions were sent to Belgium and France in 1960, and at the beginning of 1961 recruiting offices were opened in South Africa.⁴⁶ The use of mercenaries did, however, quickly come to be a

⁴² For information on Angola, see *Mercenaries in Africa: Hearings before the Special Subcomm. on Investigations of the House Comm. on International Relations*, 94th Cong. 2d Sess. (1976). For an account of the trial by one of the defense counsel, see Cesner & Brant, *Law of the Mercenary: An International Dilemma*, 6 CAPITAL U. L. REV. 339 (1977); and Note, *The Laws of War and the Angolan Trial of Mercenaries: Death to the Dogs of War*, 9 CASE WESTERN RESERVE J. INT. L. 323 (1977).

⁴³ See J. DE ST. JORRE, *THE NIGERIAN CIVIL WAR* Ch. 12 (1972); D. S. P. CRONJÉ, *THE WORLD AND NIGERIA* (1972); MOCKLER, *supra* note 10, at 279.

⁴⁴ For a detailed account, see H. THOMAS, *THE SPANISH CIVIL WAR* (1961). Also see N. PADEL FORD, *INTERNATIONAL LAW AND DIPLOMACY IN THE SPANISH CIVIL STRIFE*, 311 (1939). Chapter 3 contains a detailed account of the nonintervention system and Appendix V sets out the texts of legislative and other measures adopted by states to restrain the departure of volunteers.

⁴⁵ See S.-J. CLARKE, *THE CONGO MERCENARY* (1968) for a general description of the use of mercenaries in the Congo conflicts.

⁴⁶ *Id.* Ch. 3.

subject of UN attention. In a resolution of February 21, 1961, the Security Council urged the immediate withdrawal from the Congo of all Belgian and other foreign military and paramilitary personnel "... and mercenaries."⁴⁷ Subsequently, in a resolution adopted on November 24, 1961⁴⁸ the Security Council authorized the Secretary-General to take vigorous action, including the use of force, if necessary, for the immediate apprehension, detention, and deportation of all foreign advisers and mercenaries.

While ONUC forces arrested and expelled some mercenaries, recruitment continued. This was despite a clear call by the Security Council in its February 21 resolution for:

all States to take immediate and energetic measures to prevent the departure of such personnel [*i.e.*, military and paramilitary personnel, political advisers and mercenaries] for the Congo from their territories, and for the denial of transit and other facilities to them ⁴⁹

This resolution constitutes a clear statement by the Security Council of an obligation on states to prevent the departure of their nationals who have an intention of serving as mercenaries and of an obligation not to provide facilities or otherwise to assist such persons. It can be argued that the obligation imposed on states by the Security Council was in the exercise of its powers to prevent a breach of the peace and related only to the situation in the Congo and thus did not reflect a general norm of international law. The resolutions do, however, indicate the attitude that may well be taken by the Security Council toward the use of mercenaries in any future conflict likely to involve a threat to the peace.

After the end of the Katanga secession some of the mercenaries returned to Europe while others remained in Portuguese Angola. When the Simba revolt broke out in 1964, Tshombe moved quickly to organize an effective fighting force led by mercenaries. After General Mobutu took over the presidency in November 1965, many of the South African and Rhodesian mercenaries recruited by Tshombe were replaced by largely French-speaking mercenaries.⁵⁰ Mercenaries also continued to be involved in plans to restore Tshombe, with Angola apparently being used as a base. Following complaints from the Democratic Republic of the Congo, the Security Council on July 10, 1967 adopted a resolution which condemned any state which persisted "in permitting or tolerating the recruitment of mercenaries . . . with the objective of overthrowing the Governments of State Members of the United Nations" and called upon governments to ensure that their territory as well as their nationals were not used for the recruitment, training and transit of mercenaries designed to overthrow the Government of the Democratic Republic of the Congo.⁵¹ This followed an earlier resolution of October 14, 1966,⁵² which urged Portugal not to

⁴⁷ SC Res. 161. 16 SCOR, RES. & DEC. 2, UN Doc. S/4741 (1961).

⁴⁸ SC Res. 169. *Id.* 4, UN Doc. S/5002 (1961).

⁴⁹ *Supra* note 47.

⁵⁰ CLARKE, *supra* note 45, at 68.

⁵¹ SC Res. 239. 22 SCOR, RES. & DEC. 13 (1967).

⁵² SC Res. 226. 21 SCOR, RES. & DEC. 13 (1966).

allow foreign mercenaries to use Angola as a base of operations for interference in the domestic affairs of the Congo. The Security Council in a further resolution on November 15, 1967⁵³ condemned in particular the failure of Portugal to prevent the mercenaries from using Angola as a base of operations for armed attacks against the Congo. The use of mercenaries in Africa has also been condemned by the Organization of African Unity, which has urged states to take action to prevent their nationals from being used as mercenaries.⁵⁴

The use of mercenaries in the Congo on a large scale provoked considerable opposition. The repeated calls of the Security Council for foreign states to cease assisting mercenaries and for the adoption of measures to prevent their departure and the continued appeals for the end of foreign intervention clearly lend weight to the view that a state has an obligation to control the recruitment of its nationals in situations where a threat to peace and security exists. Such an obligation goes beyond that recognized in traditional customary international law.

IV.

LEGISLATIVE ACTION BY STATES

Apart from the reactions of the international community, provisions in the domestic legislation of certain states indicate a willingness by such states to impose controls over nationals inclined to serve in foreign armed forces. The laws of the United States, the United Kingdom, and Australia are mentioned briefly here as examples.

United Kingdom

In the United Kingdom the Foreign Enlistment Act of 1870⁵⁵ makes it an offense punishable by fine and imprisonment for a person being a British subject, without the license of Her Majesty, within or without the dominion, to accept or agree to accept any commission or engagement in the military or naval service of any foreign state at war with any foreign state at peace with Her Majesty (section 4). It is also made an offense to board any ship (but not an aircraft) with a view to leaving the jurisdiction with the intent to accept a commission or engagement proscribed by section 4 (section 5). Service as a mercenary is not itself an offense. The Act also penalizes the master or owner of a ship taking on board a person who has agreed to serve with a foreign state or who is leaving the country with that intent (section 7). The Act is applicable to internal civil conflicts only if the insurgents exercise some regular control over part of the territory of a state. It is doubtful if the Act can apply

⁵³ SC Res. 241. 22 SCOR, RES. & DEC. 14 (1967).

⁵⁴ For the texts of OAU declarations on mercenaries in 1964, 1967, 1970, and 1971, see Cesner & Brant, *supra* note 42, at 363-67.

⁵⁵ 33 and 34 Vict. ch. 90.

to enlistment in a guerrilla force or security force used to suppress guerrillas.⁵⁶

The inadequacy of the Act for present conditions was highlighted by events in Angola which led directly to the inquiry by Lord Diplock into the existing controls over the recruitment of mercenaries. The Diplock Report recognized the unsatisfactory nature of the Act, which is out of date and largely unworkable in practice. It therefore recommended the repeal of the provisions in relation to illegal enlistment and suggested that enlistment as a mercenary should cease to be a criminal offense; service as a mercenary abroad should not be made a new offense. New legislation should, it was recommended, merely empower the prohibition of recruitment in the United Kingdom of mercenaries for service in specified armed forces abroad.⁵⁷

It is submitted that the Report fails to consider the question of mercenaries in the broader global context, but concentrates merely on domestic problems of law enforcement. The Report, for instance, stresses the evidentiary difficulties of proving on the return of a mercenary that he had in fact enlisted.⁵⁸ It does not stress the important deterrent effect that an offense of enlistment may have. The Report concluded that there was not sufficient compelling public interest to overcome the practical difficulties of proof of motivation or actual conduct while overseas. But the Report took a different approach to activities within the United Kingdom related to the recruitment of mercenaries, such as advertising or the conclusion of arrangements, including the payment of money, to assist a person to enlist. It recommended that such activities should be prohibited but that a specific executive order should be necessary before the prohibition would become effective with respect to any specific conflict.

At the time of writing, no legislation giving effect to the recommendations has been introduced, and it is not known whether they will in fact be adopted. As already noted, however, the Report does not make recommendations that adequately take account of the international legal order which seeks to regulate armed conflict. For the reasons indicated above, it would be desirable for international legal norms to impose a responsibility on states to take reasonable action to prevent the enlistment of their nationals as mercenaries. The recommendations of the Diplock Report may not lead to the adequate carrying out of the responsibility of states in this regard.

⁵⁶ See the definition of "foreign State" contained in section 30 of the Act and the Diplock Report, *supra* note 1, para. 36.

⁵⁷ *Id.* para. 52.

⁵⁸ *Id.* para. 42.

The practical difficulties of proving such an offence (i.e. an offence of enlistment) would mean that there could be very few successful prosecutions; and the chances of convicting the accused would depend not so much on his actual guilt as on his exceptional bad luck in there being available to the prosecution in his case sufficient evidence to convict him on his trial in this country.

United States

In the United States, the first law dealing with foreign enlistment was enacted in 1794. Subsequent laws have been passed extending its scope.⁵⁹ The present provisions,⁶⁰ based on a 1909 law, make it an offense for a person to accept a commission or to enlist in or agree to go abroad with the purpose of enlistment in a foreign force. They also make it an offense to recruit in the United States, but it is necessary to show that some agreement or understanding has been entered into. A mere advertisement is not proscribed.⁶¹ The provisions are applicable to civil as well as international conflicts. But, in contrast to the United Kingdom legislation, the U.S. provisions only apply to acts within the country. Thus, if a person goes abroad voluntarily and enlists in a foreign force, he will not be subject to prosecution.⁶²

Section 1481 of Title 8 of the United States Code provides that a U.S. national will lose his nationality if he enters or serves in the armed forces of a foreign state unless authorized in writing by the Secretary of State and the Secretary of Defense. It may be that this provision is unconstitutional.⁶³ It would seem, however, that the possible loss of citizenship may well have a deterrent effect on persons inclined to join a foreign force. The Foreign Agents Registration Act⁶⁴ may also apply to the activities of any persons who, it can be established, seek to recruit persons on behalf of a foreign government.

The adequacy of these laws to protect U.S. citizens and to meet the obligations of the country itself have been the subject of recent congressional attention.⁶⁵ The principal matter for concern appears to be the spate of advertisements which have appeared in a number of sporting magazines. Any restraints on advertising could, it has been suggested, be attacked on constitutional grounds.⁶⁶ While administration officials indicated that they saw little need for change in the existing law, it is suggested that a much closer look at the adequacy of existing laws to meet

⁵⁹ Dumbauld, *Neutrality Laws of the United States*, 31 AJIL 258 (1937).

⁶⁰ 18 U.S.C. §§958, 959.

⁶¹ *Gayon v. McCarthy*, 252 U.S. 171 (1920).

⁶² *Wiborg v. United States*, 163 U.S. 632 (1896).

⁶³ In *Afroyim v. Rusk*, 387 U.S. 253 (1967), the Supreme Court by a 5-4 decision ruled a provision of section 1481 that deprived a person of his citizenship if he voted in a foreign election as unconstitutional by reason of the Fourteenth Amendment. Actual enlistment in a foreign force and the taking of an oath of allegiance may, however, amount to an effective voluntary renunciation of citizenship.

⁶⁴ 22 U.S.C. §§611 *et seq.*

⁶⁵ *Supra* note 42, where Robert L. Keuch, Deputy Assistant Attorney General, described the relevant law and its adequacy. Reprinted in part in 71 AJIL 141 (1977). An amendment, introduced by Senator McGovern on June 16, 1977, to the Foreign Relations Authorization Act (H.R. 6689) makes it unlawful for any person within the United States, who is not legally authorized, to participate in any act of sabotage or any military or paramilitary operation against any foreign state with which the United States is not at war. 123 CONG. REC. S9941 (daily ed. June 16, 1977).

⁶⁶ Statement by Robert L. Keuch, *supra* note 65.

the appropriate obligations that a state might assume to control its nationals, as part of its duty to avoid the spread of armed conflict, is timely. Congress and the Executive should not wait until another Angolan situation occurs. Already there are reports of Americans involved in Rhodesia. Any escalation of conflict in that part of the world is likely to lead to the presence of mercenaries and the adequacy of existing legislation is again likely to arise.

Australia

The most recent attempt to legislate to control mercenaries has occurred in Australia, where legislation has been proposed to make it an offense to recruit a person in Australia to serve in any capacity with an armed force in a foreign country, whether or not the armed forces form part of the armed forces of the government of a foreign country.⁶⁷ It is also made an offense to publish an advertisement for the purpose of recruiting or containing any information relating to service in a foreign armed force. The proposed legislation does not make it an offense to enlist outside Australia or actually to perform service in a foreign armed force.⁶⁸ The bill provides for an exemption to be issued in order to permit the recruitment in Australia of persons to serve in particular armed forces when it is in the interests of the defense or international relations of Australia. The proposed legislation would also prohibit persons from preparing for or engaging in incursions into foreign countries. The proposed legislation avoids the problem of defining mercenaries since it would apply to the recruitment of persons to serve in foreign armed forces in any capacity.

V.

TREATMENT TO BE ACCORDED MERCENARIES UNDER THE LAWS OF WAR

Along with the growing acceptance by states of some obligation to deter the recruitment of mercenaries, considerable attention has been given to the status to be accorded mercenaries themselves. Under the existing laws of war, aliens who enlist in a foreign force commit no offense against international law, and they are treated the same, as regards the enemy, as the nationals of the state whose force they have joined.⁶⁹ This position is reflected in Article 17 of the Hague Convention No. V of 1907 which provides that a neutral cannot avail himself of his neutrality if he voluntarily enlists in the ranks of the armed forces of one of the parties. The article also provides:

In such a case, the neutral shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent State could be for the same act.⁷⁰

⁶⁷ Crimes (Foreign Incursions and Recruitment) Bill 1977.

⁶⁸ See the Second Reading speech by the Attorney-General, HANSARD (House of Representatives), 17 March 1977, at 342, for a brief explanation of the bill. The bill had not been passed when Parliament was dissolved in November 1977.

⁶⁹ OPPENHEIM, *supra* note 20, at 261.

⁷⁰ *Supra* note 21.

Under the 1949 Geneva Convention on the Treatment of Prisoners of War⁷¹ mercenaries are entitled to prisoner-of-war treatment without distinction, provided they belong to or form part of the armed forces, militia, or other volunteer forces whose members are otherwise entitled to such treatment.⁷² However, recent events in the United Nations and at the Diplomatic Conference on International Humanitarian Law indicate a move to regard mercenaries as not subject to certain protections of the laws of war, especially where they are used against national liberation movements fighting colonialist or racist regimes.

As early as 1968 in a resolution on the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, the General Assembly declared:

that the practice of using mercenaries against movements for national liberation and independence is punishable as a criminal act and that the mercenaries themselves are outlaws, and calls upon the Governments of all countries to enact legislation declaring the recruitment, financing and training of mercenaries in their territory to be a punishable offence and prohibiting their nationals from serving as mercenaries.⁷³

This paragraph was introduced by the Soviet Union on behalf of a number of East European countries toward the end of debate on the resolution. It was not debated. After the adoption of the resolution as a whole, several Western European countries recorded their reservations on this paragraph. The declaration was, however, reiterated in Resolution 2548 (XXIV) of December 11, 1969⁷⁴ and Resolution 2708 (XXV) of December 14, 1970.⁷⁵ In Resolution 3103 (XXVIII) of December 12, 1973 on the "Basic Principles on the Legal Status of Combatants Struggling Against Colonial and Alien Domination and Racist Regimes," the following "basic principle" was proclaimed:

5. The use of mercenaries by colonial and racist régimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals.⁷⁶

The principles contained in these resolutions received the support of some countries at the 1975 session of the Diplomatic Conference on International Humanitarian Law in Armed Conflicts. In discussion of draft Article 42⁷⁷ on the status of prisoners of war, certain countries supported

⁷¹ 6 UST 3316, TIAS No. 3364, 75 UNTS 135, 47 AJIL Supp. 119 (1953).

⁷² See Van Deventer, *supra* note 2, for a more detailed indication of the status of mercenaries under the Geneva Conventions.

⁷³ GA Res. 2465, para. 8. 23 GAOR, Supp. (No. 18) 5, UN Doc. A/7218 (1968).

⁷⁴ 24 GAOR, Supp. (No. 30) 5, UN Doc. A/7630 (1969).

⁷⁵ 25 GAOR, Supp. (No. 28) 7, UN Doc. A/8028 (1970).

⁷⁶ 28(1) GAOR, Supp. (No. 30) 142, UN Doc. A/9030 (1973).

⁷⁷ Now Article 44. For the relevant debates, see Doc. CDDH/III/SR.33-SR.36 (1975).

the principles in the resolutions. These countries desired to exclude mercenaries fighting for colonial or racist regimes from the protection of prisoner-of-war status and to class such persons as criminals. This would be a major departure from traditional international law, as outlined above, which has given to mercenaries the same status as the members of the belligerent force for which they are fighting.

At the 1976 session of the Conference further detailed discussion took place in the Working Group of Committee III on the treatment to be accorded mercenaries. The Report of the Committee indicated general agreement that, as a minimum, mercenaries should have no entitlement to prisoner-of-war or combatant status.⁷⁸ There was, however, disagreement over whether it should be mandatory to deprive mercenaries of such status. It was also accepted by the Working Group that "as a minimum persons found to be mercenaries should be entitled to be treated humanely and in accordance with the national law of the capturing power."⁷⁹ At the 1977 session, the provision which was adopted provided that a mercenary shall not have the right to be a combatant or prisoner of war.⁸⁰ The mere fact of being a mercenary is not, however, made a criminal act. While the article does not say so expressly, it is clearly understood that a mercenary is entitled to the basic humanitarian treatment and protections provided under the Protocol for persons in the power of a party to the conflict who are not otherwise entitled to more favorable treatment.⁸¹

The exaggerated assertions of the UN resolutions were not adopted at the Conference and do not appear to reflect the consensus of the international community. Nevertheless, the removal of even certain protections from combatants who would otherwise qualify for such protection must be viewed with some concern. At the same time that one is extending protection under the laws of war to guerrillas, it seems inconsistent to be taking it away from other combatants.⁸² If states accept the exclusion of mercenaries from the protection of the laws of war, then the argument that war criminals as a whole⁸³ should not receive treatment as prisoners

⁷⁸ Doc. CDDH/III/361/Add. 1, at 3. (June 7, 1976).

⁷⁹ *Id.*

⁸⁰ *Supra* note 6.

⁸¹ See the statement in the Report of Committee III, *supra* note 8, para. 27, and explanations of vote in both the committee and plenary. Doc. CDDH/III/SR.57 and Corr.1 and Doc. CDDH/SR.41 (1977). The most relevant article is Article 75 entitled "Fundamental guarantees." (This was Article 65 prior to the adoption of the final text of the Protocol). Article 45 (formerly Article 42bis), which entitles a person who claims prisoner-of-war status to have his status adjudicated by a judicial tribunal, would also seem applicable if a "mercenary" were to claim prisoner-of-war status.

⁸² See the comments of Schwarzenberger in *Terrorists, Hijackers, Guerrilleros and Mercenaries*, 24 CURRENT LEGAL PROBLEMS 257, 281-82 (1971). He remarks that exclusion of mercenaries from human rights protection while extending it to terrorists and guerrillas is "another milestone on the high road to violence unlimited." *Id.* 282.

⁸³ The USSR included a reservation to its signature and subsequent ratification of

of war is also likely to gain acceptance. Once protection is denied to one class of persons the way is left open for other classes to be similarly denied protection. If states consider foreign participation in national liberation struggles against colonial and racist regimes to be of such gravity as to require that certain protections not be accorded to mercenaries, it seems only logical, for the reasons given above, that such protections should not be accorded to *any* private foreign participants. This does not seem to be the trend that the law is taking.

VI.

CONCLUSION

A study of the practice of states and of the United Nations in situations both of internal and international conflict indicates a willingness on the part of states to limit the use of foreign nongovernmental forces, including mercenaries, where a danger to world peace and security may arise. It is suggested that states should accept as a basic principle that their nationals should not freely participate in conflicts as mercenaries and that states should take appropriate action to restrict the participation and recruitment of nationals in these circumstances. Such action would be more appropriate and consistent with the maintenance of a proper international legal order than depriving mercenaries of the protections contained in the laws of war applicable to other combatants and prisoners of war. Acceptance of such a basic principle by states also seems a much more desirable way of dealing, from a legal and humanitarian point of view, with the whole question of the intervention of private forces in armed conflicts. To deprive mercenaries of protection as combatants or prisoners of war will leave the way open for a fundamental transformation of the humanitarian law of war. From being a law applicable to all combatants in an armed conflict, it will become a law applicable to only some. This is hardly a result to be admired. While the newly adopted Protocols to the Geneva Conventions extend protection to many persons not previously covered, the provision adopted on mercenaries reflects a trend in the other direction. One can accept that mercenaries are not honorable, without depriving them of rights to which other foreign participants are entitled. The new article must, therefore, be regarded as unfortunate. If states are prepared to accept more extensive obligations to prevent their nationals from serving as mercenaries in the first place, the impact of the article may be reduced. One suspects, however, that mercenaries will continue to be a feature of armed conflicts for many years to come and that their treatment in national legislation and on the field of battle will continue to be a source of controversy.

the 1949 Geneva Prisoner-of-War Convention which excluded war criminals from the protections of the Convention. See 75 UNTS 460 (1950) for text.

THE THIRD UNITED NATION'S CONFERENCE ON THE LAW OF THE SEA: THE 1977 NEW YORK SESSION

By Bernard H. Oxman *

The sixth session of the Third UN Conference on the Law of the Sea was held in New York from May 23 to July 15, 1977.¹

The Conference confirmed two procedural decisions taken at the close of the fifth session—to devote the first two or three weeks of the sixth session to Committee I (deep seabed) problems and to entrust the President and Committee Chairmen with the preparation of an informal composite text of the treaty as a whole later in the session. In the interim between the fifth and sixth sessions, Minister Jens Evensen of Norway, Vice-President of the Conference, who at an earlier stage of the Conference had held lengthy informal meetings on economic zone matters with marked success, arranged for an intersessional meeting in Geneva early in 1977 on the deep seabeds system of exploitation, to which all conference participants were invited. Minister Evensen continued these efforts at the Conference itself,² reporting to the Chairman of the First Committee.

Several days after the conclusion of the session, the President of the Conference released the new Informal Composite Negotiating Text (ICNT), which reorganized all the material in earlier texts into comprehensive draft treaty form with certain significant substantive changes.³ That text, in a formal sense, represented the efforts of the President, the Chairmen of the three Main Committees, the Chairman of the Drafting Committee, and the Rapporteur-General. However, three special considerations should be borne in mind. First, the Conference entrusted primary substantive responsibility to the Chairman of each Main Committee.⁴ Second, although

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¹ This article is a sequel to Stevenson & Oxman, *The Preparations for the Law of the Sea Conference*, 68 AJIL 1 (1974); *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 69 AJIL 1 (1975); *The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session*, 69 AJIL 763 (1975); and Oxman, *The Third United Nations Conference on the Law of the Sea: The 1976 New York Sessions*, 71 AJIL 247 (1977).

² Cabinet members and other high ranking officials of a significant number of governments attended the Conference. The air of anticipation was heightened by the appearance of new participants representing new governments, including Ambassador-at-Large Elliot L. Richardson, Special Representative of the newly elected U.S. President, and Shanti Bhushan, Law Minister in the new Government of India.

³ UN Doc. A/CONF.62/WP.10, July 15, 1977, reprinted at 16 ILM 1108 (1977) [hereinafter cited as ICNT].

⁴ See Explanatory memorandum of the President, UN Doc. A/CONF.62/WP.10/Add. 1, July 22, 1977, 16 ILM 1099 (1977).

no voting on substantive articles has taken place, some of the new provisions, such as those regarding the economic zone, were inserted in the text after review at this session where they were generally accepted, at least as a suitable basis for preparing final treaty language; many older provisions remained unchanged at this and previous sessions. Third, aside from general principles and some noncontroversial provisions long since agreed, the deep seabeds chapter (Part XI) was not seen by the Conference, or even by a representative group of states, until the ICNT was released.⁵ It differs in important respects from revised texts circulated by Minister Evensen, which were the subject of significant objections and reservations on all sides but, after lengthy consideration, were not rejected by any interested group as a basis for further discussion.⁶ Part XI of the new text contains approaches to general and technical problems that were unequivocally rejected during the negotiations.

The fact that the deep seabeds controversy has brought the Conference to the verge of collapse obscures an equally significant fact. The concepts before the Conference have ripened to the stage where it is on the verge of general agreement on the entire law of the sea except for the deep seabeds.⁷ Accordingly, as space permits, it would seem useful to inquire more deeply into the work of the Conference on some other issues after a brief comment regarding the deep seabeds, bearing in mind the plentiful commentary being generated elsewhere by the deep seabeds controversy.

THE DEEP SEABEDS

The immediate reaction by the United States to the ICNT (set forth

⁵ As the substance of the preamble and final articles had not been discussed by the Conference, their inclusion could not reflect the negotiations; nevertheless, the attempt to avoid controversy is notable.

⁶ Given the history of this problem, it is evident that Minister Evensen had succeeded in many respects in narrowing deeply divisive issues of approach and concept to questions of degree. Such questions can and often do control the ultimate success or failure of a negotiation. It is by no means clear that those questions could have been successfully resolved had his efforts been more closely pursued. What is clear is that the proposed solutions to those questions in the ICNT, taken as a whole, are not a basis for agreement.

⁷ Those who are skeptical of the ultimate impact of the Conference on international law, or impatient with the slow pace necessitated by consensus procedures, might consider not only the burgeoning state practice on the economic zone modeled on the negotiating texts, but the fact that on an "older" legal issue, namely, that of continental shelf delimitation, the French Government requested a court of arbitration to look to the informal negotiating texts before the Conference as evidence of international law applicable to the parties; the British Government, it would seem from the opinion, considered it prudent to respond by emphasizing the measure of dispute over the particular provision in question rather than the general premise; and the court chose to avoid the issue by pointing out that its approach was in any event consistent with the provision in question. *Delimitation of the Continental Shelf (France/United Kingdom)*, French Submission in its Reply, at 12, para. 3; French Submission of Feb. 2, 1977, at 20, paras. 3 & 5; Opinion, June 30, 1977, at 102-04, paras. 96-97 (English text). For further comment on this arbitration, see Colson, *The United Kingdom-France Continental Shelf Arbitration*, *infra* p. 95.

here in a footnote⁸) should suffice to acquaint the reader with the general nature, magnitude, and consequences of the latest developments in the deep seabeds controversy, as perceived by the state most directly affected.

⁸ Statement by Ambassador-at-Large Elliot L. Richardson, July 20, 1977:

The Informal Composite Negotiating Text resulting from this session of the U.N. Law of the Sea Conference evidences real progress on vital issues relating to international security and freedom of navigation. At the same time it substantially sets back prospects for agreement on an international regime for the conduct of seabed mining. Both the substance of the text on this issue and the lack of fair and open processes in its final preparation require me to recommend that the United States undertake a most serious and searching review of both the substance and procedures of the conference.

It is with a sense of considerable frustration that I make this accounting, for true progress was made during the past session.

—New provisions were negotiated to clarify the legal status of the new 200-mile economic zone. They seek to safeguard traditional high seas freedoms within this zone except for specific resource-related rights accorded coastal states by the convention. These provisions are a marked improvement over previous texts and may help prevent erosion of high seas freedoms by coastal state attempts to extend their sovereignty over ocean space.

—We successfully retained the generally satisfactory previous texts on passage of straits which a determined minority sought to change. At the same time we found a way to accommodate the real need for environmental protection in straits, particularly in areas such as the Straits of Malacca.

—The provisions of the text dealing with scientific research were improved. An effort by some delegations to increase the degree of coastal state control of scientific research in the economic zone was defeated. In the new text, the conditions for conducting scientific research are set out clearly and are likely to be copied into national laws, thus regularizing what has until now been a capricious situation. Also, we successfully eliminated a clause that could have obliged the United States to restrict publication of scientific data after the fact and without the consent of scientists, which was highly offensive to our concepts of free science and free speech. Now the coastal state, in granting consent, must indicate in advance if it wishes to impose such a restriction and, if so, the scientist can decide whether he wishes to proceed with the project under such circumstances.

—We were successful in eliminating texts that could have prevented us from imposing rules in our territorial sea to prevent pollution from foreign ships. At the same time, we retained our right to fix strict environmental conditions—including construction, manning, equipment, and design regulations—for entry into U.S. ports. These changes bring the text into full harmony with the Administration's antipollution program.

—Continued progress was made in the design of a comprehensive system for peaceful settlement of disputes relating to ocean uses.

—Under the fair and judicious leadership of Minister Jens Evensen of Norway [a Vice Chairman of the Law of the Sea Conference], a responsible and effective discussion of seabed issues took place. This discussion and the texts formulated by Minister Evensen offered real prospect that the impasse on seabed mining issues could be resolved on terms acceptable to both the developed and developing nations.

Regrettably, however, the new "composite" text concerning the system of exploitation and governance of the deep seabed area (Part XI) is now fundamentally unacceptable. It deviates markedly from the proposed compromise text which had been prepared on the basis of full, fair, and open discussion under Minister Evensen's leadership.

The Evensen text, although not without problems, was generally viewed as a useful basis for further negotiation. The newer text—produced in private, never discussed with a representative group of concerned nations, and released only after this session of the conference terminated—cannot be viewed as a responsible substantive contribution to further negotiation. Indeed, the manner of its production—treating weeks of serious debate and responsible negotiation as essentially irrelevant—raises an equally serious procedural problem: whether the Law of the Sea Conference can be organized to treat deep seabed issues with the seriousness they, and the conference which depends upon their satisfactory resolution, demand.

The views of the author in this regard need not be repeated.⁹ However, one additional point bears noting, as it affects not only the Conference but also the potential direction of customary international law.

Some industrialized states believe there should be a quota on the number of minesites being exploited by any one state or its nationals, regardless of the benefits offered to the international community as a whole by competing applicants or of the relative world market positions of the sponsoring states in the production of the metals involved within their territory or economic zone. These states lay less stress on economic arguments familiar either to Western antitrust experts or to Marxist theorists regarding the ultimate economic effects of monopoly than on the need to preserve the legal right of all states to exploit the deep seabeds.

Other industrialized states believe that the large number of suitable minesites available in a slowly expanding market, the automatic reservation of half of the promising minesites for the Enterprise, as well as the mobility of capital and technology make monopolization highly unlikely. They believe that unnecessary artificial restraints would reduce efficiency

Among the serious points of substantive difficulty in the latest deep seabeds text, and the system it would define, are the following:

—It would not give the reasonable assurance of access that is necessary if we and others could be expected to help finance the enterprise and to accept a "parallel system" as a basis of compromise;

—It could be read to make technology transfer by contractors a condition of access to the deep seabed—subject, at least in part, to negotiation in the pursuit of a contract;

—It could be read to give the Seabed Authority [International Seabed Resource Authority] the power effectively to mandate joint ventures with the Authority as a condition for access;

—It fails to set clear and reasonable limits on the financial burdens to be borne by contractors; indeed, it simply combines a wide range of alternative financial burdens, as if such a combination could be a compromise—when, in fact, it is likely to prove a compound burden sufficient to stifle seabed development;

—It would set an artificial limit on seabed production of minerals from nodules—which is not only objectionable in principle, it is also far more stringent than would be necessary to protect specific developing country producers from possible adverse effects and is incompatible with the basic economic interests of a developing world generally;

—It would give the Seabed Authority extremely broad new, open-ended power to regulate all other mineral production from the seabed "as appropriate;"

—It would appear, arguably, to give the Authority unacceptable new power to regulate scientific research in the area;

—It would fail adequately to protect minority interests in its system of governance and would, accordingly, threaten to allow the abuse of power by an anomalous "majority;"

—It would allow the distribution of benefits from seabed exploitation to peoples and countries not party to the convention;

—It would seriously prejudice the likely long-term character of the international regime, by requiring that—if agreement to the contrary is not reached within 25 years—the regime shall automatically be converted into a "unitary" system, ruling out direct access by contractors except to the extent that the Authority might seek their participation in joint ventures with it.

With this unfortunate, last-minute deviation from what had seemed to be an emerging direction of promise in the deep seabed negotiations, I am led now to recommend to the President of the United States that our government must review not only the balance among our substantive interest but also whether an agreement acceptable to all governments can best be achieved through the kind of negotiations which have thus far taken place.

77 DEPT. STATE BULL. 389 (1977).

⁹ See Oxman, *supra* note 1, 71 AJIL 251-59.

of benefit both to the consumer and to the international community sharing in the revenues generated.

At least in the abstract, a situation in which one party does not believe an event will occur and has strong objections to the means proposed by another party to prevent it would seem to be one amenable to rational dialogue. In this connection, one interesting aspect of this particular issue is that those advocating the view that legally imposed equality of opportunity is beneficial but that legally imposed equality of result is not are operating in the context of a proposed regime in which the poorer nations can perceive the benefits to them of a competitive approach, because they share directly in the benefits of greater efficiency. Thus, notwithstanding considerable ideological suspicions regarding free market theories and doubts regarding the amount of economic benefit from deep seabed mining, there has been little developing country participation in the debate over the quota issue.¹⁰

This issue aside, what is perhaps most startling about the deep seabeds impasse is that the industrialized states are in effect prepared to agree to an unprecedented test. The performance of a regulated open international system (embracing free enterprise, mixed economy, and socialist participants) in its sphere could be matched against the performance of the Enterprise in its sphere. Some at least would even agree to financial measures to help the Enterprise get started and to a system under which they would be supplying the Enterprise with minesites of equal number and promise and with other assistance. Given the widely held doubts about the total benefits that can conceivably be generated by deep seabed mining in this century anyway, developing countries struggling with the problem of selecting national and international economic models ought to have a greater interest in watching a fair test proceed than in stacking the substantive and procedural cards in favor of approaches that now seem attractive to the most vocal among them.

INTERNAL WATERS, THE TERRITORIAL SEA, AND THE CONTIGUOUS ZONE

In general, the provision of the ICNT regarding the regimes of internal waters, the territorial sea, and the contiguous zone are not markedly different from those in the Convention on the Territorial Sea and the Contiguous

¹⁰ This might be contrasted with freedom of fishing on the high seas, where no attempts in fact were made to internationalize the benefits of and participation in open competition, only reluctant attempts were made to control its impact on the resource, and only meager attempts were made to control its social impact on weaker competitors. Over 90% of the world's fisheries will now be removed from direct global competition. Not even coastal states deeply committed to free competition are subjecting their own fishermen to direct outside competition to the extent of the "harvesting capacity" of coastal state vessels. Indeed, the European Community is encountering difficulties over reservation of areas and quotas to member states.

Zone of 1958.¹¹ The ICNT contains four major new elements:

First, the maximum permissible breadth of the territorial sea is fixed at twelve nautical miles.¹²

Second, the regime of passage of straits used for international navigation is dealt with as a separate and distinct matter.¹³ It is not, except for specified types of straits,¹⁴ the same as the regime of innocent passage applicable to territorial seas and certain internal waters outside straits.¹⁵ The pollution chapter also deals separately with the two regimes.¹⁶ A similar distinction between passage regimes applies to archipelagic waters and their adjacent territorial seas.¹⁷

Third, the meaning of innocent passage¹⁸ and the regulatory rights of the coastal state and the duties of the flag state regarding innocent passage have been elaborated in greater detail, both in general¹⁹ and with specific reference to the prevention of pollution.²⁰ As a result of continuing conversations on the pollution issue among interested states, the ICNT reduces the restrictions on coastal state antipollution measures applicable to foreign vessels in innocent passage in the territorial sea as compared with the Informal Single Negotiating Text (SNT)²¹ and the Revised Single Negotiating Text (RSNT),²² but continues the prohibition on construction, manning, equipment, and design standards not giving effect to generally accepted rules or standards for foreign vessels that are not proceeding to a port of the coastal state.²³

¹¹ Convention on the Territorial Sea and the Contiguous Zone, done April 29, 1958, 15 UST 1606, TIAS No. 5639, 516 UNTS 205, 52 AJIL 851 (1958).

¹² ICNT, Art. 3.

¹³ ICNT, Part III.

¹⁴ ICNT, Art. 45.

¹⁵ Compare ICNT, Arts. 34-44 with ICNT, Arts. 8(2) & 17-32.

¹⁶ ICNT, Part XII, Art. 234; see Part III, Arts. 39(2), 42 & 43.

¹⁷ Compare ICNT, Art. 52 with Arts. 53-54.

¹⁸ ICNT, Art. 19.

¹⁹ ICNT, Arts. 21-24.

²⁰ ICNT, Arts. 21-23, 211, 212, 217-18, 221, 224-28, 230-33, & 235-37.

²¹ Informal Single Negotiating Text, Part II, Art. 18(2). Parts I, II, and III of the text appear at 4 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFF. RECS. 137, UN Doc. A/CONF.62/WP.8 (1975), reprinted at 14 ILM 682 (1975); Part IV of the text appears in 5 UNCLOS OFF. REC. 111, UN Doc. A/CONF.62/WP.9, 15 ILM 61 (1976) [hereinafter cited as SNT with the relevant Part indicated in parenthesis].

²² Revised Single Negotiating Text, Part II, Art. 20(2). Parts I, II, and III of the text appear at 5 UNCLOS, OFF. RECS. 125, UN Doc. A/CONF.62/WP.8/Rev. 1 (1975); Part IV appears at 6 *id.* 144, UN Doc. A/CONF.62/WP.9/Rev. 2 [hereinafter cited as RSNT with the relevant Part indicated in parenthesis].

²³ ICNT, Arts. 21(2) & 25(2). It should be noted, however, that actual pollution of the territorial sea is subject to coastal state legislative and enforcement jurisdiction, that violation in the territorial sea of generally accepted standards on such matters as construction is subject to coastal state enforcement jurisdiction, and that coastal state proceedings for violations in the territorial sea are not preempted by flag state proceedings. ICNT, Arts. 21(1) (f), 221(2), & 229. Moreover, if a vessel unlawfully discharges pollutants in the territorial sea, the coastal state's opinion of its construction, manning, equipment, or design could of course affect the severity of the penalty. It might also be noted that routine enforcement of construction regulations at sea, that is with respect to vessels not entering port, would in any event be costly, potentially

Fourth, the maximum permissible breadth of the contiguous zone for customs, fiscal, immigration, or sanitary purposes is extended from twelve to twenty-four nautical miles from the baseline.²⁴

Other technical changes previously noted have been retained.²⁵ A new technical correction has been made clarifying the point that the coastal state is not prevented from taking enforcement actions in its territorial sea that it may take in its economic zone simply because the offense was committed in the economic zone rather than in the territorial sea.²⁶ This could be helpful in pollution cases. Absent hot pursuit, the reverse of course would not be true where the act is not of a kind that is subject in the economic zone to coastal state legislative jurisdiction and coastal state enforcement actions.

STRAITS USED FOR INTERNATIONAL NAVIGATION AND ARCHIPELAGIC STATES

The importance of the principle of transit enunciated in the chapters on straits and on archipelagic states cannot be underestimated. The principle represents a reexamination of the non-suspendable innocent passage approach taken in Article 16, paragraph 4, of the Territorial Sea Convention of 1958 in light of the proposed extension of the territorial sea, the more extensive use of straight baselines, and the incorporation of a new principle of archipelagic states. The restrictive approach of Article 16, paragraph 4, was not in fact conceived by user states as the regime applicable to significant international access routes; the approach adopted by many states in 1958 to deal with this problem was to oppose extensions of coastal state sovereignty beyond three nautical miles. In principle, therefore, the current Conference has merely altered the approach to the protection of these routes, but has retained the rejection of any extension of the restrictions of innocent passage to transit of important routes used for international navigation. The ICNT approach to transit reflects more accurately the actual practice of states than theoretical assumptions about extension of the more restrictive regime of innocent passage, whether such practice is based on a theory of a three-mile territorial sea or a view that the ICNT transit principle is declaratory of existing law.²⁷

hazardous, and raise serious questions regarding the hampering of innocent passage. See ICNT Arts. 24, 212(3), 221(2). Finally, it might be noted that two or more states could cooperate to establish higher construction, manning, equipment, and design standards for port entry in order to cover the ships off the coast of one state that are proceeding to the ports of another.

²⁴ ICNT, Art. 33.

²⁵ Stevenson & Oxman, *The 1975 Geneva Session*, *supra* note 1, at 771-73, particularly 771 n.10.

²⁶ ICNT, Art. 27(5); see Art. 221, paras. 3, 5, & 6.

²⁷ Such a statement is necessarily based on evaluations and observations that do not easily admit of documentation. The author might, in this connection, note a delicately worded but fairly clear remark regarding the Strait of Gibraltar by a well-informed group of Soviet commentators, mainly holding international legal positions in the Foreign and Defense Ministries: "At the present time all merchant vessels and warships can pass through the strait without restriction." P. B. BARABOLYA, A. S. BAKHOV, L. A. IVANASCHCHENKO, D. N. KOLESNIK, V. D. LOGUNOV, S. V. MOLODTSOV,

The straits articles as such were not changed from the RSNT. Opposition has dwindled to suggestions by very few states, all now in the form of amendments to the "transit passage" regime rather than attempts to impose the regime of innocent passage in straits generally.²⁸ Earlier attempts to impose a requirement that submarines navigate on the surface failed and were not revived.

An important development has facilitated this broad measure of consensus. For several years, the problem of dealing with oil pollution hazards in straits has understandably troubled certain straits states. The straits articles established standards for discharges that in effect prohibit intentional discharges of oil or other substances.²⁹ However, the special prob-

& Y. N. NASINOVSKY, *MANUAL OF INTERNATIONAL MARITIME LAW* (unpublished translation, 1966). Nevertheless, some reflection might reveal to the reasonably informed nongovernmental observer of international events some fallacies inherent in theoretical positions that extension of the regime of innocent passage in straits conforms to state practice. For example, one might speculate that the theorists would have difficulty accounting for known or probable movements of substantial numbers of the world's submarines between seas and oceans by attempting to count those navigating on the surface in straits; moreover, they would do injustice to straits states were they to propound questionable requirements of open and notorious behavior for evidence of state practice, thereby implying a fairly incredulous, or at least embarrassing, level of naiveté and preparedness among such states.

²⁸ Article 45, which applies the regime of nonsuspendable innocent passage to certain types of straits deemed of somewhat different international significance, such as those connecting high seas to the territorial seas of a foreign state, should be read in this context. Attempts by coastal states to eliminate existing transit rights by extending their territorial seas in a semi-enclosed sea so as to bring access routes within an Article 45 approach under customary international law probably would not succeed in the face of the practical considerations that underlie the general principle of transit applicable to most straits. In this sense, the combination of the transit passage concept and the economic zone concept outlined in the text may in fact finally stabilize the law of the sea by providing coastal states with basic jurisdictional protections without the need to extend territorial seas and by making clear that further extensions of the territorial sea could not in any event cut off access routes between points outside that state or restrict their use to innocent passage.

²⁹ Vessels within straits, in a juridical sense, are closer to the coast than the minimum distance for intentional discharges under widely accepted international regulations, particularly the long-established 50-mile "no discharge" zone for intentional discharges of oil and oily substances. The texts before the Conference require ships in transit to "comply with generally accepted international regulations, procedures and practices for the prevention and control of pollution from ships," and permit the straits state to "make laws and regulations relating to transit passage through straits, in respect of . . . the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait." ICNT, Arts. 39(2)(b) & 42(1)(b); see RSNT (II), Arts. 38(2)(b) & 40(1)(b). The idea of a prohibited zone for discharges of oil extending at least 50 nautical miles from shore was incorporated in the IMCO Convention of 1954, retained in amendments to that Convention, and combined with prohibited zones of at least 12 nautical miles for discharges of other noxious substances in the successor IMCO Convention of 1973. There would seem to be little doubt that existing generally accepted prohibitions, as evidenced by the repeated prohibitions in the IMCO conventions, in effect prohibit international discharges of oil and other noxious substances in straits. See International Convention for the Prevention of Pollution of

lem of preventing accidents that cannot be averted simply by the application of general navigational rules and the problem of enforcement remained.

States concerned are already cooperating in the preparation of new and improved traffic separation schemes for review by the Inter-Governmental Maritime Consultative Organization (IMCO). These include reasonable underkeel clearance requirements for large tankers in the long and shallow Straits of Malacca. In effect, Article 41 of the ICNT is being implemented. With respect to the enforcement problem, a new provision has been added to the pollution chapter, making it clear that the straits state may take appropriate enforcement measures in the face of a serious pollution threat subject to the same pollution enforcement safeguards as apply generally.³⁰

With respect to the question of archipelagic states, Indonesia and the Philippines are, of course, widely associated with the revival of the archipelago concept after World War II, although in the case of the Philippines the question is frequently associated with its broad historic waters position. Other island states, including the Bahamas, Fiji, and Papua-New Guinea, have since become greatly interested in the subject.

The Conference on the Law of the Sea of 1958 did not accept the archipelago concept. Since then, states have been reluctant to accept it not only because of concerns regarding transit through archipelagos in areas where a special archipelagic regime might be appropriate, but also because of fear that the principle would be extended by other states beyond recognition, forcing a choice between acquiescence in the gradual erosion of freedom of the high seas and confrontation based on seemingly fine distinctions.

Thus, the Third Conference on the Law of the Sea offered a new and perhaps unique opportunity to resolve the issue. Fine distinctions could be made in a treaty; states shared the common expectation that universal practice should conform to the eventual consensus. In brief, the global treaty might afford the only practical opportunity to achieve simultaneous universal recognition of the status of certain states as archipelagic states, the limits on the concept, and the respective rights and duties of archipelagic states and of states whose vessels plied those waters.

However, a logical problem soon presented itself. Assuming all coastal states would be entitled to a 200-mile economic zone for both continental and insular territory, such a zone would basically include all the waters within the islands of the major pretenders to archipelagic status. Whatever the previous arguments for the concept, what was the rationale now? Was it merely a hedge against proposals to restrict the right to claim economic zones in respect of islands?

the Sea by Oil, *done at* London, May 12, 1954, Art. III & Annex A, para. 1, 12 UST 2989, TIAS No. 4900, 327 UNTS 3. International Convention for the Prevention of Pollution from Ships, *opened for signature* Jan. 15, 1974, Annex I, reg. 9; Annex II, reg. 5; Annex IV, reg. 8; Annex V, reg. 3. IMCO Doc. MP/CONF./WP.35 and MP/CONF./WP.21 & Add. 1-4, *reprinted at* 12 ILM 1319 (1973).

³⁰ ICNT, Art. 243.

Perhaps the most persuasive answer proffered relates to the particular problems of emphasizing and protecting the unity of a nation composed exclusively of many islands: to the extent the international community can find reasonable ways to connect such islands in a single national unit, without risking serious erosions of high seas areas or transit rights, it ought to do so.

This underlying thought is reflected in the definition of an archipelagic state³¹ and explains many of the detailed provisions. Maps of every island group in the world were carefully studied as these provisions emerged. The concept applies to island *states* only,³² subject to precise geographic limitations.³³ The waters have a new and distinct legal status: archipelagic waters.³⁴ Ships and aircraft have a right of archipelagic sealanes passage, separate and distinct from innocent passage, for the purpose of traversing the archipelago.³⁵ The right applies in broad seas up to 25 miles to either side of an axis established in accordance with carefully drawn criteria and procedures.³⁶ There are special provisions regarding neighboring states.³⁷ In brief, the acceptability of the concept and the precision of its elaboration were at the outset and remain largely one and the same issue. Thus, it is not clear whether states that are prepared to accept the ICNT provisions on archipelagic states as part of an overall generally acceptable law of the sea treaty would be prepared to recognize the archipelago concept in the absence of such a treaty.

The virtual identity of wording used in connection with the regimes of "transit passage" of straits (drafted first) and "archipelagic sealanes passage" invites attention to the differences. The term "rights of navigation and overflight in the normal mode" is used in defining archipelagic sealanes passage, whereas the term "freedom of navigation and overflight" is used in defining transit passage of straits.³⁸ Many were prepared to use either term in connection with archipelagos. The comment was made that the underlying concept of unimpeded passage through, over, and under the waters would be the same. It would normally be applied in the same way, but certain practical considerations in the application of the concept might be sufficiently different, owing to the narrowness of straits as contrasted with the broad expanses of archipelagic waters, that one should not automatically tie oneself to identical application in all cases. It was also noted that, since the delimitation of the area to which archipelagic sealanes passage applies is dictated by practical considerations³⁹ and is subject to change,⁴⁰ it would be inappropriate to use the term "freedom." Read in the context of the two chapters, the difference in wording, if it produces problems at all, seems most likely to produce them for scholars.⁴¹

³¹ ICNT, Art. 46.

³² *Id.*, para (a).

³³ ICNT, Art. 47.

³⁴ ICNT, Art. 49.

³⁵ ICNT, Arts. 52 & 53.

³⁶ ICNT, Art. 53.

³⁷ ICNT, Arts. 47(7) & 51.

³⁸ Compare ICNT, Art. 53(3) with Art. 38(2).

³⁹ ICNT, Art. 53(4).

⁴⁰ *Id.*, paras. 7 & 9.

⁴¹ The difference in wording between Article 41(4) and Article 53(9) on sealanes and traffic separation schemes reflects the fact that the archipelagic submission to the

THE ECONOMIC ZONE

As a result of the work of the sixth session of the Conference, it is now possible to examine the concept of the economic zone more closely. While the constituent elements of the zone have not been changed significantly,⁴² the Conference has moved closer to agreement on new articles regarding its status.

Insistence on characterization of the economic zone as "exclusive" arose consistently in discussions of natural resource issues, particularly fisheries. In earlier years, it was regarded as a philosophical and tactical counter to proposals to give international fisheries organizations significant regulatory functions regarding coastal fisheries. In later years, it has been a counter to proposals by some landlocked and geographically disadvantaged states for equal fishing rights in the zones of their neighbors or for regional administration in the zones. No assertion has been made that coastal state jurisdiction is exclusive for all nonresource purposes.

The changes introduced into the ICNT on the status of the economic zone were the result of long and arduous informal work among states representing all shades of opinion. They were presented to Committee II, where reactions across a broad spectrum of opinion were favorable. They are doubtlessly being reviewed with great care at the present time. The complex interrelationships among these articles are the essence of the balance sought.

The Problem of the Exclusive Economic Zone

As might be expected, the ICNT attempts to accommodate the views of those who regarded the economic zone as *sui generis*, distinct from the high seas, with those who regarded the zone as a part of the high seas subject to certain coastal state rights and jurisdiction. The word "accommodate" rather than "compromise" is particularly appropriate here, as it became apparent that disagreements as to the legal result, as opposed to the legal theory, were generally not extensive.

There had long been general agreement that the rights and jurisdiction of the coastal state would be those specified in the Convention. Thus,

organization would normally be unilateral, albeit after informal discussions with user states; in the case of straits, frequently several states border the strait and they must cooperate in consultation with the organization in formulating proposals under Article 41(5). The requirement of prior adoption by the competent international organization before implementation is the same in both cases.

⁴² See Oxman, *supra* note 1, 71 AJIL at 260-63. ICNT Articles 57, 59-70, & 72-75 are substantively the same as the equivalent articles of the RSNT. The corrections in Article 56 do not alter the substantive elements of the zone. New Article 55 and the changes in Article 58 are related to the question of the status of the zone and will be discussed along with Article 56. New Article 71 relieves a coastal state "whose economy is overwhelmingly dependent on the exploitation of the living resources of its exclusive economic zone" from the obligations of Articles 69 and 70 to neighboring landlocked and geographically disadvantaged states.

Article 56 is much like its predecessors.⁴³ Its drafting has been significantly improved by making clear that the article is a summarization of the jurisdiction, rights, and duties of coastal states defined elsewhere in the Convention, with the notable exception of subparagraph (a), which establishes the sovereign rights of the coastal state. This will encourage states to copy the detailed provisions in their national laws, thereby avoiding accidental or unnecessary divergences in state practice which could result from differing interpretations of the general language of this article.

In the course of these drafting corrections, the right to control "other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents, and winds" has been moved from an "exclusive rights and jurisdiction" category and combined with rights over natural resources in the "sovereign rights" category. In the context of the other changes made, this change emphasizes the point that the zone is an "economic" zone in concept; the sovereign rights are economic rights.

Similarly, there had long been general agreement, reflected in Article 46, paragraph 1, of the RSNT and Article 58, paragraph 1, of the ICNT, that the rights of all states to be preserved in the zone would include "freedom of navigation and overflight and of the laying of submarine cables and pipelines," and that these did not exhaust the class of freedoms preserved.

The concerns underlying the disagreement over the status of the economic zone fall mainly within three interrelated categories—the quality of rights in the zone, the quantity of rights in the zone, and the growth of the law.

(1) *The quality of the rights.* While the nature and scope of coastal state rights were described in considerable detail in the text, the RSNT did not clearly state that the navigational and other freedoms being preserved in the economic zone are the same, qualitatively, as those freedoms on the high seas beyond the zone, as they existed under traditional high seas

⁴³ See SNT (II) Art. 45; RSNT (II) Art. 44. ICNT, Art. 56 is as follows:

Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the sea-bed and subsoil and the superjacent waters, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of the present Convention with regard to:

- (i) the establishment and use of artificial islands, installations and structures;
- (ii) marine scientific research;
- (iii) the preservation of the marine environment;

(c) other rights and duties provided for in the present Convention.

2. In exercising its rights and performing its duties under the present Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of the present Convention.

3. The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI.

law and would exist under the new text.⁴⁴ Among the particular points made in support of a clarification were that full freedoms are being preserved, not merely passage rights, and that the application of existing international agreements and regulations regarding navigation, overflight, spacecraft, and submarine cables would be unchanged. These points were not contested.⁴⁵

(2) *The quantity of rights.* Article 2 of the Convention on the High Seas⁴⁶ identifies the high seas freedoms as navigation, overflight, laying and maintenance of submarine cables and pipelines, fishing, and "other freedoms recognized by the general principles of international law." The enumerated freedoms are clearly not exhaustive, but the Convention did not enumerate additional freedoms. While ICNT Article 87 (like RSNT Article 76) is more extensive in its enumeration than the High Seas Convention, it follows the same approach as Article 2 of that Convention by including the words "*inter alia*" before the enumeration of specific freedoms.

The underlying thesis of high seas law is that unforeseen classes of uses are either freedoms that may be enjoyed by all or are prohibited to all, without discrimination. That is one possible result in the economic zone. Another is that, although the use is not prohibited, coastal states have special rights regarding its exercise. Since there is by definition no way to determine the result with precision with respect to unforeseen uses, a residual rights clause is included specifying the criteria to be applied where the Convention does not attribute rights or jurisdiction to the coastal state or to other states.⁴⁷

This presents the logical problem of ensuring that all significant foreseeable classes of uses are accounted for in the economic zone—in other words; that existing classes of high seas uses are taken into account. While complete application to the economic zone of what is now Article 87 (high seas status) could have accomplished this, some argued that this would do more than necessary, in that it would arguably nullify the residual rights clause. Others, sympathetic to those advocating a change, noted that, as a

⁴⁴ There was no disagreement that certain new coastal state rights specified in the Convention (e.g., pollution enforcement rights) would affect these freedoms or that these freedoms must be exercised in the economic zone with due regard to the rights and duties of the coastal state under the Convention.

⁴⁵ Even ardent *sui generis* proponents were astonished to learn that there was a basis in fact for these concerns in some insufficiently informed oral remarks of employees of certain nonmaritime specialized agencies, and they readily granted the need for clarification.

⁴⁶ Convention on the High Seas, done April 29, 1958, 13 UST 2312, TIAS No. 5200, 450 UNTS 82, 52 AJIL 842 (1958).

⁴⁷ ICNT, Art. 59 (identical to SNT (II), Art. 47(3), RSNT (II), Art. 47).

Basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone

In cases where the present Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

legal matter, such incorporation might not resolve the problem, since it would match a general "*inter alia*" with the specific provisions of the residual rights article. It was noted that the Chairman of the Second Committee had correctly asserted that the solution to the residual rights problem lay in addressing the issue directly. Thus, it was agreed that the class of freedoms being preserved in the economic zone could be better defined to accommodate the objections of maritime and other states.

(3) *The growth of the law.* If the economic zone is not high seas, does that open the door to gradual erosion of the rights and freedoms of all states in the economic zone? Can it be argued that the fundamental principle is coastal state jurisdiction and that exceptions are to be narrowly construed? On the other hand, if the economic zone is high seas, does that open the door to the gradual erosion of the rights and jurisdiction of coastal states in the economic zone? Can it be argued that the fundamental principle is freedom of the seas and that exceptions are to be narrowly construed?

On the assumption that the qualitative and quantitative problems previously identified can be satisfactorily resolved, this issue of the growth of the law arises in the context of those agreements on specific high seas characteristics that will apply, and that will not apply, to the zone. It is the classic dilemma of describing the glass as half-full or half-empty, thereby arguably implying the direction of movement. The advocates of the view that the economic zone is *sui generis* did not deny the application of some high seas principles and rules to the zone; the high seas advocates did not deny the application of some non-high seas principles to the zone. In large measure, the two groups could agree on the result, but not on the theory.

The logical problem presented was difficult enough without the existence of other complications. States with different views had taken exceedingly firm positions on the matter and had made clear their willingness to forgo a treaty if it could not be resolved satisfactorily. Moreover, while many states were interested in the issue, the possibilities for productive interchange in large groups were limited.

At the same time, many states saw the "status" issue as related to the other outstanding issues regarding the economic zone—scientific research, third-party dispute settlement with respect to fisheries, and access of landlocked and geographically disadvantaged states to fisheries in the zones of their neighbors. The last of these was already under intensive negotiation in a small group. As to the others, the perceived relationships among the issues varied widely among the participants. It was not at all a question of trading issues. There were no consistent "sides" on the three issues taken together. Rather, there was a structural problem which demanded simultaneous discussion of the issues; otherwise, resolution of any one of them was further complicated by concerns that the result would prejudice the outcome of another.

The Resolution of the Problem

The scope of the accommodation in the ICNT on the issue of the status of the economic zone can only be perceived by reading the relevant articles

together. Many of the changes address more than one of the underlying concerns involved.

The governing provisions on the exclusive economic zone and the high seas, in addition to Article 56, paragraph 1,⁴⁸ stipulate:

PART V

EXCLUSIVE ECONOMIC ZONE

Article 55

Specific legal régime of the exclusive economic zone

The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal régime established in this Part, under which the rights and jurisdictions of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of the present Convention.

Article 58

Rights and duties of other States in the exclusive economic zone

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of the present Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of the present Convention.

2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone insofar as they are not incompatible with this Part.

3. In exercising their rights and performing their duties under the present Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations established by the coastal State in accordance with the provisions of this Convention and other rules of international law insofar as they are not incompatible with this Part.

PART VII

HIGH SEAS

(N.B. Part VII comprises Arts. 86–115 and 116–120
on living resources)

Article 86

Application of the provisions of this Part

The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58.

Article 87

Freedom of the high seas

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions

⁴⁸ ICNT Article 56(1) is set out at note 43 *supra*.

laid down by the present Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:

- (a) Freedom of navigation;
- (b) Freedom of overflight;
- (c) Freedom to lay submarine cables and pipelines, subject to Part VI;
- (d) Freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
- (e) Freedom of fishing, subject to the conditions laid down in section 2;
- (f) Freedom of scientific research, subject to Parts VI and XII.

2. These freedoms shall be exercised by all States, with due consideration for the interests of other States in their exercise of the freedom of the high seas, and also with due consideration for the rights under the present Convention with respect to activities in the Area.

Article 89

Invalidity of claims of sovereignty over the high seas

No state may validly purport to subject any part of the high seas to its sovereignty.

The new Article 55 is designed to obviate the problem of deductive reasoning regarding the nature of the economic zone. The economic zone is "subject to the specific legal regime established in this Part, under which" the relevant rights, jurisdiction, and freedom of coastal states and other states "are governed by the relevant provisions of the present Convention." This article expressly contradicts any argument that the concept of the economic zone exists in international law independently of the specific attribution of rights and duties as set forth in the Convention. The regime is found in Part V of the Convention (Economic Zone), but under that regime, rights and freedoms are governed by relevant provisions of the Convention, including provisions of Part VII of the Convention (High Seas). Thus, the article attempts to accommodate the *sui generis* approach with objections to that approach.

Paragraph 1 of Article 58 deals directly with the qualitative and quantitative problems. As to the qualitative nature of the "freedoms" of navigation, overflight, and laying of submarine cables and pipelines, the adjectival clause "referred to in article 87" inserted after "freedoms" establishes the qualitative identity of these freedoms with those beyond the economic zone, as Article 87 is the basic article enumerating high seas freedoms. Except as specifically provided in the Convention (*e.g.*, as to pollution enforcement and pipeline routing), the coastal state has no greater rights with respect to these freedoms within the economic zone than it does beyond the zone. Their connotation is the same. Treaties and international regulations apply to these freedoms in the same way in both areas.

As to the quantitative issue, as well as some aspects of the qualitative issue, the clause of Article 46 of the RSNT II "and other internationally lawful uses of the sea related to navigation and communication" has been changed in Article 58, paragraph 1, to "and other internationally lawful uses

of the sea related to these freedoms such as those associated with the operation of ships, aircraft, and submarine cables and pipelines, and compatible with the other provisions of the present Convention."

At the very least, the two changes incorporated in paragraph 1 of Article 58 make clear that the operation of ships, aircraft, and submarine cables and pipelines and associated uses remain, as on the high seas beyond the zone, the right and responsibility of the flag state, whose responsibility it is, under paragraph 3, to ensure in the zone "due regard to the rights and duties of the coastal State." It will be noted that the mere fact that coastal states have enforcement rights in the zone, for example with respect to fishing activities, does not affect the flag state's responsibilities of "due regard" in exercising its navigation or other freedoms. It will also be noted that the Article 88 reservation for peaceful purposes applies to both areas by virtue of Articles 58 and 86. Needless to say, it does not prohibit military activities generally by the coastal state or others.

Paragraph 2 of Article 58 is the same in substance as its predecessor. It should be read together with the new Article 86, which replaces the definition of the high seas. The effect is that all articles of Part VII (High Seas) apply beyond the economic zone and that, with two exceptions, all articles of Part VII apply within the economic zone "insofar as they are not incompatible with" the economic zone articles. The exceptions are Articles 116-120 (fishing provisions) and Article 87 (the elaboration of high seas freedoms, the substance of which is dealt with directly in Article 58(1), which itself crossreferences Article 87 in this regard).⁴⁹ A drafting correction in Article 58(3) is designed to ensure that the reference to international law is not read to authorize legislation incompatible with rights and freedoms under the Convention.⁵⁰

⁴⁹ The decision to crossreference Article 87 in paragraph 1 for purposes of identifying the freedoms, but not to crossreference Article 87 generally in paragraph 2 of Article 58, led to the movement of the prohibition on sovereignty claims from what is now Article 87 (RSNT (II) Art. 76) to a new Article 89, so that it would be incorporated by reference by Article 58(2). It might be noted that nothing in the economic zone articles is "incompatible" with Article 89 or, indeed, with most of the other articles incorporated by reference. It is simply inadmissible to argue that a prohibition on sovereignty in a treaty that permits sovereign rights and jurisdiction for certain specified purposes is incompatible with the sovereign rights and jurisdictional provisions; quite to the contrary, the combination expresses exactly what is meant by the economic zone and, for that matter, the continental shelf. Obviously, in areas beyond the economic zone and continental shelf, the prohibition should be read in the context of articles that do not provide for sovereign rights.

⁵⁰ A general allergy to references to international law has been apparent in the negotiation of the Convention as a whole from the outset. The reasons vary. One has been a concern that references to international law could have the effect of prejudicing or narrowing new rules established in this Convention. The wording of the new fourth preambular paragraph ("[a]ffirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention") seems to attempt to present the obvious legal point that not all international law is being altered but with careful regard to the reticence of certain delegations on this matter. Generally, textual references to international law have been included where the matter is not particularly controversial, where delegations desire to avoid

What is significant here is not that the theoretical argument has been neutralized (or confused) but that it has been made irrelevant. While the new Article 86 specifies that the articles of Part VII will apply only beyond the economic zone, the second sentence of this new article specifies that this entails no abridgment of freedoms enjoyed by all states in the economic zone under Article 58; Article 58 itself incorporates by reference the relevant provisions of Part VII.

Looking back at the new Article 55, the logic behind this apparent system of mirrors becomes quite clear: the question whether relevant aspects of the economic zone regime are part of the high seas regime has been resolved by making relevant aspects of the high seas regime part of the economic zone regime and by deleting the geographic definition of the high seas.

Under traditional approaches to the law of the sea, one looked to the geographic status of the area to determine the applicable law. It was assumed that each body of law was largely distinctive. The new texts apply the relevant bodies of law directly to specified geographic areas in specified ways; the fact that there are shared elements, far from being an embarrassment of practical accommodation, becomes the essence of the regime.

Whether the 200-mile line is juridically significant depends on the purpose for which the question is asked. If one is discussing navigation, by and large, it is not. If one is discussing fishing, it is. Whether the high seas regime is in effect the applicable regime when one crosses into an economic zone depends on what one is doing. A vessel navigating in, or an aircraft flying over, the economic zone is not within the national jurisdiction of the coastal state. (The pollution enforcement rights of coastal states with respect to a vessel doing no more than navigating in the zone are generally triggered by a violation of international standards, which the vessel would in any event be obliged to observe.) A vessel fishing within the zone is within coastal state jurisdiction. But the vessel is also subject to flag state jurisdiction. It is conceivable that the coastal state would fine the vessel for illegal fishing and that the flag state would fine those concerned for poor navigation under its domestic laws applicable to the conduct of its vessels on the high seas.

The new text, in the same way that it clarifies the continuing applicability to the economic zone of international regulations regarding navigation and overflight on the high seas, may also obviate the need for states to modify the language regarding the area of applicability of their laws regulating the conduct of their nationals and vessels on the high seas.

None of this is to suggest that the text could not do with improvement. While favoring the experiment in functionalism, this author would prefer

the controversy inherent in dealing with the matter, or where the international law in question is outside the scope of this Conference, as where allusion is made to general principles of international law rather than just law of the sea principles. Nevertheless, in some places references to international law have been omitted even in these cases on the ground that it is obvious that international law applies.

to rest the law on known foundations. The new text is certainly an improvement over the RSNT from this point of view. It does not invite erosion. Whether it or any text, unless widely ratified and subject to impartial third-party adjudication, could stabilize the situation with sufficient flexibility to avoid another rupture, is unclear.

Scientific Research

As mentioned previously, scientific research in the economic zone was a major aspect of the informal discussions on outstanding issues relating to the zone, although the Chairman of the Third Committee made some unfortunate changes in the texts that emerged from those discussions. The major advocates of a regime entailing maximum freedom of scientific research are parties to the Convention on the Continental Shelf, which gives the coastal state broad discretion regarding research "concerning the continental shelf and undertaken there."⁵¹ A large number of coastal states not only desire broad control over scientific research in the economic zone but also believe that the point was implicitly conceded outside the Conference as a matter of existing or emerging international law.

The four main elements of an accommodation on the question of scientific research were already apparent in the earlier work of the Conference. First, there would be specified obligations in the treaty for those engaged in scientific research in the economic zone or on the continental shelf, such as notice to the coastal state, allowing participation by that state, and data-sharing with it.⁵² Second, there would be a requirement to seek the consent of the coastal state. Third, the coastal state would have a duty to grant consent. Fourth, the project could go forward if the coastal state did not respond to a request for consent in a specified period of time.⁵³

The controversy centered on the second and third issues. While phrased alternatively in terms of the scope of the duty to seek consent or the scope of the duty to grant consent, the main question was the scope of coastal state discretion to deny consent. While it was recognized that the articles under discussion deal with marine scientific research and not with commercial exploration or military activities, concerns were expressed that vessels might not be engaged in bona fide scientific research. As a matter of drafting, this posed two problems. Would the coastal state be obliged to grant consent except in specified circumstances? If so, how precisely would the specified "exceptions" be?

The result in Article 247 of the ICNT is that marine scientific research

⁵¹ Convention on the Continental Shelf, done April 29, 1958, Art. 5(8), 15 UST 471, TIAS No. 5578, 499 UNTS 311, 52 AJIL 585 (1958).

⁵² See ICNT, Arts. 249-50.

⁵³ See ICNT, Art. 253. Those who argue that no treaty would be better for science share the author's dismay at the suspicious and restrictive attitudes toward science displayed in state practice and at the Conference. Nevertheless, they might consider that no presumption of consent in the absence of response could be relied upon without clear agreement to that effect by the coastal state in advance. They might reflect upon what might be offered to obtain such an agreement in bilateral negotiations and whether such costs would be drawn from overall resources available for scientific purposes.

in the economic zone or on the continental shelf requires the consent of the coastal state. "Coastal States shall, in normal circumstances grant their consent for . . . projects . . . to be carried out in accordance with the present Convention exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind." Paragraph 4 of Article 247 continues:

Coastal States may however in their discretion withhold their consent to the conduct of a marine scientific research project of another State or competent international organization in the exclusive economic zone or on the continental shelf of the coastal State if that project:

(a) is of direct significance for the exploration and exploitation of natural resources, whether living or non-living;

(b) involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment;

(c) involves the construction, operation or use of artificial islands, installations and structures as referred to in articles 60 and 80;

(d) contains information communicated pursuant to article 254 regarding the nature and objectives of the project which is inaccurate or if the researching [S]tate or competent international organization has outstanding obligations to the coastal State from a prior research project.

Subparagraphs (a), (b), and (c) deal with the basic economic and environmental interests of coastal states. Subparagraph (d), by making inaccuracy of information communicated a basis for denial of consent, is designed to deal in an objective manner with the question of bona fides. These criteria, while addressing additional coastal state concerns, are probably not so amenable to abuse as the comparable criteria in the RSNT.⁵⁴

The precise problem posed was the one of a noneconomic scientific research project with respect to which the information communicated is accurate. Some coastal states argued that there might be some unusual diplomatic circumstances in which they simply could not grant consent. The obvious reply would be to suggest limiting the requirement for obtaining consent so that the coastal state need not decide. The idea of a consent requirement was already too deeply ingrained to permit this facile answer. This "deductive" trap is an instructive warning to those who believe that there is no difference between the willingness of a state to refrain from interference with certain activities not subject to its jurisdiction and its willingness to permit such activities if they are subject to its jurisdiction. Once forced to take a stand, albeit by virtue of their unwillingness to consider other jurisdictional solutions, most states will insist on some residual right to say "no."

The solution proposed in an informal "test proposal" of the Chairman of the Third Committee was to provide that the coastal state should "normally" grant consent. This suggestion evoked strong objections on the

⁵⁴ See RSNT (III), Art. 60.

ground that it was much too broad, since it could be read to refer to the pattern of coastal state behavior rather than to the existence of unusual international circumstances, subject to some objective verification, in connection with a particular project. The proponents of the clause "in normal circumstances" argued that it meets the asserted needs of the coastal state by providing for abnormal diplomatic circumstances between the states concerned relevant to the project, that it is subject to objective inquiry, and that it cannot be invoked merely because coastal state officials would prefer to stop the project.

The RSNT contained a clause which might have implied a right of the coastal state to restrain publication of information after the fact.⁵⁵ This would have created problems of notice and other potential legal problems. Coastal states justified their insistence on some right to limit publication on the grounds that unexpected data of direct economic significance might be discovered. While any right to restrain publication can hardly be viewed with favor, the ICNT at least links this to requirements for granting consent.⁵⁶ Thus, it is up to the scientists concerned to decide in advance whether they will agree or prefer to cancel or alter the project.

The ICNT also contains a provision that may be a long range solution to the overall problem. Article 248 provides:

A coastal State which is a member of a regional or global organization or has a bilateral agreement with such an organization, and in whose exclusive economic zone or on whose continental shelf the organization wants to carry out a marine scientific research project, shall be deemed to have authorized the project to be carried out, upon notification to the duly authorized officials of the coastal State by the organization, if that State approved the project when the decision was made by the organization for the undertaking of the project or is willing to participate in it.

On its face, this article merely seems to say that the coastal state may consent in different ways. However, on another level, the article seems to reflect a perception among developing countries that negative control over scientific research is insufficient. The power to stop a project does not ensure that projects of concern to developing countries will be carried out. Since the underlying aim must be to marshal sophisticated and expensive scientific capabilities, a question of incentives arises. Few states have coastlines long and exposed enough to be able, on their own, to entice foreign projects into their area. This article seems to say that in exchange for cooperation by major research states and institutions in the conduct of scientific research by regional or global organizations (a collective effort under heavy developing country influence) predictability will be enhanced and bureaucratic problems simplified with respect to the coastal states that have approved or are participating in the project. On a more practical level, in the absence of arrangements of the type contemplated by this article, the administrative problems of organizing meaningful large-scale projects in areas bordered by many coastal states, such as the Caribbean or

⁵⁵ RSNT (III), Art. 61.

⁵⁶ ICNT, Art. 250(1)(d) & (2).

West Africa, could be a considerable disincentive to research. This also raises a question of coordination among coastal states bordering enclosed or semi-enclosed seas, as an aspect of a broader problem that will be addressed presently.

It should be noted that the subject of deep seabed scientific research was not discussed at the 1977 session. The appearance of a new, and arguably ambiguous, text on this subject (Article 151(7)), coupled with a new position for Article 143, is but one aspect of the broader deep seabeds problem (and probably one of those more easily rectified.)

Dispute Settlement

The informal discussions on the economic zone also addressed the question of limiting compulsory third-party settlement of disputes with respect to scientific research and fisheries. Although differences were narrow, the fisheries issue remained controversial. The approaches of ICNT Article 265 (Part XIII) and Article 296(3) (Part XV) on the settlement of disputes on marine scientific research are similar. Both proceed on the premise that, where a right or discretion is accorded to the coastal state, the decision it reaches in the exercise of such right or discretion in accordance with the Convention is not subject to challenge, as such challenge would necessarily raise questions outside the scope of interpretation and application of the Convention. Article 296, paragraph 4, of the ICNT takes the same approach on fisheries in dealing with the exercise of discretion by the coastal state in accordance with Articles 61 (conservation measures) and 62 (optimum utilization and allocation). As Dr. Adede discusses dispute settlement in greater detail in this issue of the *Journal*,⁵⁷ no more need be said here.

Fisheries

Although the question of access of landlocked and "geographically disadvantaged" states to fisheries of the economic zones of their neighbors was the subject of intensive negotiation, agreement on incorporation of a new proposed text in the ICNT was not reached. Thus, Articles 69 and 70 of the ICNT have been retained in their previous form pending such agreement. The function of such articles should be viewed against the background of Article 62. That article obliges the coastal state to permit foreign fishing only for those portions of the overall allowable catch of a stock which exceed the coastal state's harvesting capacity at the time and grants the coastal state broad discretion as to the allocation of that surplus.⁵⁸

⁵⁷ Adede, *Law of the Sea—The Integration of the System of Settlement of Disputes under the Draft Convention as a Whole*, *infra* p. 84.

⁵⁸ In this connection, interesting questions arise with respect to states that have to some extent pooled their resources. For example, access by other states to fisheries within the 200-mile fisheries zone off the coast of the nine European Community States is negotiated by the Community. The European Community States are discussing the inclusion in the law of the sea treaty of special provisions regarding the general question of economic communities.

Delimitation

It is fair to say that a "tilting" battle continues over the question of delimitation of economic zones and continental shelves between opposite and adjacent states. Even advocates of the equidistance method do not seriously maintain that the equidistance method can be the only universally applicable rule. Thus, the division of opinion was fairly equal over the question whether the RSNT provisions gave too much, or too little, prominence to the equidistance method. The Chairman of the Second Committee decided that those provisions should be retained "as it had not been possible to devise a formula which would narrow the differences between the opposing points of view."⁵⁹ It may be hoped that the view expressed recently by the Court in the British-French arbitration over the Channel Islands to the effect that the result under customary international law and the Continental Shelf Convention would have been the same under the RSNT provisions may have some generally moderating effect.⁶⁰ This Conference cannot and will not resolve bilateral delimitation disputes.

One aspect of the problem relates to proposals to revive the SNT interim rule of equidistance.⁶¹ This necessarily involves the equally controversial question of compulsory third-party settlement with respect to delimitation disputes. The underlying question posed is whether the same state may refuse to accept equidistance provisionally pending final settlement and may refuse to accept third-party settlement if no negotiated solution can be found. A related question is whether this problem can be resolved without appearing to give priority to equidistance as the preferred method for definitive delimitation.

A state had discretion under the RSNT to designate a regional or other third-party dispute settlement procedure entailing a binding decision for delimitation disputes in place of the Convention procedures. This approach has been retained, but with a new proviso that "such procedure or decision shall exclude the determination of any claim to sovereignty or other rights with respect to continental or insular land territory."⁶² From this it may be assumed that to the extent that a determination of contested claims to sovereignty over land territory is necessary to the resolution of a delimitation dispute, the dispute could not be settled by the third-party procedures in the absence of a special agreement by the parties to the contrary.

Enclosed and Semi-Enclosed Seas

While the ICNT provisions on enclosed and semi-enclosed seas are not new, the definition of such seas and the substantive requirements are functionally related to economic zone issues arising between neighboring states, particularly issues involving geographically disadvantaged states. A "geographic disadvantage" frequently derives from a state's location on an enclosed or semi-enclosed sea. Article 122 defines enclosed and semi-enclosed

⁵⁹ ICNT, Arts. 74 & 83. See Explanatory memorandum, *supra* note 4, at 11.

⁶⁰ Delimitation of the Continental Shelf (France/United Kingdom), Opinion, *supra* note 7, at 102-04, para. 96.

⁶¹ SNT (II), Arts. 61(3) & 70(3).

⁶² ICNT, Art. 297(1)(a).

seas as those surrounded by two or more states, and either connected to the open seas by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal states.

This geographic situation entails a duty of cooperation among the states bordering such a sea in the exercise of their rights and duties under the Convention, but does not give rise to enhanced or diminished rights vis-à-vis third states. Accordingly, these provisions should not be confused with attempts by certain theorists to propound generalized "closed sea" doctrines on the basis of the specific limitations on third states agreed in the Montreux Convention with respect to the Black Sea. Such doctrines were never even mentioned at this Conference.

Article 123 provides that the states bordering enclosed or semi-enclosed seas "shall endeavour . . . to co-ordinate" their fisheries, environmental, and scientific research activities, policies, and programs, and "to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article." The three subjects for coordination all relate to activities that are likely to affect the interests of more than one state bordering an enclosed or semi-enclosed sea, if only because of the migration of fisheries, ambient water quality problems, and the interrelationship or mobility of scientifically significant structures or phenomena. To the extent these provisions may be carried out with respect to scientific research, for example through a regional organization, the potential for benefit to the coastal states and researching institutions, as under Article 248, could be considerable.

The remaining provisions regarding the economic zone, including those relating to pollution, are largely the same as the RSNT provisions, with some refinements and clarifications. The fact that discussion of them is not repeated here is not intended to depreciate their importance. One of the unhappy aspects of current discussion of the desirability of a law of the sea treaty is that it assumes that certain rules that are no longer in controversy at the Conference may have already found their way into customary international law and will continue to be respected. This is hardly a sound assumption in certain cases.

THE CONTINENTAL SHELF

The continental shelf text comes a step closer to final resolution of the question of the continental shelf by specifying the precise revenue-sharing obligations of the coastal state beyond 200 miles for the benefit of developing countries.⁶³ The rate is based on the informal suggestion circulated several years ago by the United States,⁶⁴ with contributions commencing in the sixth year of production at a particular site at one percent of the value of production and increasing by one percent per year until the tenth year, after which the rate would remain at five percent. While the United States

⁶³ ICNT, Art. 82.

⁶⁴ See Stevenson & Oxman, *The 1975 Geneva Session*, *supra* note 1, at 782, including n.43.

had, of course, originally proposed even broader revenue sharing⁶⁵ and trimmed its proposals in light of widespread foreign opposition, it is arguable that even this amount, given the rising value of hydrocarbons, would do more for developing countries in this century than anything they could conceivably achieve from any regime for the deep seabeds beyond the continental margin. Even those preoccupied with principle and precedent would do well to consider whether the principle and precedent involved here would better serve the future needs of all mankind than any entailed in a system of exploitation for deep seabed manganese nodules.

While the revenue-sharing exclusion for developing coastal states with broad continental shelves has been deleted,⁶⁶ a new provision has been added exempting a broad-margin developing coastal state "which is a net importer of a mineral resource produced from its continental shelf . . . from making such payments or contributions in respect of that mineral resource."⁶⁷ The underlying justification for any such provision remains unclear. A large proportion of promising continental margin areas beyond 200 miles lies off the coast of industrialized states. Contributing developing coastal states in economic need would presumably receive a fair proportion of the total global revenues contributed in any event. Why should they receive more, or receive an exemption and still be entitled to a share of the global total? If the amounts are significant at all, the fact that a coastal state is nevertheless a net importer of hydrocarbons might suggest that it is not among the least developed.

As to the definition of the precise outer limit of the continental shelf where it extends beyond 200 miles (that is the outer edge of the continental margin), the Chairman of the Second Committee, noted that a specific proposal has been supported by a group of delegations regarding the outer edge of the continental margin, but that "despite the need for such a definition, and although no alternative definition which is generally acceptable has been submitted, the inclusion of the suggested wording in the composite text was not considered justifiable at this stage."⁶⁸ The reference is presumably to a formula that permits the coastal state to determine the edge of the continental margin at a distance of sixty nautical miles seaward of the surficial foot of the continental slope or where the thickness of sediment is at least one percent of the distance from the foot of the slope.⁶⁹

⁶⁵ Statement by the President on United States Oceans Policy, May 23, 1970, UN Doc. A/AC.138/22, 62 DEPT. STATE BULL. 738, 9 ILM 806 (1970); U.S. Draft United Nations Convention on the International Seabed Area, Arts. 4, 28, and Appendix A, paras. 6 & 10, and Appendix B, para. 9, 25 GAOR, Supp. (No. 31) 130, UN Doc. A/8021 (1970).

⁶⁶ See RSNT (II), Art. 70(3).

⁶⁷ ICNT, Art. 82(3).

⁶⁸ ICNT, Explanatory Memorandum, *supra* note 4, at 10.

⁶⁹ In effect, this is a determination of jurisdiction over the continental rise. Measurement commences where the continental slope first meets the continental rise (or, in the absence of a continental rise, the deep ocean floor). Significant changes in surface gradient are associated with this intersection. The coastal state can either assume that its continental rise is sixty miles wide or it can proceed to the point where the continental sediment thins to one percent of the distance from the foot of the slope.

Although based on geological information, the formula establishes a line for juridical, not scientific, purposes. It is designed to ensure relative precision, and to preclude a juridical interpretation of the continental margin as extending unreasonable distances beyond 200 miles based solely on the existence of a broad and gradually thinning layer of continental sediment overlying oceanic rock. While the doctrine of the continental shelf is based on geology, this definition constitutes a legal solution to the legal problem posed by broad continental rises extending over an oceanic floor. It is true that the sixty-mile rule alone, as originally suggested by the United States, would also accomplish this, perhaps more simply and with greater attention to considerations of the common heritage. Nevertheless, some directly affected states prefer the "thickness of sediment" ratio as an alternative. This preference should, of course, be taken into account. Indeed, it is the failure to pay due regard to the views of the most directly affected states that explains a good deal of the problem on deep seabed issues.

CONCLUSION

In broad terms, one might inquire how this Conference is disposing of the international law of the sea after years of careful deliberation. The significant elements of any response might be the following.

First, the Conference accepted the three major "received" regimes: the territorial sea (and contiguous zone), the continental shelf, and the high seas. It dealt mainly with the geographic scope of those regimes and in this sense made a very significant change in the high seas regime, reducing the area in which all classic high seas freedoms obtain by at least one-third.

Second, the Conference has provided for unimpeded transit through, over, and under routes used for international navigation connecting points outside coastal state "sovereign" waters, irrespective of the extension of coastal state internal waters, territorial sea, or archipelagic waters to embrace such routes. It has, accordingly, rejected the notion that such extensions, if lawful, automatically subject all other states to innocent passage and the attendant coastal state powers.

Third, the Conference, by establishing a 200-mile economic zone and providing for coastal state jurisdiction over the continental margin beyond 200 miles, has decreed a vast partition of most significant economic rights in the oceans among coastal states, but has sought to insulate other traditional non-resource uses (*e.g.*, navigation) from the effects of such partition and to reserve them to all states. It is taking an uncertain step into a dimly perceived "law of economic interdependence" by requiring optimum utilization of economic zone fisheries and by providing for some revenue sharing from mineral exploitation of the continental margin beyond 200 miles.

Fourth, the Conference has entered into the field of international environmental law with conviction and balance, laying down broad new obligations and precise rules regarding their implementation.

Fifth, the Conference, perhaps feeling guilty over the abandonment of much potential "common heritage" to coastal states, is seeking to maximize

the ideological benefit from the deep seabeds regime by striving for a "mirror image" of natural resource development approaches preferred by developing countries on land. In so doing, it has failed to distinguish between what states will live with in fact on land and what they will (albeit implicitly) approve as a model in a treaty for the deep seabeds.

Finally, the Conference is making provision for comprehensive binding third-party settlement of disputes as an integral part of the treaty, not an optional protocol.

Needless to say, as for the last two points, only a comprehensive treaty can provide an adequate basis for realizing the goals of a new type of arrangement between developed and developing countries for seabed resources or a binding system of third-party dispute settlement.

Except for revenue sharing, the first three points will probably be regarded by many states as declaratory of international law, at least for a while. As for the fourth, there may be more enthusiasm for the jurisdictional rights than for the environmental duties and more opposition to assertions of those rights. What then? How states assess the gravity of that question will largely determine the outcome of the Conference and, indeed, their practice in the absence of a treaty.

NOTES AND COMMENTS

LAW OF THE SEA—THE INTEGRATION OF THE SYSTEM OF SETTLEMENT OF DISPUTES UNDER THE DRAFT CONVENTION AS A WHOLE

I.

INTRODUCTION

It is generally recognized that numerous articles of the Convention on the Law of the Sea will be in the form of delicately balanced provisions representing painfully worked out compromises which will require careful interpretation and application. Consistent with this recognition is the legitimate desire that an effective and comprehensive system should be established for the peaceful settlement of disputes which may arise from the interpretation and application of the Convention. The system itself is to be flexible enough to allow states various modes of peaceful settlement, ranging from informal noncompulsory procedures to formal compulsory procedures entailing binding decisions.

The idea is that law of the sea disputes should be settled by peaceful means of the parties' own choice including judicial settlement of a compulsory nature, thereby precluding settlement of disputes by the use or threat of force. This has been the basic aim of Part IV of the Revised Single Negotiating Text (RSNT) dealing exclusively with the subject of settlement of disputes,¹ which has now become Part XV of the present Informal Composite Negotiating Text (ICNT).²

The question of settlement of disputes arising under the Law of the Sea Convention was not dealt with exclusively in Part IV of the RSNT negotiated in informal plenary meetings of the Conference under the direction of the President of the Law of the Sea Conference.³ Part I of the RSNT dealing with the seabed matters, which are being negotiated in Committee I of the Conference, also contained detailed draft provisions on settlement of seabed disputes,⁴ including an annex for the establishment of a separate system for the settlement of such disputes through a Sea-Bed Tribunal as an organ of the proposed Sea-Bed Authority.⁵ In contradistinction, Parts

¹ Part IV of the Revised Single Negotiating Text appears at 6 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA: OFF. RECS. 144, UN Doc. A/CONF.62/WP.9/Rev. 2 (1976); Parts I, II, and III appear at 5 *id.* 125, UN Doc. A/CONF.62/WP.8/Rev. 1 (1975) [hereinafter cited as RSNT with the relevant Part indicated in parenthesis].

² UN Doc. A/CONF.62/WP. 10, July 15, 1977, reprinted at 16 ILM 1108 (1977) [hereinafter cited as ICNT]. [Ed. Note: There are numerous stylistic inconsistencies in the Parts of the ICNT. Articles quoted in this Note are as they appear in the text.]

³ For recent discussion of certain aspects of the RSNT, see e.g., Sohn, *U.S. Policy Toward the Settlement of Law of the Sea Disputes*, 17 VA. J. INT. L. 9 (1976); Adede, *Law of the Sea: The Scope of Third-Party Compulsory Procedures for Settlement of Disputes* 71 AJIL 305 (1977).

⁴ RSNT (I) Arts. 33-40.

⁵ Annex III.

II and III of the RSNT did not have such elaborate provisions on settlement of disputes, but had articles referring to the system under Part IV.⁶ Thus, under the RSNT, there were formally two separate detailed systems for the settlement of disputes: the system created under Part I dealing exclusively with seabed disputes and the system under Part IV representing a comprehensive approach to dispute settlement under the Convention as a whole and contemplating the possibility of inclusion of seabed disputes under it also.⁷

While the negotiation of Part IV in the informal plenary meetings of the Conference took place both during the two sessions of the Conference held in 1976 and at the sixth session of the Conference in 1977, Committee I of the Conference, which is responsible for Part I of the RSNT, did not take up the subject for detailed discussion until near the end of the sixth session. As a result of the discussion in Committee I, one significant decision was taken, which is the subject of the present note—the integration of the seabed dispute settlement system into the system envisaged for the settlement of disputes under the Convention as a whole. This is the approach followed by the present ICNT. The integrating provisions are contained in both Part XV of the ICNT (formerly Part IV of the RSNT), and Part XI, Section 6, of the ICNT (formerly Part I of the RSNT).

II.

THE COMPOSITE TEXT AND THE COMPREHENSIVE APPROACH TO DISPUTE SETTLEMENT

A. *The Establishment of the Sea-Bed Disputes Chamber and the Law of the Sea Tribunal under Part XV of ICNT*

The way toward integrating the system for settling seabed disputes into the general system negotiated in the plenary was paved by Article 15 of Annex II of Part IV of the RSNT, containing the Statute of the proposed Law of the Sea Tribunal. That article stipulated that seabed disputes may be settled by a Sea-Bed Disputes Chamber of the Law of the Sea Tribunal. The Chamber would thus deal with disputes relating to the interpretation and application of the provisions of Part I of the RSNT (now Part XI of the ICNT), leaving the question of jurisdiction and competence, including access to the Chamber, to be determined by Committee I of the Conference, which is negotiating the seabed articles.

Committee I of the Conference adopted the above provision, abandoned a separate dispute settlement system for seabed matters, and transferred the institutional arrangements for the settlement of seabed disputes to the general system, accepting the proposed Sea-Bed Disputes Chamber of the Law of the Sea Tribunal as the forum. Within Annex V of Part XV of the ICNT, containing the Statute of the Law of the Sea Tribunal, is Article 15

⁶ See e.g., RSNT (II) Art. 131 and (III) Arts. 76 & 77.

⁷ This was contained in RSNT (IV), Annex II, Article 15, in which the establishment of a Sea-Bed Disputes Chamber was proposed as part of the Law of the Sea Tribunal.

providing for the establishment of a Sea-Bed Disputes Chamber. The Chamber is more elaborately dealt with in the five articles of Section 4 of Annex V, set out below:

Article 37

Composition of the Chamber

1. The Sea-Bed Disputes Chamber shall be established in accordance with article 15 and shall be composed of eleven members, selected from among the members of the Tribunal by the Assembly of the Authority, by a majority specified in accordance with paragraph 6 of article 157 of Part XI, for matters of substance.

2. The Assembly shall assure the representation of the principal legal systems of the world and equitable geographical distribution in the Chamber.

3. The members of the Chamber shall be selected every three years and may be selected for a second term.

4. The Chamber shall elect its Chairman from among its members, who shall serve for the period for which the Chamber has been selected.

5. If any proceedings are still pending at the end of any three year period for which the Chamber has been selected, the Chamber shall complete the proceedings in its original composition.

6. Upon the occurrence of a vacancy in the Chamber, the Tribunal shall select a successor from among its members who shall hold office for the remainder of the term of his predecessor, subject to the approval by the Assembly at its next regular session.

7. A quorum of seven members shall be required to constitute the Chamber.

Article 38

Access

The Chamber shall be open to the States Parties, to the Authority and to nationals of States Parties in accordance with the provisions of section 6 of Part XI.

Article 39

Applicable Law

In addition to the provisions of article 293 of Part XV, the Chamber shall apply:

(a) The rules, regulations and procedures adopted by the Assembly or the Council of the Authority in accordance with the present Convention; and

(b) The terms of any contracts concerning activities in the Area in any matter relating to such contract.

Article 40

Enforcement of decisions of the Chamber

The decisions of the Chamber shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party where the enforcement is sought.

Article 41

Applicability of the procedure of the Tribunal to the Chamber

1. The provisions of this annex which are not incompatible with this section shall apply to the Chamber.

2. In the exercise of its functions relating to advisory opinions, the Chamber shall be guided by the provisions of this annex relating to procedure before the Tribunal to the extent to which it recognizes them to be applicable.

Under Article 37, the eleven judges of the Chamber are to be elected by the Assembly of the International Sea-Bed Authority from among the members of the Law of the Sea Tribunal already selected by the Contracting Parties.⁸ This provision creates the necessary link between the Chamber and the Authority. Without it, the Chamber would be a completely autonomous institution with no relation to the Sea-Bed Authority. In performing its function of electing the members of the Sea-Bed Disputes Chamber, the Assembly does not need the recommendation of the Council, as was stipulated in the RSNT.⁹ The ICNT has thus limited the link between the Chamber and the Authority by involving only the Assembly in the election process. However, the question of the extent to which the Sea-Bed Disputes Chamber is to be autonomous or linked to the institutions of the Sea-bed Authority will still require further closer scrutiny.

Under Article 38, the Sea-Bed Disputes Chamber is open to entities other than states in the manner further elaborated in the six articles of Section 6 of Part XI of the ICNT. By virtue of this integration, Part XV of the draft Convention now includes an international judicial forum open to states, individuals, and an international organization. This expanded jurisdiction of the Sea-Bed Disputes Chamber of the proposed Law of the Sea Tribunal supports the desirability of the establishment of the Tribunal. It is only fair that *all* the would-be actors in the International Sea-Bed Area (and therefore potential parties to disputes arising from the interpretation and application of the provisions of that part of the Convention) should have access to the mechanisms for the settlement of disputes, designed for the protection of rights and duties under the Convention. Giving natural and juridical persons and the Sea-Bed Authority access to an international judicial forum is one of the important features of the draft Convention of the Law of the Sea, but, as will become evident shortly, that access is still limited.

Article 40 of Annex V of the ICNT provides for the enforcement of the decisions of the Sea-Bed Disputes Chamber in the territories of all the States Parties. This is altogether appropriate for what has been identified as the "common heritage of mankind." Under Articles 160 and 186 of Part XI of the ICNT, the Council of the Sea-Bed Authority is given the

⁸ The Law of the Sea Tribunal is to be composed of twenty-one members elected in the manner described in Articles 2-4 of the Statute of the Tribunal.

⁹ RSNT (I) Art. 26 (2) (ii) dealing with the functions of the Assembly and Art. 28 dealing with the functions of the Council.

function of recommending to the Assembly appropriate measures to be taken in cases of gross and persistent violation of the provisions of the Convention dealing with the seabed, provided that the Sea-Bed Disputes Chamber has found that such a violation has been committed.

Since the institutional arrangements for the Sea-Bed Disputes Chamber have been so exhaustively dealt with under Article 15 of Annex V of the ICNT, Section 6 of Part XI of the ICNT is limited appropriately to substantive articles on jurisdiction and access.

B. *Jurisdictional Clauses of Sea-Bed Disputes Chamber under Part XI of ICNT*

The following six articles concerning settlement of seabed disputes are retained in Section 6 of Part XI of the draft Convention:

Article 187

***Jurisdiction of the Sea-Bed Disputes
Chamber of the Law of the Sea Tribunal***

1. The Sea-bed Disputes Chamber of the Law of the Sea Tribunal shall have jurisdiction pursuant to Articles 187 to 192 of this Part. The establishment of the Chamber, and the manner in which it shall exercise its jurisdiction shall be governed by the provisions of Part XV of the present Convention.

2. The Chamber shall have jurisdiction with respect to:

(a) Disputes between a State Party and the Authority concerning an allegation that a decision or measure taken by the Assembly, the Council or any of its organs is in violation of this Part of the Convention, rules, regulations or procedures promulgated in accordance therewith, or that the Assembly, the Council or such organ lacks jurisdiction in respect of such decision or measure, or has misused its power.

(b) Disputes arising out of any of the grounds stated in subparagraph (a) above between a national of a State Party and the Authority relating to a decision or measure directed specifically to that person, or, in the case of a person referred to in Article 151, paragraph 2 (ii) conducting activities in the Area or seeking a contract to do so, a decision or measure which is of direct concern to him though in form not directed to him.

(c) Disputes, other than those referred to in subparagraphs (a) and (b) above, between the Authority and a State Party or between the Authority and a national of a State Party relating to the interpretation or application of any contract concerning activities in the Area.

(d) Disputes between the Authority and a State Party concerning alleged violations by the State Party of the provisions of this Part of the present Convention relating to activities in the Area.

(e) Disputes arising out of matters referred to in Articles 167 and 186.

Article 188

Submission of disputes to arbitration

Where the parties to any dispute referred to in Article 187 so agree for any specific dispute, or have so agreed under a contract or a general arbitration clause, such dispute shall be submitted to arbitration in accordance with the provisions of annex VI of the present Convention, or to any other arbitration procedure agreed upon.

Article 189

Disputes involving States Parties or their nationals

1. The Sea-bed Disputes Chamber of the Law of the Sea Tribunal shall also have jurisdiction with regard to:

(i) Disputes between States Parties concerning the interpretation or application of this Part of the Convention in respect of activities in the Area;

(ii) Disputes brought by a State Party against a national of another State Party, or between nationals of different State Parties, regarding the interpretation or application of any contract between them, or in respect of their activities in the Area.

2. Where a respondent party so elects within one month of receiving notice of the referral of a dispute to the Chamber under paragraph 1 above, the dispute shall instead be submitted to arbitration in accordance with the provisions of annex VI of the present Convention.

Article 190

Advisory opinions

The Sea-bed Disputes Chamber of the Law of the Sea Tribunal shall give advisory opinions when requested to do so by the Assembly, the Council or any of its organs, on any legal question arising within the scope of their activities. Such advisory opinions shall be rendered as a matter of urgency.

Article 191

Scope of jurisdiction with regard to decisions adopted by the Assembly or Council

In exercising its jurisdiction pursuant to Articles 187 and 189 the Sea-bed Disputes Chamber of the Law of the Sea Tribunal shall not pronounce itself on the question whether any rules, regulations or procedures adopted by the Assembly or by the Council are in conformity with the provisions of the present Convention. Its jurisdiction with regard to such rules, regulations and procedures shall be confined to their application to individual cases. The Sea-bed Disputes Chamber shall have no jurisdiction with regard to the exercise by the Assembly or by the Council or any of its organs of their discretionary powers under this Part of the present Convention; in no case shall it substitute its discretion for that of the Authority.

Article 192

Rights of States Parties when their nationals are parties to a dispute

When in a dispute referred to in articles 187 and 189, a national of a State Party is a party, the sponsoring State shall be given notice thereof, and shall have a right to intervene in the proceedings.

Again certain points in the provisions relating to the competence of the Sea-Bed Disputes Chamber and access to it merit emphasis here. According to Article 191, the exercise of the *discretionary powers* by the Assembly or the Council of the Sea-Bed Authority is not subject to judicial review by the Chamber. For example, when such discretion has been exercised in the actual promulgation or adoption of rules and regulations, the Chamber has no competence to decide whether the rules and regulations adopted conform to the provisions of the Convention. The competence is limited

to a determination in individual cases whether or not a rule or regulation is being properly applied. This limitation upon the competence of the Chamber with regard to the actions and decisions of the Assembly or the Council is consistent with the view maintained by those seeking to protect the Authority from what they consider as unacceptable judicial encroachment upon the legislative and discretionary powers of the Authority.

The above concern with the insulation of the Sea-Bed Authority from judicial proceedings, challenging its legislative and discretionary powers, is parallel to that reflected in the comparable discussion of Part XV concerning the use of the compulsory procedures for challenging the legislative and discretionary powers of the coastal states within the economic zone. Thus, the present Article 296 of the ICNT, dealing with the limitations on the applicability of the compulsory procedures to certain disputes, adopts an approach which seeks to balance the needed protection of coastal states from unnecessary international proceedings based on frivolous and vexatious claims with peaceful judicial settlement of otherwise justiciable disputes within the economic zone.

Article 296

Limitations on applicability of this section

1. Without prejudice to the obligations arising under section 1, disputes relating to the exercise by a coastal State of sovereign rights or jurisdiction provided for in the present Convention shall only be subject to the procedures specified in the present Convention when the following conditions have been complied with:

(a) that in any dispute to which the provisions of this article apply, the court or tribunal shall not call upon the other party or parties to respond until the party which has submitted the dispute has established *prima facie* that the claim is well founded;

(b) that such court or tribunal shall not entertain any application which in its opinion constitutes an abuse of legal process or is frivolous or vexatious; and

(c) that such court or tribunal shall immediately notify the other party to the dispute that the dispute has been submitted and such party shall be entitled, if it so desires, to present objections to the entertainment of the application.

2. Subject to the fulfilment of the conditions specified in paragraph 1, such court or tribunal shall have jurisdiction to deal with the following cases:

(a) When it is alleged that a coastal State has acted in contravention of the provisions of the present Convention in regard to the freedoms and rights of navigation or overflight or of the laying of submarine cables and pipelines and other internationally lawful uses of the sea specified in article 58; or

(b) When it is alleged that any State in exercising the aforementioned freedoms, rights or uses has acted in contravention of the provisions of the present Convention or of laws or regulations established by the coastal State in conformity with the present Convention and other rules of international law not incompatible with the present Convention; or

(c) When it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by the present Convention or by a competent international organization or diplomatic conference acting in accordance with the present Convention.

3. No dispute relating to the interpretation or application of the provisions of the present Convention with regard to marine scientific research shall be brought before such court or tribunal unless the conditions specified in paragraph 1 have been fulfilled; provided that:

(a) when it is alleged that there has been a failure to comply with the provision of articles 247 and 254, in no case shall the exercise of a right or discretion in accordance with article 247, or a decision taken in accordance with article 254, be called in question; and

(b) the court or tribunal shall not substitute its discretion for that of the coastal State.

4. No dispute relating to the interpretation or application of the provisions of the present Convention with regard to the living resources of the sea shall be brought before such court or tribunal unless the conditions specified in paragraph 1 have been fulfilled; provided that:

(a) when it is alleged that there has been a failure to discharge obligations arising under articles 61, 62, 69 and 70, in no case shall the exercise of a discretion in accordance with articles 61 and 62 be called in question; and

(b) the court or tribunal shall not substitute its discretion for that of the coastal State; and

(c) in no case shall the sovereign rights of a coastal State be called in question.

5. Any dispute excluded by the previous paragraphs may be submitted to the procedures specified in section 2 only by agreement of the parties to such dispute.

Two basic elements of Article 296 need special emphasis. Before a competent court or tribunal may entertain the merits of a dispute relating to the coastal state's exercise of sovereign rights or jurisdiction as provided for in the Convention,¹⁰ the plaintiff must establish *prima facie* that his claim is well founded.¹¹ The other important element is that even when the plaintiff has established a *prima facie* case, if the dispute relates to the exercise of coastal states' rights or discretion with respect to the living resources of the sea,¹² the court or tribunal cannot call into question the exercise of such rights or discretion.¹³ In no case may the court or tribunal substitute its discretion for that of the coastal state.¹⁴ The same is also true as to disputes relating to scientific research.¹⁵ No such provisions, however, apply to disputes concerning the protection and preservation of the marine environment. Proceedings brought in accordance with Article

¹⁰ Cf. ICNT (V) Art. 56 on rights, jurisdiction and duties of coastal states in the exclusive economic zone.

¹¹ Art. 296 (1)(a).

¹² Art. 296 (4).

¹³ Art. 296 (4)(c).

¹⁴ Art. 296 (4)(b).

¹⁵ Art. 296 (3)(b).

296 are governed by Article 294 which calls for the prior exhaustion of local remedies as required by international law.

From these articles of Part XV and Part XI of the ICNT, it can be seen that the dispute settlement system established hereunder takes the same approach to the problem of justiciability of the discretionary powers of the coastal states in the exclusive economic zone and the discretionary powers of the Authority in the International Sea-Bed Area.

Access to the Sea-Bed Disputes Chamber is open to natural or juridical persons only in disputes between them and the Authority and in disputes between nationals of different States Parties. In addition, States Parties may sue nationals of other States Parties.¹⁶ On the other hand, an individual has no right to bring a case before the Chamber directly against a State Party. The basic issue here is the traditional reluctance of states to accept being sued by natural or juridical persons in an international forum. Even in the limited situations in which natural or juridical persons are accorded access to the Chamber, Article 192 asserts the right of a state sponsoring such a natural or juridical person to intervene in the proceedings.

Articles 188 and 189(2) give the parties to a dispute the right to opt out of the procedures for the settlement of disputes by the Sea-Bed Disputes Chamber in favor of arbitration in accordance with Annex VI to the ICNT. This provision is a reflection of the flexible approach shown in Part XV, which allows parties to a dispute a choice of several forums for settling their disputes. Article 287 of Part XV lists four forums:

Article 287

Choice of procedure

1. A State Party, when signing, ratifying or otherwise expressing its consent to be bound by the present Convention, or at any time thereafter, shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes relating to the interpretation or application of the present Convention:

(a) The Law of the Sea Tribunal constituted in accordance with annex V;

(b) The International Court of Justice;

(c) An arbitral tribunal constituted in accordance with annex VI;

(d) A special arbitral tribunal constituted in accordance with annex VII of one or more of the categories of disputes specified therein.

2. Any declaration made under paragraph 1 shall not affect or be affected by the obligation of a State Party to accept the jurisdiction of the Sea-Bed Disputes Chamber of the Law of the Sea Tribunal to the extent and in the manner provided for in section 6 of Part XI.

3. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with annex VI.

4. If the parties to a dispute have accepted the same procedure for the settlement of such dispute, it may be submitted only to that procedure, unless the parties otherwise agree.

¹⁶ Art. 189 (1)(ii).

5. If the parties to the dispute have not accepted the same procedure for the settlement of such dispute, it may be submitted only to arbitration in accordance with annex VI, unless the parties otherwise agree.

6. Any declaration made under this article shall remain in force until three months after notice of revocation has been deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.

7. When a dispute has been submitted to a court or tribunal having jurisdiction under this article, a new declaration or notice of revocation of a declaration or expiration of a declaration, shall not affect in any way the proceedings so pending, unless the parties otherwise agree.

8. Declarations and notices referred to in this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.

The "unless the parties otherwise agree" clause in Article 287 indicates that the system logically recognizes as paramount the right of parties to a dispute to agree on any of the forums for settlement therein stipulated. That right is not prejudiced. Accordingly, no single mode of settlement may be rejected out of hand as inappropriate.

Article 190 gives the Sea-Bed Disputes Chamber the power to render advisory opinions. An advisory opinion is to be given by the Chamber only when requested by the Assembly, the Council, or any of its organs. This wording implies that the Enterprise—the operational arm of the Authority—does not have such a right.¹⁷ Whether the Enterprise or states should be accorded the right to request advisory opinion from the Chamber is a point worthy of further discussion.¹⁸

There is an additional competence of the Sea-Bed Disputes Chamber not specifically included in the above jurisdictional clauses of Part XI but stipulated under Part XV and Annex V of the Convention. The Chamber has competence to prescribe interim measures in accordance with Articles 290 of Part XV and Article 27 of Annex V, which contains the Statute of the Law of the Sea Tribunal. It seems preferable that an article dealing with the competence of the Sea-Bed Disputes Chamber to prescribe interim measures should be added to Section 6 of Part XI dealing, as we have seen, with the jurisdiction of the Chamber, instead of leaving that competence to inference from Article 41, paragraph 1, of Annex V to the ICNT. The articles correctly stipulate that the Chamber or the Tribunal to which a request for provisional measures is made must first establish *prima facie* that it has jurisdiction over the merits of the case. The provisional measures so prescribed are binding as between the parties.¹⁹ When the circumstances justifying such provisional measures cease to exist,

¹⁷ To enable the Enterprise to ask for advisory opinions, it would be necessary to revise this provision by naming the Enterprise in the article or by stating that an advisory opinion may be requested by "any organ of the Authority." Cf. RSNT (I) Art. 34.

¹⁸ Cf. RSNT (I) Art. 25 (11).

¹⁹ ICNT, Art. 295. The power to "prescribe" provisional measures is stronger than the power of the International Court of Justice to "indicate" such measures under Article 41 of its Statute.

the measures may be modified or revoked. Finally, the provisional measures may not be prescribed *proprio motu* by any court or tribunal. They may only be prescribed at the request of a party to the dispute and after the parties have been given an opportunity to be heard.²⁰

The establishment of a Sea-Bed Disputes Chamber of the Law of the Sea Tribunal has clearly given more vitality to the Tribunal and has strengthened the case for it. To facilitate this integration, states which have not been in favor of the creation of the new Tribunal may, under Article 287(2), limit their acceptance of its jurisdiction to the settlement of seabed disputes through the Chamber. Other states may still confer upon the Tribunal the general jurisdiction to deal with the other law of the sea disputes; and some may regard the Tribunal as a particularly suitable forum for the prescription of interim measures²¹ and for settling disputes relating to the prompt release of vessels.²²

On the latter subject, the competence of the Tribunal or of any of the other compulsory procedures established under Article 287 of Part XV is clearly limited to the question of prompt release. The wrongful act is not that a particular ship or vessel has violated relevant provisions of the Convention, but that there is a *failure to release promptly* the foreign vessels detained by a coastal state claiming that violation. Other issues, such as the merits of the case and any action to be taken against the owner of the vessel or its crew, are left for the decision of domestic forums, as stipulated under other parts of the Convention.²³

III.

CONCLUSIONS

The integration of the system for the settlement of seabed disputes into the general system for the settlement of disputes arising under the Convention as a whole is certainly a step in the right direction. As a result of the integration only one new tribunal must be established instead of two.

The entire settlement mechanism under Part XV and Annex V of the ICNT represents the comprehensive approach which has received and deserves support as a useful basis for further negotiation of final treaty texts.

Part XV as a whole contains certain provisions which call upon states to make a decision as to how far they are willing to go in accepting the idea of directing disputes among them to settlement through legal channels where the principle of equality before the law prevails as opposed to extralegal channels in which political, economic, and other pressures play dominant roles. Thus, while attempting to persuade states to accept, in limited cases,²⁴ the compulsory procedures in forums left for free choice

²⁰ This distinguishes the power of the Chamber and the Tribunal from that of the International Court of Justice which may indicate provisional measures *proprio motu*.

²¹ See ICNT, Article 290, paragraph 3, suggesting conditions under which the Tribunal, as a preconstituted forum, would have such jurisdiction.

²² See ICNT, Art. 291.

²³ See, e.g., ICNT, Arts. 221-34.

²⁴ See ICNT, Art. 296.

of the parties,²⁵ Part XV still isolates certain sensitive issues which a state may take out of the compulsory settlement procedures.²⁶

In sum, Part XV seems to lean toward the rejection of "the affirmation of the view that it is the essence of international law that a State can legally claim the right to remain judge in disputes with other States by the simple means of refusing to them the benefit of judicial settlement."²⁷ In its unavoidably complicated mechanism, Part XV clearly encourages a state not to remain its own judge in a dispute with other states and holds out both nonjudicial and judicial third-party settlement procedures. States are further encouraged to exchange views expeditiously for the purpose of agreeing on the best mode of settlement.²⁸ The exchange of views provision is important, since it establishes that there should be no *automatic* transfer, for example, from the noncompulsory procedures of Part XV to the compulsory procedures when the first procedure fails to yield a settlement. The provision is also important in a situation in which a settlement has been reached but implementation becomes questionable.

What emerges is a system for the settlement of law of the sea disputes under which the harassment of coastal states through frivolous and vexatious international litigations is discouraged; the power of the Sea-Bed Authority to control activities in the Area for the benefit of mankind is protected from being curtailed by unnecessary judicial actions; and justiciable disputes related to many other rights and interests in the oceans are to be submitted to suitable forums for peaceful settlement.

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THE UNITED KINGDOM—FRANCE CONTINENTAL SHELF ARBITRATION

I.

INTRODUCTION

Since the International Court of Justice set forth the principles of customary international law governing the continental shelf delimitation in the

²⁵ See ICNT, Art. 287.

²⁶ See ICNT, Article 297 dealing with optional exceptions allowing a state to make a declaration excluding from the compulsory procedures the following subjects: boundary delimitation between adjacent or opposite states or historic bays or titles (subject to an obligation to accept some other tribunal), military activities, including government vessels and aircrafts *jure imperii*, some law enforcement activities, and disputes in respect of which the Security Council is exercising its functions pursuant to the Charter of the United Nations.

²⁷ 2 INTERNATIONAL LAW, BEING COLLECTED PAPERS OF HERSCH LAUTERPACHT 18-19 (E. Lauterpacht ed. 1975).

²⁸ See ICNT, Art. 281.

° The views expressed herein are those of the author and have no official standing.

North Sea Continental Shelf cases,¹ the international community has awaited a further judicial expression of the principles of law relative to the delimitation of the continental shelf. Now, the Court of Arbitration established by the United Kingdom and France² has delivered such an opinion—one that reflects on customary law, the principles enunciated in the *North Sea* cases, and Article 6 of the Geneva Convention of 1958 on the Continental Shelf.³ The opinion of the Court of Arbitration is of interest and will provide fruit for continuing comment and guidance as jurists and government policymakers concerned with the delimitation of maritime boundaries analyze the opinion in the light of differing sets of geographical facts and legal circumstances.

The English Channel between France and the mainland of the United Kingdom generally follows a southwest to northeast course. The Straits of Dover are in the northeast, and farther to the southwest, between Portsmouth and Le Havre, the Channel begins to widen. Continuing to the southwest on the French side is the Normandy Peninsula, then the almost rectangular Gulf of St. Malo, referred to in the opinion as the Golfe breton-normand, the Brest Peninsula, and the island of Ushant. Of major importance is the fact that the Channel Islands, administered by the United Kingdom, lie squarely in the Golfe breton-normand. On the other side of the Channel, the coast of the United Kingdom is comparatively smooth and does not include prominent gulfs or peninsulas similar to those on the French coast. In the Atlantic area, the coast of the United Kingdom including the Scilly Islands extends farther west into the Atlantic Ocean than does the French mainland and Ushant.

¹ [1969] ICJ REP. 3; digested and excerpted in 63 AJIL 591 (1969).

² Decision of 30 June 1977 by the Court of Arbitration established by the United Kingdom of Great Britain and Northern Ireland and the French Republic on Delimitations of the Continental Shelf. (At the time this note was written, the decision was not yet available in the public domain.) The Court of Arbitration consisted of Erik Castrén, President; Herbert Briggs, André Gros, Endre Ustor, and Sir Humphrey Waldock. The Registrar was Lucius Caflisch, and the Court sat in the Palais Eynard, Geneva.

³ Convention on the Continental Shelf, done April 29, 1958, 15 UST 471, TIAS No. 5578, 499 UNTS 311, 52 AJIL 858 (1958). Article 6 provides:

1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the baselines from which the breadth of the territorial sea of each State is measured.

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

3. In delimiting the boundaries of the continental shelf, any lines which are drawn in accordance with the principles set out in paragraphs 1 and 2 of this article should be defined with reference to charts and geographical features as they exist at a particular date, and reference should be made to fixed permanent identifiable points on the land.

The United Kingdom and France engaged in negotiations looking toward delimitation of their continental shelf boundary from 1970 to 1974. The negotiations resulted in some agreement; specifically, east of 30 minutes longitude west of Greenwich, the two sides agreed in principle that the boundary should be based on the principle of equidistance. However, the two sides were in fundamental disagreement concerning the portion of the continental shelf boundary west of 30 minutes longitude west of Greenwich.

Generally, there were two major areas of difference. In the Golfe breton-normand, the United Kingdom argued that the boundary should be drawn equidistant between the French coast and the Channel Islands, thereby leaving to France only a narrow strip of maritime jurisdiction between the French coast and the Channel Islands, and giving to the United Kingdom virtually all of the continental shelf of the English Channel in this area. The contrary French position was that the boundary should follow an equidistant line between the French coast and the mainland of the United Kingdom and that the Channel Islands should be entitled to no more than a belt of jurisdiction six miles wide on the side of those islands facing the English Channel. The effect of the French position was to create an enclave for the Channel Islands on what would otherwise be the French continental shelf.

The other major area of difference was in the Atlantic, in the Western Approaches to the English Channel. The French position was that the boundary should follow the bisector of an angle formed by two lines expressing the general direction of the coasts of the United Kingdom and France. The United Kingdom on the other hand was of the view that the boundary in this area should be determined by application of the principle of equidistance, utilizing both the Scillies and Ushant as basepoints for measuring the equidistant line.

Finding it impossible to resolve their differences by negotiation, the two sides entered into an Arbitration Agreement on July 10, 1975. The Arbitration Agreement itself deserves study because its form is a model which lends itself to easy application in a variety of situations. Here, it is sufficient to note that it provided for a binding arbitration by five named arbitrators.⁴ The arbitrators were not asked to declare the legal principles relative to the delimitation, but, in accordance with the rules of international law applicable to the matter as between the parties, to decide the course of the continental shelf boundary in the arbitration area, including the drawing of the course of the boundary on a chart.⁵

⁴ *Supra* note 2. The Arbitration Agreement in its entirety is set forth at the beginning of the Court of Arbitration's decision.

⁵ *Id.* Article 2 of the Arbitration Agreement provides:

1. The Court is requested to decide, in accordance with the rules of international law applicable in the matter as between the Parties, the following question:

What is the course of the boundary (or boundaries) between the portions of the continental shelf appertaining to the United Kingdom and the Channel Islands and to the French Republic, respectively, westward of 30 minutes west of the Greenwich Meridian as far as the 1,000 metre isobath?

2. The choice of the 1,000 metre isobath is without prejudice to the position of either Government concerning the outer limit of the continental shelf.

II.

THE SUBMISSIONS ⁶

The French position was that the Geneva Convention of 1958 on the Continental Shelf was not in force between the parties because of valid reservations⁷ made by France at the time of accession to the Convention and subsequent equally valid objections⁸ to such reservations by the United Kingdom. France argued in the alternative that, if the Court found that the 1958 Convention was in force between the parties, Article 6 concerning delimitation was still not applicable between them because of these reservations and objections. In that case, the rules of international law applicable were the rules of customary law, as stated in the *North Sea* cases. In the French view, this meant that the boundary must be drawn in conformity with the principle of natural prolongation and in accordance with equitable principles. Finally, France argued in the further alternative that, if the Court found that Article 6 was applicable between the parties, "special circumstances" in the Channel Islands and Atlantic areas prohibited recourse to the equidistance method.

Based on this legal view of the situation, France claimed that the particular geographic circumstances in the Channel Islands area indicated that a boundary should be drawn equidistant from the French coast and the coast of the mainland of the United Kingdom, without regard to the Channel Islands, and that the maritime jurisdiction of the Channel Islands should be restricted to an enclave no more than six nautical miles wide in areas facing the English Channel, and determined by the equidistant line in areas facing the French coast. In the Atlantic area, France claimed that equidistance was inappropriate and that the bisector of the angle formed by lines which eliminated salients and reentrants and which represented the general direction of the coast was more in accord with the principles of natural prolongation and equity.

The United Kingdom took the position that the Geneva Convention on the Continental Shelf in its entirety was in force between the parties; that the objections by the United Kingdom to French reservations did not preclude entry into force of the Convention as between the parties; that the French reservations with respect to Article 6 were not true reservations or permissible reservations to Article 6; and that, in any event, even if the

Article 9 (1) provides:

1. When the proceedings before the Court have been completed, it shall transmit to the two Governments its decision on the question specified in Article 2 of the present Agreement. The decision shall include the drawing of the course of the boundary (or boundaries) on a chart. To this end, the Court shall be entitled to appoint a technical expert or experts to assist it in preparing the chart.

⁶ *Supra* note 2. The Submissions of the Parties are set forth at the beginning of the Court of Arbitration's decision.

⁷ See MULTILATERAL TREATIES IN RESPECT OF WHICH THE SECRETARY-GENERAL PERFORMS DEPOSITARY FUNCTIONS. LIST OF SIGNATURES, RATIFICATIONS, ACCESSIONS, ETC. AS OF 31 DECEMBER 1976, UN Doc. ST/LEG/SER.D/10, at 518 (1977).

⁸ *Id.* at 520.

reservations were applicable, they would not make any difference in the application of the relevant legal principles. Accordingly, the United Kingdom's view was that Article 6, paragraph 1, of the Shelf Convention governed. In this regard the United Kingdom claimed that France had not "discharged the *onus* of showing that the circumstances"⁹ of the relevant areas constituted "special circumstances" within the meaning of Article 6. Therefore, the position of the United Kingdom was that the boundary throughout the entire arbitration area should be determined by application of the principle of equidistance, giving full effect in that process to the basepoints from which the territorial sea was measured, including the Scilly and Channel Islands.

The United Kingdom argued in the alternative that, if the Court found that customary law governed as opposed to Article 6 of the Shelf Convention, then the boundary line should be drawn in such a way as to leave as much as possible to each party of its natural prolongation without encroachment on the natural prolongation of the other party. Since the continental shelf was essentially of a continuous geologic character, the United Kingdom argued that the natural prolongation of the two countries should be divided by the equidistant line. In its view such a line would produce a boundary in accordance with equitable principles and leave to neither side areas which were "uniquely part of the natural prolongation of the land territory of the other."¹⁰

In the further alternative, the United Kingdom argued that, if the Court was of the view that a structural discontinuity existed in the seabed and subsoil so as to disrupt the geologic continuity of the continental shelf, the rule of international law was that the boundary should be drawn along the axis of that structure thereby leaving to both states those parts of the continental shelf that constituted the natural prolongation of their land territory.

III.

THE DECISION

(1) *Competence of the Court of Arbitration*

At the outset the Court found it necessary to clarify the task entrusted to it. The Arbitration Agreement was clear that the Court was to determine the continental shelf boundary between 30 minutes longitude west of Greenwich to the 1,000-meter isobath in the Atlantic; nevertheless, the facts presented two fundamental problems that first had to be dealt with.

Since the Arbitration Agreement referred specifically to the continental shelf, and since the Geneva Convention on the Continental Shelf defines the continental shelf as an area beyond the territorial sea,¹¹ the question arose whether the Court had competence to settle differences between the parties regarding the maritime boundary of their respective territorial

⁹ *Supra* note 2. U.K. Submissions, paras. 3(b) and 3(c).

¹⁰ *Id.* para. 5(b).

¹¹ *Supra* note 3. Art. 1.

seas or fishing zones. This question was important since a maritime boundary between the Channel Islands and the French coast over almost its entire length would necessarily involve delimitation of territorial sea and fishing zone areas in those narrow waters.

To clarify the intent of the parties, the Court requested their views. Generally, France took the position that the Court did not have the competence to deal with any area included within the French territorial sea. The United Kingdom on the other hand was of the view that the Court had the competence to determine the continental shelf boundary throughout the entire arbitration area; even so, the United Kingdom placed a qualification on the competence of the Court in certain areas near some of the Channel Islands. Noting that its competence derived from the consent of the parties and that they were not in agreement on this point, the Court held that it did not have competence to delimit a boundary in the narrow waters between the Channel Islands and the French coast.

The other matter relating to competence concerned the possible interest of the Republic of Ireland in areas of the continental shelf in the vicinity of the 1,000-meter isobath in the Atlantic area. The Court took note of the fact that it was possible that a France-United Kingdom boundary would meet a United Kingdom-Republic of Ireland boundary at a tripoint east of the 1,000-meter isobath within the arbitration area. Furthermore, the United Kingdom contended that in assessing what would be an equitable delimitation between itself and France, the Court should take into account the effect on the United Kingdom of a boundary with the Republic of Ireland. In particular, it argued that it was in a situation similar to that of the Federal Republic of Germany in the *North Sea* cases. In those cases the Federal Republic was a middle state compressed between the Netherlands and Denmark; likewise, in this case, the United Kingdom claimed that it was a middle state compressed between France and Ireland.

After hearing from the parties on this issue, the Court concluded that its task was to determine the boundary between the United Kingdom and France to the 1,000-meter isobath, without regard to the possibility that a United Kingdom-Ireland boundary agreement could result in the overlapping of zones. Emphasizing that its decision could only be binding upon France and the United Kingdom, the Court suggested that should overlapping zones be created, the normal solution would be found through negotiations between the three states concerned.

(2) *Applicable Law*

Having decided the extent of its competence, the Court next addressed the rules and principles of international law in force between the parties. France had, as previously observed, argued that because of its reservations to the Geneva Convention on the Continental Shelf and the United Kingdom objections, the Convention, or alternatively Article 6, was not in force between the parties. The purpose for this position was to assure recourse to the principles of customary law set forth by the International Court of

Justice in the *North Sea* cases. On the other hand, the United Kingdom took the view that the Shelf Convention in its entirety was in force between the parties. In its view, Article 6 set forth the principles of law relevant to the delimitation, and recourse to the principles of customary law set forth in the *North Sea* cases was not appropriate.

Without going into a detailed analysis, it is sufficient to note that the Court's holding on this point centered on the question of the effect to be given the French reservations and the United Kingdom objections in the context of Article 12 of the Shelf Convention.¹² That article authorizes a contracting state to make its consent to be bound subject to reservation to articles other than Articles 1, 2, and 3. Accordingly, when the United Kingdom ratified the Convention it consented to France's later becoming a party to the Convention subject to such reservations as France might make to articles other than Articles 1 to 3. On the other hand, the Court noted that it would be unreasonable to interpret Article 12 as committing states to accept reservations in advance. Therefore, should a state react to reservations made in conformity with Article 12, such reactions would have to be judged on the basis of the intent of such comment, rejection, objection, or further reservation. With this in mind, the Court observed that it was not the intent of the United Kingdom by way of its objections to the French reservations to prevent the entry into force of the Shelf Convention between the two countries. Therefore, the Court found that the Shelf Convention was a treaty in force between the United Kingdom and France. In so doing, the Court failed to accept a French argument that the Shelf Convention had been rendered obsolete by recent evolution of customary law stimulated by the work of the Third United Nations Conference on the Law of the Sea (UNCLOS III).¹³ However, the Court did find that it was appropriate to take into account recent developments in customary law in assessing the present case.

The finding that the Shelf Convention was in force between the parties did not dispose of the question of the effect of the French reservations to Article 6. France had made three reservations to this article: one dealing with equidistant boundaries determined from baselines established after 1958, another regarding boundaries extending beyond the 200-meter isobath; and a third dealing with areas of special circumstances, including the Bay of Granville (the Channel Islands area).¹⁴ These reservations were attacked

¹² *Id.* Article 12 provides:

1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1 to 3 inclusive.

2. Any Contracting State making a reservation in accordance with the preceding paragraph may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

¹³ See The Informal Composite Negotiating Text resulting from the Sixth Session of the Third United Nations Conference on the Law of the Sea, New York, 23 May to 15 July 1977; UN Doc. A/CONF.62/WP.10 (1977), 16 ILM 1108 (1977).

¹⁴ *Supra* note 7. The French reservation to Article 6, paras. 1 and 2, declares:

In the absence of a specific agreement, the Government of the French Republic will not accept that any boundary of the continental shelf determined by ap-

by the United Kingdom as not being true reservations. The Court, however, found that each of the reservations modified the legal effect of Article 6 and was an appropriate reservation.

Having won this point, France argued that Article 6 as a whole was not in force between the two parties. The United Kingdom argued that its objection rendered the reservations unopposable to the United Kingdom and therefore that Article 6 was in force between the parties. Alternatively, it argued that the reservations were opposable to the United Kingdom only to the extent of the reservations. The Court accepted this alternative argument. Relying on the principle of mutuality of consent and the effect of Article 21, paragraph 3, of the Vienna Convention on the Law of Treaties,¹⁵ the Court held that Article 6 was inapplicable between the parties only to the extent of the reservations. In areas where the reservations were operable, the Court held that principles of customary law applied.

As a practical matter, this holding meant that the Court would apply customary law in the Bay of Granville (the Channel Islands area). In the Atlantic area it would apply Article 6 of the Shelf Convention. The Court found that the French baseline reservation and the 200-meter isobath reservation were not relevant to the arbitration, since no post-1958 baselines were at issue, and since the parties had agreed to extend the delimitation to the 1,000-meter isobath.

The fact that this conclusion meant application of two different legal regimes along the course of the boundary did not bother the Court. In its view, "in the circumstances of the present case, the rules of customary law lead to much the same result as the provisions of Article 6."¹⁶

This holding of the Court, taken throughout the case, is of significant importance. There has been a view, certainly reflected in the Submissions in this case, that the Shelf Convention accents the role of equidistance, while customary law as set forth in the *North Sea* cases tends to minimize the role of equidistance as a legal criterion for the delimitation of continental shelf boundaries. This disagreement as to the legal relationship between the principles laid down in the *North Sea* cases and those set forth in Article 6 has been at issue in more than one continental shelf boundary dispute and has been the focus in UNCLOS III of a debate concerning the delimitation articles of the negotiating texts.¹⁷ Now, in the first relevant international judicial decision since the *North Sea* cases, the Court took the view that the principles of those cases and the rule of the

plication of the principle of equidistance shall be invoked against it:

—if such boundary is calculated from baselines established after 29 April 1958;

—if it extends beyond the 200-metre isobath;

—if it lies in areas where, in the Government's opinion, there are "special circumstances" within the meaning of article 6, paragraphs 1 and 2, that is to say: the Bay of Biscay, the Bay of Granville, and the sea areas of the Straits of Dover and of the North Sea off the French coast.

The British objection was as follows:

The Government of the United Kingdom are unable to accept the reservations made by the Government of the French Republic.

¹⁵ 63 AJIL 875 (1969), 8 ILM 679 (1969).

¹⁶ *Supra* note 2, at para. 65.

¹⁷ *Supra* note 13. See Arts. 74 and 83.

Convention are virtually the same. Indeed, the Court stated that in its view, had the delimitation articles under discussion at UNCLOS III been applicable, they would not have made any difference in the present case.¹⁸

The Court's analysis of the interrelationship of Article 6 and equitable principles is important. It found that Article 6 does not establish two rules—an equidistance rule and a special circumstance rule. Instead, the Court found that Article 6 provides a combined equidistance-special circumstances rule. Contrary to the view taken by the United Kingdom, the Court found that there is no burden of proof in regard to the existence of special circumstances since "the question of whether 'another boundary is justified by special circumstances' is an integral part of the rule providing for application of the equidistance principle."¹⁹ Moreover, the Court noted that the role of special circumstances in Article 6 is to ensure an equitable delimitation and that the combined equidistance-special circumstances rule in effect provides for the general norm of customary law that the continental shelf boundary is to be determined in accordance with equitable principles. The Court held that

the equidistance-special circumstances rule and the rules of customary law have the same object—the delimitation of the boundary in accordance with equitable principles. In the view of this Court, therefore, the rules of customary law are relevant and even essential means both for interpreting and completing the terms of Article 6.²⁰

Having found that both Article 6 and customary law lead to the same result—that is, a boundary of an equitable character—the Court was bound to determine that the role of equidistance as a method of delimitation is always relative to the particular geographic situation. It held that it is the

geographical and other circumstances of any given case which indicate and justify the use of the equidistance method as the means of achieving an equitable solution rather than the inherent quality of the method as a legal norm of delimitation.²¹

In this regard the Court explored the distinction made in the *North Sea* cases regarding opposite and adjacent states and found that the distinction was one derived not from legal theory, but from the substance of the two geographical situations. In other words, the geographical situation encountered in the opposite situation is simply less likely to produce inequity than the geographical situation found in the adjacent geographical situation. The Court noted that in the opposite situation an equidistant line

will normally effect a broadly equitable delimitation, (but) a lateral equidistance line extending outwards from the coasts of adjacent States for long distances may not infrequently result in an inequitable delimitation by reason of the distorting effect of individual geographic features. In short, it is the combined effect of the side-by-side relationship of the two States and the prolongation of the lateral boundary for great distances to seawards which may be productive of inequity

¹⁸ *Supra* note 2, at para. 96.

²⁰ *Id.* at para. 75.

¹⁹ *Id.* at para. 68.

²¹ *Id.* at para. 70.

and is the essence of the distinction between "adjacent" and "opposite" coasts situations.²²

Upon further review of the principles of the *North Sea* cases, the Court noted that it may be necessary to bear in mind the geographical circumstances of the *North Sea* cases when applying the principles of those cases. Nevertheless, the Court found that the fundamental rules of that case

—that a coastal state has an inherent right in the continental shelf which constitutes the natural prolongation of its land territory; and

—that failing agreement, the boundary must be determined in accordance with equitable principles;

are of "general character and applicable to a delimitation under Article 6 no less than under customary law."²³

In short, the Court viewed the applicable law as follows:

... the appropriateness of the equidistance method or any other method for the purpose of effecting an equitable delimitation is a function or reflection of the geographical and other relevant circumstances of each particular case. The choice of the method or methods of delimitation in any given case, whether under the 1958 Convention or customary law, has therefore to be determined in the light of those circumstances and of the fundamental norm that the delimitation must be in accordance with equitable principles. Furthermore, in appreciating the appropriateness of the equidistance method as a means of achieving an equitable solution, regard must be had to the difference between a "lateral" boundary between "adjacent" States and a "median" boundary between "opposite" States.²⁴

(3) *The Course of the Boundary*

Eddystone Rock: After examining the relevant law, the Court was prepared to determine the course of the boundary in the arbitration area. Before turning to the Channel Islands and Atlantic areas, however, the Court dealt with the status of Eddystone Rock.²⁵ During the course of oral argument it had become clear that the parties were agreed that to the south of Plymouth the boundary should be the equidistant line in mid-Channel; however, they were not in agreement on whether Eddystone Rock should be used as a basepoint for determining its course.

Evidently, the parties had agreed that points along the baseline from which the territorial sea is measured would be used as the basepoints for purposes of determining the equidistant line. Such a practice is not necessary when reaching a boundary by agreement, but it is convenient. It does require, however, that the baselines be agreed, and here the status of Eddystone Rock becomes relevant. France argued that it was a low-tide

²² *Id.* at para. 95.

²³ *Id.* at para. 77.

²⁴ *Id.* at para. 97.

²⁵ Eddystone Rock actually is several rocks which lie some eight nautical miles south of Rams Head on the English coast. A 51.2 meter granite light tower is on the rocks. The issue in this case centered around whether the natural rock on which the light house is built constitutes a legal island or low-tide elevation.

elevation which in this instance was entitled to no territorial sea²⁶ and thus could not be used as an equidistant line basepoint. The United Kingdom argued that it was an island, having a territorial sea, and thus relevant as a basepoint for measuring the equidistant line.

The evidence presented to the Court included a variety of factors including the fact that at the height of mean high-water spring tides Eddystone Rock is above water, but that it is occasionally awash during certain of the highest tides. The French argued that an island under international law must always be above water. This view does not accord with international practice, nor the interpretation normally given to "high tide" in Article 10 of the Convention on the Territorial Sea and Contiguous Zone, which defines an island as a "naturally formed area of land, surrounded by water, which is above water at high tide."²⁷ However, the Court chose not to decide the question on this basis but instead held that the equidistant line should be measured from Eddystone Rock because of French acquiescence. In a 1964-1965 fisheries agreement between France and the United Kingdom, Eddystone Rock had been used as a basepoint from which the fisheries zone of the United Kingdom was determined; also, in early technical discussions during the course of continental shelf boundary negotiations, the French had used Eddystone Rock as a basepoint in certain agreed calculations.

The important thing to note about this sidelight is the important role the determination of basepoints may play, even though the parties may be agreed on the equidistance method. Indeed, the selection of basepoints for measuring the equidistant line may be equally as important as agreement on the general method of delimitation. Since seldom do two neighboring states employ precisely the same baseline system, the determination of an equidistant line becomes something considerably more than a mechanical process. It becomes an exercise of principle, where the application of international law to the geographical facts is as important as it is in the determination of the method of delimitation.

The Channel Islands: In considering the applicable law between the parties in the Channel Islands area,²⁸ the Court had concluded that customary law applied rather than Article 6 of the Shelf Convention. Furthermore, the Court had before it the fact that the parties were in agreement that as a geographical matter the coasts were opposite, that the continental shelf was essentially of continuous geologic character, and that the boundary in principle should be the equidistant line. However, the parties were

²⁶ Convention on the Territorial Sea and the Contiguous Zone, done April 29, 1958, 15 UST 1606, TIAS No. 5639, 516 UNTS 205, 52 AJIL 851 (1958). Arts. 4 and 11.

²⁷ *Id.* Art. 10.

²⁸ The Channel Islands have a land territory of approximately 195 sq. kilometers and a population of about 130,000. They are divided for governmental purposes into two Bailiwicks, each having its own legislature, fiscal and legal system, courts of law, and local administration. Responsibility for foreign affairs and external defense rests with the United Kingdom. The various islands range from about 6 to 16 nautical miles from the French coast, while the nearest of the Channel Islands is 49 nautical miles from the coast of England.

in profound disagreement regarding how the equidistant line should be drawn.

Both parties presented a variety of arguments in support of their case. The French view was that the boundary should be a mid-Channel equidistant line with an enclave around the Channel Islands made up of the tangent of six-mile circles around each island. The French argued that the specific geographical, geological, and legal characteristics of the Channel Islands, the defects of the equidistance method when applied to this situation, the geology of the area, state practice, and equitable principles justified its position. But, primarily, it was the location of the Channel Islands within a rectangular bay of the French coast and only a few miles distance from France that was the foundation of its case and the point on which the Court's decision hinged.

For its part, the United Kingdom argued that all islands, except for very small islands in certain circumstances, are entitled to a continental shelf, regardless of their location or political circumstances. Accordingly, since the Channel Islands are of substantial size and have a considerable population, they should be entitled to a full continental shelf regime. It was on this basis, not on the basis of an extension of the continental shelf from the mainland of the United Kingdom, that the United Kingdom argued its case.

Since the rules of customary law applied in this area, the Court took the view that the question was whether the Channel Islands "should be given the full benefit of the application of the principle of natural prolongation . . . or whether their situation close to the mainland of France requires, on equitable grounds, some modification of the application of the principle."²⁹

To answer this question the Court sifted through the various arguments and came to the following conclusions.

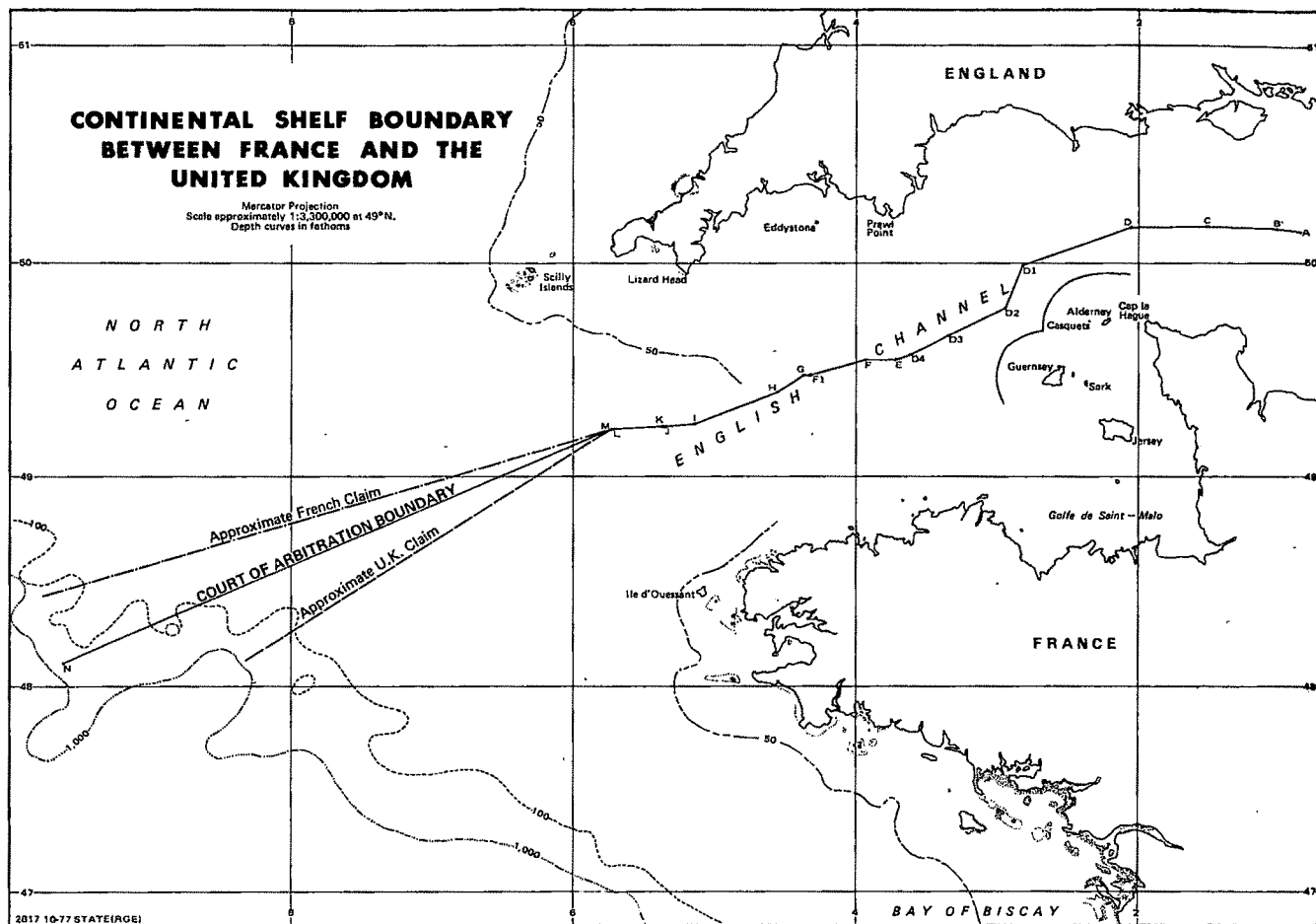
In general, it was of the view that the coastlines of the United Kingdom and France face each other across the English Channel in a relation of approximate equality. Thus, because of this relative coastal equality and the parties agreement that the continental shelf in the area was of continuous geologic character, the Court accepted that, if the Channel Islands did not exist, a mid-Channel equidistant line would leave broadly equal areas of continental shelf to each state and therefore would be a delimitation in accordance with equitable principles. However, in the Court's words,

the presence of these islands . . . disturbs the balance of the geographical circumstances which would otherwise exist between the Parties in this region as a result of the broad equality of the coastlines of their mainlands.³⁰

Therefore, it was necessary to evaluate the extent of this disturbance. In so doing, the Court took account of the following factors: First, as between France and the United Kingdom, the Channel Islands had to be treated

²⁹ *Supra* note 2, at para. 195.

³⁰ *Id.* at para. 183.



as islands of the United Kingdom rather than semi-independent states. This meant that the Court would evaluate the law and geographical facts as between the United Kingdom and France, not as they might be considered to exist between the Channel Islands and France. Second, the Channel Islands are of significant size and population and are of economic and political importance. Third, the Court noted the existing juridical regime in the region—the French twelve nautical mile territorial sea; the twelve nautical mile fishing zone of the United Kingdom and the potential of a twelve nautical mile territorial sea for the Channel Islands. Fourth, the Court considered the navigational defense and security interests which had been advocated by both parties in support of each position. The Court held that such considerations were not decisive but could support and strengthen other circumstances and that in this case these considerations were evidence of the predominant interest of France in the southern areas of the English Channel.

Taking account of these factors, as well as the location of the Channel Islands, the Court concluded:

The presence of these British Islands close to the French coast, if they are given full effect in delimiting the continental shelf, will manifestly result in a substantial diminution of the area of continental shelf which would otherwise accrue to the French Republic. This fact by itself appears to the Court to be, *prima facie*, a circumstance creative of inequity and calling for a method of delimitation that in some measure redresses the inequity.³¹

On the other hand, the Court was of the view that certain equitable considerations regarding the size, population, and economy of the Channel Islands militated against complete acceptance of the French position but did not remove the overall imbalance in the equities that the Court saw.

Thus, an intermediate solution was called for. In order to "maintain the appropriate balance between the two States in relation to the continental shelf as riparian States of the Channel with approximately equal coastlines,"³² the Court decided that a primary boundary should be drawn equidistant from the French coast and the coast of the mainland of the United Kingdom. Secondly, a boundary was to be drawn between the French shelf south of the mid-Channel equidistant line and the Channel Islands. In the Court's view, this line should be drawn twelve miles from the baselines of the Channel Islands so as not to encroach on the twelve-mile fishing zone already established. The effect of the decision was to give France a band of continental shelf in mid-Channel continuous with its continental shelf east and west of the Channel Islands. For the Channel Islands, the result was to enclose them within an enclave formed by the twelve-mile boundary to their north and west, and by the yet to be determined boundary between them and the French coast.

The Western Approaches—The Atlantic Area: In its analysis of the

³¹ *Id.* at para. 196. The Court noted that, if it were operating under Article 6, the "presence of the Channel Islands close to the French coast" would be a special circumstance (at para. 196).

³² *Id.* at para. 201.

relevant law, the Court had concluded that in the Atlantic area the rule of Article 6 applied. In this regard France argued that special circumstances existed which justified a method of delimitation other than the equidistant line, particularly the effect of the small islands in the Scillies and Ushant³³ on the general direction of the French and English coasts, the fact that in the French view the coasts in this area were neither opposite nor adjacent, and the absence of a long coastline in this area and the consequent plurality of basepoints to determine the equidistant line. The method of delimitation proposed by France was to use the bisector of an angle drawn between lines constructed along the general direction of each coast. The United Kingdom on the other hand proposed that the boundary be determined as prescribed in Article 6 in the absence of special circumstances, namely, an equidistant line measured from the baseline from which the breadth of the territorial sea of each country is measured. This, of course, meant giving full effect to Ushant and the Scillies.

The Court took the view that the Atlantic region had certain characteristics which distinguished it geographically and legally from the region within the English Channel. Particularly:

—The area to be delimited was no longer confined in the Channel, but extended into the open spaces of the Atlantic;

—The course of the boundary extended seaward for great distances and thus an equidistant line could be significantly affected by relatively minor geographical features;

—The coastlines abutting on the continental shelf to be delimited were comparatively short; and

—The geographical situation was one of two laterally related coasts abutting on the same continental shelf.

Furthermore, the Court found other considerations important to its approach: Both coasts were peninsulas constituting the ultimate reach of France and the United Kingdom into the Atlantic; and the Scillies extended farther into the Atlantic than did Ushant, both because the mainland of the United Kingdom was farther west than the French mainland and because the Scillies extended farther beyond the United Kingdom mainland than Ushant did beyond the coast of France.

In applying these findings to the relevant law, the Court decided that paragraph 1 of Article 6 of the Shelf Convention dealing with opposite states applied, rather than paragraph 2 which deals with adjacent states. However, the Court noted that "the legal rule and the method of delimitation prescribed by the two paragraphs are precisely the same"³⁴ and that "the equitable character of the delimitation results not from the *legal*

³³ The Scilly Islands consist of 48 islands, six of which are inhabited with a total population of about 2,500. At their nearest point they lie some 21 nautical miles from Land's End, while their farthest point is some 31 nautical miles distant. Ushant is inhabited with a population of about 2,500. Its most westerly point is 14.1 nautical miles from the French mainland.

³⁴ *Supra* note 2, at para. 238.

designation of the situation as one of 'opposite' States *but from its actual geographical character as such.*"³⁵

Taking account of its geographical and legal findings, particularly the great distance that the continental shelf extended seaward and that this was a case where the coasts were geographically adjacent, the Court put to itself the question whether the projection of the Scillies farther west than Ushant rendered an equidistant line inequitable. The Court noted that the effect of the Scillies on the equidistant line was to deflect it considerably more to the southwest than would be the case if the equidistant line were delimited from the English mainland. The difference in the angle between the two equidistant lines is 16 degrees 36' 14", and the area between the two equidistant lines is approximately 4,000 square miles. The Court observed that in its view the farther projection westward of the Scillies when added to the general westward projection of the Cornish mainland was similar to the projection of an exceptionally long promontory. Taking this into account, along with the fact that the two states abut on the same continental shelf with coasts of roughly similar length in relation to the shelf, the Court held that the additional projection of the Scillies into the Atlantic constituted an element of distortion material enough to justify a boundary other than that proposed by the United Kingdom and therefore that the position of the Scillies was a special circumstance within the meaning of Article 6.

However, the Court was not inclined to accept the method of delimitation proposed by France. In the Court's view, that method—of bisecting the angle formed by lines defining the general direction of the coasts—was not "compatible with the legal regime of the continental shelf,"³⁶ because it detached itself from the coasts actually abutting on the area to be delimited and therefore was not easily reconciled with natural prolongation. In particular, the Court was not convinced that the general direction of the Channel coasts alone should be considered to represent the totality of the relationship between the land masses of the two countries.

In the Court's view, since equidistance would otherwise be appropriate except for the distorting effect of the Scillies, what was needed was a modified form of equidistance which would abate the disproportionality. Thus, noting that the Scillies extended approximately twice as far from the coast of the United Kingdom mainland as Ushant did from the French mainland, the Court determined to give the Scillies only half effect in determining the equidistance line. This was accomplished by determining the line midway between an equidistant line giving the Scillies full effect and an equidistant line drawn without regard to the Scillies.

IV.

SOME FINAL THOUGHTS

The decision of the Court is only binding upon the parties, and its effect in other delimitation situations must remain to be seen. Presumably, the

³⁵ *Id.* at para. 239.

³⁶ *Id.* at para. 246.

legal theory of the Court, comparison of this case with the *North Sea* cases, and analysis of this case in specific geographical situations will provide jurists and the academic community with fruit for comment for some time to come. Moreover, it would seem that government policymakers would scrutinize the case in order to glean from it whatever would be useful to their particular situation and to distinguish those factors which might not be so helpful.

As a general matter, however, the opinion seems to stake out new ground in three particular areas. Of particular importance is the Court's merger of the rules of customary law, Article 6, and state practice. Although distinctions will continue to be argued, the Court's view that the rules to be applied all lead to the same result—a boundary in accordance with equitable principles—is an important concept. It supports a theory that international law respecting maritime boundary delimitation rests on a continuum of law, which, while adopted from various sources, rests upon an equitable foundation.

Secondly, the Court's insistence on taking into account the geographical and other circumstances assures that all the relevant factors will be taken into account in any particular situation. Although this leads to a boundary in accordance with equitable principles, it will often be difficult for states to agree on the relevant circumstances in any given situation. Thus, states may find it necessary to refer to third-party settlement more often.

Finally, the Court's view that in this case application of the delimitation provisions under discussion at the Law of the Sea Conference would have attained the same result is important. The logical conclusion is that the principles relating to continental shelf delimitation arising out of this case, the Geneva Convention of 1958 on the Continental Shelf, the *North Sea* cases, and state practice are similar and relevant to the principles relating to the delimitation of 200-mile fishing and economic zones and continental margins. There is no reason why this should not be the case. The inequity caused by special circumstances in one instance would seem to be the same as in the other, and the rule that boundaries are to be determined in accordance with equitable principles would seem to be just as applicable.

The emergence of 200 nautical mile fishing and economic zones, along with the nature of the jurisdiction being exercised in those zones, and the rapid development of offshore hydrocarbon technology creates a sudden need for many states to seek early resolution of their maritime boundaries. This Court's view of the interrelationship between the sources of law, the importance of all the relevant factors in a particular case, and the relevance of continental shelf principles to the economic and fishing zone is a useful guide. But further judicial expression is needed to provide the international community with a clearer understanding of those factors, circumstances, criteria, and principles which in each case lead to a maritime boundary in accordance with equitable principles, in order that states may

seek to define the limits of their maritime jurisdiction in accordance with international law.

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INTERNATIONAL LAW IN WAR COLLEGE PERSPECTIVE

The question of how most effectively to teach international law at the war college level (the senior military educational stage for those U. S. officers and civilians identified as future leaders and planners) has been periodically considered during the past decade.¹ Completion of a seven-year period of responsibility for international law studies at The National War College seems to the writer to be an appropriate occasion to offer a few comments on the importance, function, and organization of these studies.

The importance of this area of instruction stems from the roles played by war college graduates, military and civilian, in the formulation of U.S. national security policy. The mission of The National War College is training in this field, and the College has broad interagency representation in the student body. While the following observations are believed to apply generally to senior training, the experiences and needs of other service colleges for the Army, Navy, and Air Force might indicate different priorities for the teaching of various aspects of international law.

During the period under consideration—one of major transition in U. S. foreign policy—the knowledge of international law and organization has assumed enhanced importance for the education of senior officials dealing with national security affairs. Broadly speaking, the period from the end of World War II until the early seventies—terminating with the first clear manifestation of the energy crisis and the end of the Vietnam war—was characterized by wide latitude for the direct application of U. S. national power, politically, economically, and militarily, in the formulation of its national security policy. This situation naturally affected the emphases of senior service education.

The recent transition in the world situation implies a new operating milieu in which considerations of international law and organization have a higher priority. In a world of increasing resource scarcities, of sharpening competition among states for raw materials, and of growing limita-

* The views expressed are solely those of the author and do not necessarily represent those of the Department of State or the U.S. Government.

¹ Professor Goldie, among others, has reviewed this instruction in *International Law at the War Colleges*, 66 AJIL 24 (1972). Various meetings, focusing particularly on teaching of the law of war, have afforded opportunities for instructors to exchange views. These have included a workshop on the law of war at the April 1974 meeting of the American Society of International Law and a Conference on the teaching of the law of war at the National War College, Dec. 16–17, 1974.

tions on the options available to the national security planner, the planner is increasingly forced to deal with interactions of states on the margins of power (law of the sea issues are good examples) where his knowledge of the international law background becomes more critical. The recent emphasis on human rights issues, with new U. S. action, both in the United Nations and bilaterally, after a period of relative dormancy, is another example of an area of international law on which the future planner must be informed.

After an interim period characterized by some U. S. actions whose consonance with international law was often inadequately considered or explained² (e.g., the Cambodian incursion), the United States now confronts circumstances which underline the need for policies calling for U. S. support of international law and world community action. To meet this need, increasing the awareness on the part of senior military and civilian officials of the international law considerations in any situation should have a higher priority in their training.

The instructor in international law at the war college level has the responsibility to make clear the essential link between law and national security policy, in order that these studies are perceived to be directly relevant and indeed indispensable to the student in his career after graduation. This implies a necessary selectivity and a careful development of subject matter along lines which afford both broad conceptual understanding of the sources and role of the law and its direct policy application. This has been done at The National War College through emphasis on basic problems, which are considered in sufficient breadth and depth to bring out the basic international law concepts and at the same time to supply background on the issues involved. The teaching method is thus problem-oriented, and legal principles are brought out as the problems are examined. The aim is to show the role of law as a process in international relations—how and why it says what it does, how it changes, and how it is responsive to changes in the international environment. This approach is effectuated through participation in the program, as lecturers and seminar leaders, of outstanding teachers and practitioners, including a number in government service.

Instruction takes place in three different contexts: the "core," or basic curriculum, applicable to all 160 students; the elective studies program involving some 20 to 25; and research and writing programs on international law topics engaged in by three to five students. The international law aspects of the core curriculum are somewhat compressed, since the program must be fitted into a broad set of studies in the formulation of national security policy, which emphasizes major elements of national and military strategy.³ Within this context, three areas of the law im-

² The relatively limited role of international law considerations in national security policy formulation was noted in Moore, *Law and National Security*, 54 FOREIGN AFFAIRS 408 (1975).

³ The official description of the mission of The National War College is:

to conduct senior-level courses of study and associated research in national security policy with emphasis on its formulation and future directions in order to enhance

portant for tomorrow's national planners—the law of war, the law of the sea, and the law as developed through the United Nations and related organizations—receive coverage.

A review of the nature and sources of international law and consideration of its role as both a restraint and a potential asset in the development of U. S. policy is placed early in the academic year. This background forms part of the instruction on the international environment and uses as an example the law of war, both with regard to the *jus ad bellum*, as reflected in the UN Charter, and as expressed in restraints on the conduct of military operations. Followup seminars, giving students a chance for interchange with recognized leaders in the field, develop key aspects of the humanitarian law of war including the Protocols to the Geneva Conventions of 1949, which were drawn up from 1974 to 1977. This whole area of instruction is particularly important in meeting the requirements for training set forth in the Conventions⁴ and in the Department of Defense Law of War Program.⁵

The law of the sea is taught as one of a series of global issues centering around resource constraints confronting U. S. national security planners. The background and growth of the law in this area are traced, and a briefing is given on the current status of the negotiations in the Third United Nations Conference on the Law of the Sea.

The roles of the United Nations and other international organizations are addressed in the study of the international environment. To a growing extent, the framework for approaching certain important current issues, such as the complex of southern African problems, is based on international law, as codified and applied through the UN Charter and the opinions of the International Court of Justice. Knowledge of this range of key problems will have increasing importance to the national security planner for the coming decades.

The second major setting for international law instruction at The National War College is the elective studies program. Here it is possible, in a series of twelve to fourteen two-hour seminars, to go into the three foregoing areas in considerably more detail than the core curriculum permits. In each case instruction is strongly supported by case materials and documents to move the study from the textbook to the operational context. The seniority and experience of the students permit a methodology which approaches specifics through a broad consideration of the nature and sources of the law and its role in the world community.

Three seminars dealing with the law of the sea are the opening phase of the course. The development of this law is traced in terms of basic

the preparation of selected personnel of the Armed Forces, the Department of State, and other U. S. Government departments and agencies for the exercise of joint and combined high-level policy, command, and staff functions in the planning and implementation of national strategy.

NWC Memorandum 10-1, July 7, 1976.

⁴ E.g., Geneva Convention relative to the Treatment of Prisoners of War, done Aug. 12, 1949, Art. 127, 6 UST 3316, TIAS No. 3364, 75 UNTS 135.

⁵ DOD Directive 5100.77, Nov. 5, 1974.

concepts: the nature and sources of the law, the roles of customary and treaty law, and how the law is shaped and interpreted. A key purpose is to correct the common tendency to overemphasize the absence in international law of sanctions of the type familiar in municipal law and to underline the wider role of international law as a means of policy expression by states, as an orderly procedure for dialogue and negotiation on international problems, and as a means to achieve conflict-resolving outcomes to disputes. The weight of acceptance and compliance in international usage and state self-interest as factors sustaining the law are stressed. Withal, this approach recognizes that successful teaching of international law requires an attitude which actively seeks out ways in which international law can be an asset in dealing with specific issues.

The seminar begins with a series of cases and materials which illustrate the role and development of the law: the *Anglo-Norwegian Fisheries* case, the Truman Proclamation on the Continental Shelf, the 1958 Geneva Conventions on the Law of the Sea, the *North Sea Continental Shelf* cases, and treaties, UN resolutions, national policy statements, and negotiating texts in connection with the Third UN Conference on the Law of the Sea. The current state of the negotiations and the outlook for a treaty are given particular emphasis.

The second group of seminars deals with the law of war. The materials are calculated to refresh the students' working knowledge of the Hague and Geneva Conventions as a basis for more detailed consideration of the role and underlying assumptions of the law of war in the seminar discussions. An attempt is made to place the law of war within the context of international law as a whole, as developed in the initial seminars. Most recently this goal has been very effectively achieved through a series of three sessions on the Arab-Israeli dispute.

The third major group of seminars is devoted to a realistic appraisal of the role of the United Nations and its related organizations as major sources and codifiers of the law. The importance for the U. S. national security planner of the role of international organizations has been recognized in the curriculum since the founding of The National War College in 1946.⁶ The seminars seek to bring out in practical terms the continuing importance of these institutions.

After an introductory seminar on the Charter and the functions of the major organs of the United Nations, one session takes up the operations of a specialized agency and another focuses on a specific problem area. In recent years the latter has been the southern African complex of issues, as an ideal means to show the practical linkages between international law and the problems faced by national security planners. The essential role which the International Court of Justice has played in the development of U. S. and international policy on the status of Namibia, the evolution of Chapter VII sanctions by the Security Council on the Rhodesian question,

⁶ The latest statement is in the section on curriculum scope in NWC Memorandum 10-1: "h. The roles and functions of international organizations with emphasis on their relationships to U. S. national security objectives."

and the role of both the Council and the General Assembly with regard to the South African question, all receive detailed coverage here. As the conflict potential for the major powers in southern Africa has steadily come into clearer focus in recent years and with the growing importance of the region in U. S. policy, the need for a precise understanding by the war college student of the key role of international law in the situation has become evident.

Rounding out the elective seminar series are sessions on Soviet, Chinese, and Third World views of international law, on recognition and treaty law, and on current problems being dealt with by the Office of the Legal Adviser of the Department of State. The last named seminar reinforces the linkages between international law and national security issues.

A final word as to trend. Some observers have expressed concern about unevenness in the level and content of instruction in international law at the senior service colleges during the past decade. At The National War College, as the foregoing description suggests, an effort has been made to expand and focus international law instruction in a manner appropriate to the growing importance of the field to national security planners. A way of approaching this instruction has been established which can form the basis for bringing international law to bear within the curriculum of The National War College.

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TO THE EDITOR-IN-CHIEF:

Status of Germany

It is not astonishing that a foreign international law expert is puzzled by the intricacies of inter-German relations, as they can only really be understood in the context of historical and political developments in Germany after World War II, including party politics in the Federal Republic. Nevertheless, Professor Grzybowski labors under a misapprehension which he asserts in his review of *Der Rechtsstatus Deutschlands aus der Sicht der DDR* by Jens Hacker (71 AJIL 389-90 (1977)) that the West German Federal Constitutional Court had declared that "the Grundvertrag [Basic Treaty] did not constitute recognition of the DDR as the second German State."

Hacker himself points out (pp. 432 ff.) that the qualification of the Deutsche Demokratische Republik as a state is no longer disputed. The Federal Government officially declared this for the first time just after the accession to power of the coalition of Social Democrats and Liberals on October 28, 1969: "Albeit two German states exist in Germany, they are not, as to one another, a foreign country; their mutual relations can only be of a specific kind." The Grundvertrag (e.g., Arts. 4 and 6) speaks explicitly of "both states." Accordingly, the Federal Constitutional Court in its decision of July 31, 1973 emphasized (B.IV.3): "The German Democratic Republic is in the light of international law a state." Nevertheless,

the Federal Republic has always emphatically declined, as the Supreme Constitutional Court points out, to recognize the DDR as a foreign state under international law. Ironically, in West German legal thinking, some of the more conservative academics have tended to state that, through the Grundvertrag, the Federal Government has accorded this recognition to the DDR—a viewpoint that should be welcome to Eastern Germany.

Consequently, Professor Grzybowski is not quite correct in stating that the German Reich in its frontiers of 1937 ("Germany") is "still the only valid legal concept" according to Hacker. The predominant West German concept—shared by the Federal Constitutional Court in its judgment on the Grundvertrag (B.III.1) and by Jens Hacker (p. 433)—acknowledges three subjects of international law: the Federal Republic of Germany, the DDR, and "Germany" in the frontiers of 1937, the latter, however, being inactive due to a lack of institutions. There are still quite a few "concrete facts," it must be pointed out to the learned reviewer, indicating the existence of "Germany" as a legal concept, ranging from the still undisputed and effective responsibility of all four Allies, including the Soviet Union, for "Berlin and Germany as a whole" to the complicated details of ownership and administration of the railway in Berlin.

One must agree with what the learned reviewer probably wanted to indicate by his reference to a "puzzle": that West German diplomats will have to be rather versatile constitutional and international law experts if they are to persuade even friendly countries not to recognize a separate DDR-citizenship apart from "German" citizenship, even though they may recognize the DDR as a state under international law. This is the heritage of the continuing division of Germany.

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Professor Grzybowski replies:

I am still puzzled. How can an international treaty not be a recognition of the other party or a subject of international law, and how can there be three German states subject of international law when there are only two of them in fact.

TO THE EDITOR-IN-CHIEF:

Soviet View on Unequal Treaties

Professor Kulski's book review of Nahlik, *Code of the Law Treaties*, in the recent issue of the *Journal* contains a comment on the silence of the Soviet delegation during the Vienna Conference on the Law of Treaties, 1968–1969, on the Soviet theory of unequal treaties;¹ his comments are in need of some further refinement.

Kulski indicated that the Soviet delegation at the Conference "never mentioned" its theory of invalidity of unequal treaties.² To the contrary, various Soviet delegates referred to the concept of unequal treaties generally and to specific types of treaties which fall into that category. Talalaev of the Soviet Union, in the first session of the Conference, specifically criticized treaties procured by force: for example, the Soviet Union was "firmly opposed to treaties procured by force to obtain colonial possessions."³

¹ 71 AJIL 567 (1977).

² *Id.* 568

³ UN CONF. ON THE LAW OF TREATIES, OFF. RECS. SUMMARY RECS., 1st Sess. (1968) (29th mtg.) 152, UN Doc. A/CONF.39/11 (1970).

The Soviet delegation at the Vienna Conference supported the Declaration on Economic Coercion,⁴ which was intended by its principal supporters to expand the term "force," as used in Article 52 of the Convention to include both economic and political force. This would have made the rule enunciated in Article 52 as broad as the definition of unequal treaties espoused by Soviet legal writers. Professor Tunkin has written as recently as 1970:

The idea of the invalidity of unequal treaties set forth in the Decree on Peace, the abrogation by the Soviet state of all unequal treaties . . . were an inspiring example for the dependent countries. It has become much more difficult for imperialist states to impose unequal treaties, although, taking advantage of the weakness of some states, especially the new ones, they also frequently compel them to sign such treaties at the present time.⁵

Soviet delegates and delegates of Eastern European countries often stated that the validity of treaties is destroyed by the use of military, political, or economic force—a rule that they believed was *lex lata* in customary international law.⁶ Soviet delegates in other international forums during this same period of time took a similar view of unequal treaties. Movchan of the Soviet Union stated during the 1966 meetings of the Special Committee drafting the Principles of Friendly Relations:

The Committee must therefore help to ensure compliance with treaty obligations and at the same time assist developing countries which sought to reject inequitable agreements that had been imposed on them.⁷

Of course, the Soviet legal concept of unequal treaties is not well enunciated, nor well defined, even in the writings of their leading international legal writers. The concept is certainly not well supported by recent Soviet state practice, such as the 1968 Soviet-Czechoslovakian Treaty; however, the Soviets continue to espouse it in international forums when the occasion allows. One may well speculate to what greater extent the Soviet international lawyers would herald the concept if it were not for the existence of various East European treaties and older Czarist frontier treaties with China.⁸

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⁴ Declaration on the Prohibition of Military, Political and Economic Coercion in the Conclusion of Treaties, *id.* DOCS. OF THE CONF. (1968-1969) 285, UN Doc. A/CONF. 39/11/Add. 2 (1971).

⁵ G. TUNKIN, *THEORY OF INTERNATIONAL LAW* 14 (W. Butler trans. 1974).

⁶ See generally Malawer, "Coerced Treaties" and the Convention on the Law of Treaties, in S. MALAWER, *STUDIES IN INTERNATIONAL LAW* 31, 38 n. 37 (2d ed. 1977) (originally appearing as *A New Concept of Consent and World Public Order: "Coerced Treaties" and the Convention on the Law of Treaties*, 4 VAND. J. TRANS. L. 1 (1970)).

⁷ UN Doc. A/AC.125/SR.46, at 6-7 (1966), as quoted in S. MALAWER, *IMPOSED TREATIES AND INTERNATIONAL LAW* 125 (1977) (originally appearing in 7 CALIF. W. INT. L. J. 5 (1977)).

⁸ Soviet writers continually struggle to justify these treaties. See Miasnikov, *The Manchu Invasion of the Amur River Valley and the 1689 Treaty of Nerchinsk*, 6 CHINESE L. & GOVT. 22 (1973-74) (contending the 1689 Treaty of Nerchinsk was neither unequal nor imposed).

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

JOHN A. BOYD *

The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

POWERS AND RULES OF ORGANS

United Nations Secretary-General (U.S. *Digest*, Ch. 2, §4F)

On September 29, 1977, the UN Security Council adopted Resolution 415, which "[r]equests the Secretary-General to appoint . . . a representative to enter into discussions, with the British Resident Commissioner designate and with all the parties, concerning military and associated arrangements that are considered necessary to effect the transition to majority rule in Southern Rhodesia. . . ." The resolution also requested the Secretary-General to "transmit a report on the result . . . to the Security Council as soon as possible. . . ." ¹ There were 13 votes in favor and none opposed. The Soviet Union abstained, and the People's Republic of China did not participate in the voting.² The resolution was sponsored by the United Kingdom and supported by the United States.

During his remarks in support of the resolution, Ambassador Andrew Young, U.S. Permanent Representative to the United Nations, discussed, *inter alia*, the role of the Security Council and the Secretary-General in finding an internationally acceptable solution in Zimbabwe. Set forth below are portions of Ambassador Young's remarks:

We are here today looking for an internationally acceptable solution. There are many solutions which are possible but only from this body can come a solution which is both permanent and internationally acceptable. The way this body has operated, and especially the way our Secretary-General has operated, is an indication that perhaps . . . we can approach at least this phase of the exercise with some measure of confidence. Under some circumstances a Secretary-General might be able, without calling a Security Council [meeting], to appoint a representative to observe talks about military arrangements leading up to a cease-fire, and yet Secretary-General Waldheim has sought to consult with the Council and to take his mandate from the Council. In everything we have done in Namibia there has been an effort on the part of the Secretary-General to work in consultation with the members of the Council. That is not something that is mandated by the Council

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¹ UN Doc. S/RES/415, Sept. 29, 1977.

² UN Doc. S/PV.2034, Sept. 29, 1977, at 29-30.

necessarily, it is something which the Secretary-General accepts as his obligation and the responsibilities of his office.

As we are approaching an internationally acceptable solution and as we accept the responsibilities of this Council for an internationally acceptable solution, we are in fact giving Zimbabwe an opportunity for a permanent solution. We are giving Zimbabwe an opportunity to move towards independence and towards majority rule without a lot of the in-fighting, struggle and internal dissension that has inevitably gone with the struggle for freedom when it has not been accompanied by the support of the entire international community.

... I hope that the Council will support this proposal and, more than just supporting this limited first step, will support the entire process and see to it that as reports come back to us, we seek to find some way of bringing about freedom, independence and justice in Zimbabwe and minimizing the shedding of blood and the destruction of the resources of that country.³

PROTECTION OF HUMAN RIGHTS

(U.S. *Digest*, Ch. 3, §6)

CSCE Principles (Helsinki Final Act)

On October 6, 1977, Ambassador Arthur J. Goldberg made an opening statement at the Belgrade meeting examining the implementation of the Final Act of the Conference on Security and Cooperation in Europe (CSCE), adopted in Helsinki on August 1, 1975. A substantial portion of his address was devoted to a general assessment of the overall record among the participating 35 nations in the area of human rights. He described efforts by the U.S. Government in removing travel restrictions and visa requirements¹ and in entering into cooperative agreements with several Eastern European nations relating to cultural, educational, and scientific matters. He noted advances among the participating states in the exchange of goods, knowledge, and ideas, but he mentioned as well some areas, such as the working conditions for visiting scholars and journalists, barriers to binational marriages, and restrictions on the right of individuals to emigrate, in which old practices have not changed sufficiently to satisfy the spirit of Helsinki. While acknowledging that the U.S. delegation to the Belgrade meeting had much to learn from the exchange of views on human rights and basic freedoms, he also provided some illustrations of areas of U.S. concern with regard to the fulfillment of the pledges of the participating

³ UN Doc. S/PV.2033, Sept. 28, 1977, at 21-23.

¹ U.S. legislation concerning applications for a nonimmigrant visa by an alien who is excludable from the United States by reason of membership in or affiliation with a proscribed organization is found in Section 112 of the Foreign Relations Authorization Act, Fiscal Year 1978, P.L. 95-105, 22 U.S.C. §2691.

President Carter announced the removal of travel restrictions on U.S. citizens traveling abroad during his news conference of March 9, 1977. 13 WEEKLY COMP. OF PRES. DOC. 328-29 (Mar. 9, 1977).

nations concerning religion and belief, freedom of thought and conscience, and the legitimate interests of national minorities. Portions of Ambassador Goldberg's prepared remarks follow:

The assessment my country has made of the overall record of participating states over the last 26 months shows encouraging evidence of progress. But the progress displayed is not progress enough. It still falls short of the goals of the Final Act and, just as important, of the high expectations the Final Act aroused. Those expectations remain valid, and we must all be frank in judging that many of them remain unmet.

Let me comment first on what my own country has done to implement the Final Act. In general, the Act codified standards which reflect American policy in dealing with other nations and with our own citizens. Nevertheless, in response to the Final Act, we have looked closely at our own behavior and—where we have the need and the means—have acted to improve our conduct. In particular, we took two steps regarding the Final Act pledge to “facilitate freer movement and contacts.” First, President Carter this year removed all restrictions on travel abroad by American citizens. Second, with President Carter's support, Congress recently relaxed our visa requirements, so that people wishing to visit the United States will not be excluded because of political affiliation or belief.

Moreover, in the field of human rights, President Carter yesterday redeemed a pledge he gave last spring by signing the international Covenants on Human Rights at the United Nations. . . .

In the spheres of commercial, cultural, educational and scientific exchanges, we have done much and have much yet to do. For example, the U. S. Government has made a special effort to inform our businessmen about provisions of the Final Act affecting their opportunities to enter and work in markets with which they have not always been sufficiently familiar. This year, we signed our first cultural, educational and scientific cooperation agreements with Hungary and Bulgaria; and we concluded negotiations on a similar agreement with Czechoslovakia. With the Soviet Union, we renewed several scientific cooperation arrangements.

Meanwhile, in some other signatory nations, we have seen a well-intentioned and productive effort to implement the principles and provisions of the Final Act. In some nations in the East, advances have been only modest, and are still far below the Final Act's standards. And there are individual cases under the Final Act where forward motion has been stalled or even reversed.

Under the stimulus of the Final Act, some progress has been made in bettering relations among the participating states. The exchange of goods, knowledge, people and ideas has expanded in some measure. Substantial obstacles do remain to travel and the flow of information between one part of Europe and another, but these have already diminished somewhat. This improvement can be seen simply in the numbers of people who have been able to leave old homes for new ones in Europe, America and Israel. These results mean real individual happiness, and we here must reaffirm our resolve to speed that development.

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Thus we can see some progress.

We can see it in terms of individuals and families reunited after being separated by war, accident and history. But we must recall the many who remain apart.

We can see progress in business contacts that become business contracts. But we cannot overlook the still inadequate supply of relevant economic data on which the growth of business confidence depends.

We can see progress in books translated, performers applauded, students instructed, and scientific theories tested. But here, too, the openness and ease of contact promised at Helsinki has been only partly realized.

Thus, we cannot be satisfied with the record of implementation. The standard we have set together should be even higher, if the goals of the Final Act are to be realized.

Let me illustrate some areas in which we in the United States feel old practices have not been changed sufficiently to meet the new imperatives of the Helsinki spirit.

In educational programs, it is not enough to increase the number of scholars involved; rather, a prerequisite for such an increase is improved freedom for scholars and their research. What value is there, for example, in financing a student's work abroad, when for months he is denied admission to an essential archives and, when having finally been admitted one day, he is not permitted back the next—even to collect his notes?

Also, in seeking "to facilitate the freer and wider dissemination of information of all kinds," we cannot point convincingly to progress while international broadcasts are subjected to continuing interference.

Similarly, while steps have been taken to ease travel and working conditions for journalists, those advances are jeopardized when visas are made conditional on a correspondent's agreeing not to contact certain sources of information and opinion.

Finally, while real progress has been made in reuniting divided families and concluding binational marriages, satisfaction with those developments must be balanced by regret that many long standing cases remain unresolved; that the resolution of routine cases is too often arbitrary and capricious; and that new bureaucratic obstacles are imposed on people seeking to join relatives abroad. This runs counter to the Helsinki promise "gradually to simplify" exit procedures. It is also hard to see the workings of the "positive and humanitarian spirit" when an ill and aged husband is denied, after long years of separation, the company of his nearly blind wife and their daughter.

Equally difficult to understand are broader restrictions on the right of individuals to travel or emigrate. That right is established in Article 13 of the Universal Declaration of Human Rights: "Everyone has the right to leave any country, including his own, and to return to his country." All of us have pledged in the Final Act to "act in conformity" with that Universal Declaration, and we have given specific emphasis to that promise in the Final Act's provisions on family reunification.

.....

On many occasions this year, President Carter has set forth his own commitment to the continuity of American policy in the area of human rights—whether political, economic, social or cultural. At the United Nations last March, he stressed that the “search for peace also means the search for justice—[and] the search for peace and justice means also respect for human dignity. . . . I know perhaps as well as anyone that our ideals in the area of human rights have not always been attained in the United States, but the American people have an abiding commitment to the full realization of those ideals. We are determined therefore to deal with our deficiencies quickly and openly.”

It is in that same spirit that the U.S. delegation will speak about human rights and basic freedoms here in Belgrade. We have much to learn from that exchange of views.

Let me illustrate some of our concerns. The Principle VII guarantee of religion and belief means to us that expression of faith must not be penalized by loss or reduction of educational or career opportunities. People should be free to worship without fear or state interference in their choice of ministers, literature and houses of prayer.

Similarly, the “freedom of thought and conscience” we have all pledged to respect must have breathing space in which to flourish. Its expression should not be censored. Its exponents should not be imprisoned or exiled for making their thoughts known.

Moreover, the “legitimate interests” of “national minorities” in our 35 states require respect for unique cultural and linguistic heritages, and active policies to preserve these traditions and achievements for future generations.

Our governments have assumed the responsibility to “promote and encourage the effective exercise” of these rights. And in Principle VII we subscribed to “the right of the individual to know and act upon his rights and duties” in the field of human rights. The response of citizens to that challenge, alone and in private or public groupings in many signatory states, has been heartening evidence of the Final Act’s healthy impact on all of us. In my own country, we have benefitted by the dedication, candor, and commitment of our Commission on Security and Cooperation in Europe. . . .

All the more, then, we are also obliged to register vigorous disapproval of repressive measures taken in any country against individuals and private groups whose activities relate solely to promoting the Final Act’s goals and promises.²

CONCLUSION AND ENTRY INTO FORCE

Extent of the Treaty Power (U.S. Digest, Ch. 5, §1)

On July 29, 1977, Herbert J. Hansell, Legal Adviser of the Department of State, testified before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary concerning the transfer by treaty of property belonging to the United States. The legal question whether legislation is required by the Constitution for a transfer of such property or whether the treaty power can be utilized for that purpose had been raised in connection with U.S. negotiations with Panama concerning the

² Dept. of State File No. P77 0159-64.

Panama Canal.¹ Mr. Hansell's analysis of this question, which follows, interprets the treaty and the property clauses of the Constitution in the light of the debates of the Constitutional Convention of 1787 and various precedents found in U.S. Supreme Court cases, treaties, and statutes.

We intend that any new relationship between the United States and Panama concerning the Canal that may be negotiated will be incorporated in a treaty and submitted to the Senate for its advice and consent to ratification. Under any new treaty with Panama for the operation and defense of the Canal, the Congress will have continuing legislative responsibility over such matters as U.S. defense activities in Panama, organization and functioning of the Canal operation, financial management of the Canal, employee relations and navigation. In addition, specific legislation will be required to implement many aspects of the new relationship, including the establishment of a new Canal operating agency, and a new employment system, and measures concerning the financial management of the Canal.

While it is clear that extensive implementing legislation will be required for this treaty, we have not been able to determine precisely the nature of that legislation since the terms of the treaty are still under negotiation. Thus, let me say at the outset that no decision has been reached as yet concerning the manner in which any transfers of U.S. property to Panama would be effected. However, I would emphasize . . . that whatever the outcome of that particular question may be, the House of Representatives will in any event have a major role in the creation and implementation of any new relationship between the United States and Panama.

I would like now to discuss with you our view on the legal question of whether legislation is required by the Constitution for a transfer of property belonging to the United States or whether the treaty power can be utilized for that purpose.

The nub of the problem is the interrelation of the treaty power clause of the Constitution (Art. 2, §2, cl. 2) and the property clause of the Constitution (Art. 4, §3, cl. 2).

Article 2, §2, cl. 2, dealing with the powers of the President, states:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.

Article 4, §3, cl. 2 provides:

The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Nothing in the language of the two clauses limits the treaty power with respect to disposition of property or makes the power of Congress with respect to disposition of property exclusive. As Mr. Justice Field stated in *Geofroy v. Riggs*,² "the treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument. . . ." But there is no restraint expressed in respect to dispositions. The property clause, like most of the clauses

¹ For further comments on the Panama Canal treaties, see *infra* p. 129 and p. 134. For text see *Official Documents, infra* p. 223.

granting legislative powers contained in article 1, §8, provides that "Congress shall have power," without any qualification indicating exclusiveness against the treaty power. This position is strongly supported by the place of article 4, §3, cl. 2 in the text of the Constitution, as well as by the history of the two clauses. It is buttressed by judicial decisions and by precedents in U.S. treaty practice. I would like to elaborate on these points briefly.

Although at an early period of our constitutional history Thomas Jefferson seems to have suggested in his *Manual of Parliamentary Practice* [Sec. IV. See, Senate Manual, 94th Cong., 1st Sess. (Sen. Doc. No. 94-1) p. 667 (1975); Rules and Manual of the House of Representatives (House Doc. No. 94-663) p. 229 (1977).] that the treaty power does not extend to subjects of legislation, this narrow construction has never been accepted in practice and is rejected by a long line of Supreme Court decisions. Today the rule is firmly settled that treaties may be concluded on any subjects appropriate for international negotiation, and that the treaty power extends to all areas within the legislative authority of Congress that are not expressly reserved by the Constitution to the exclusive jurisdiction of Congress. [See n.3 *infra*. See also Henkin, *Foreign Affairs and the Constitution*, pp. 141-150 (1972).] Under article 6, clause 2 of the Constitution all treaties made under the authority of the United States which are self-executing [*Foster & Elam v. Neilson*, 2 Pet. (27 U.S.) 253, 314 (1829); *U.S. v. Percheman*, 7 Pet. (32 U.S.) 51, 89 (1833).] take effect as the law of the land without further legislative action.

The Constitution contains very few exceptions limiting the treaty power with respect to specific subjects. Principal instances are article 1, §7, cl. 1 and article 1, §9, cl. 7. The former clause provides that "all bills for raising revenue shall originate in the House of Representatives." The second clause cited ordains that "no money shall be drawn from the Treasury, but in consequence of appropriations made by law." Hence it is recognized that treaties may neither impose taxes nor directly appropriate funds.

The property clause contains no language excluding concurrent jurisdiction of the treaty power. In fact the placement of the property clause in article 4 of the Constitution which deals with Federal-State relations, rather than in article 1, provides strong evidence that the property clause does not restrict the treaty power. As the debates in the Constitutional Convention of 1787 show [2 Farrand, *Records of the Federal Convention* (Revised ed. 1937) pp. 188, 459 (Journal), 466 (Madison).], the property clause originated in conjunction with the grant to Congress, in the preceding clause of section 3, of the power to create new states in the territories ceded to the United States. The powers of Congress enumerated in cl. 2 of that section were added to establish Federal authority over these territories and other property belonging to the United States, while preserving the claims of the states and the United States in disputed matters. The drafting history of that clause shows no indication of any intent to restrict the scope of the treaty power.

It is also significant that article 4, §3, cl. 2 links "the power to dispose of" closely to "the power to make all needful Rules and Regulations" respecting the Territory and other property belonging to the United States. Thus the scope of the treaty power should be the same with respect to these two categories of congressional power. It is well

settled that the treaty power can be used to make rules and regulations governing in the territory belonging to the United States, even in the District of Columbia.^b

Moreover, the drafting history of the treaty clause, which was adopted in its final form a few days after the approval of the property clause, clearly shows that territory and other property belonging to the U.S. can be transferred by a treaty without legislation. During the debates in the Constitutional Convention on the treaty clause, it was settled by a specific vote that advice and consent of the Senate only should be required for the making of treaties [2 Farrand, *Records*, pp. 532 (Journal), 538 (Madison)]. Subsequent to that action the Convention adopted a motion by Mr. Madison that excepted treaties of peace from the requirement of a two-thirds vote in the Senate [2 Farrand, *Records*, pp. 533 (Journal), 541 (Madison)]. An amendment was then introduced by Mr. Williamson and Mr. Spaight which would have re-established the two-thirds vote requirement for a treaty of peace "affecting territorial rights." [2 Farrand, *Records*, p. 543 (Madison; see also p. 534 (Journal)).] Mr. King further suggested that the two-thirds rule should apply to all treaties giving up territory or rights of navigation and fishing. [2 Farrand, *Records*, p. 543, 4 Farrand, *Records*, p. 58.] Then, for the sake of simplicity, the original provision requiring a two-thirds majority for all treaties was restored. [2 Farrand, *Records*, p. 544 (Journal), 548, 549 (Madison).] It is clear from that history that the framers of the Constitution contemplated the transfer of territory and property belonging to the United States by treaty.

The power to dispose of public land and other property belonging to the United States by treaty is also supported by judicial decisions^c and longstanding practice.

The most familiar judicial statement of the power to transfer rights in land by treaty was made by Mr. Justice Clifford in *Holden v. Joy*,^d involving the validity of a treaty with the Cherokee Nation providing for the sale and transfer of a large tract of land belonging to the United States.

Let me now turn to the treaty practice of the United States. There the precedents look two ways. The record shows instances where transfers of territory and other property have been made by or pursuant to treaties alone and instances where treaties or executive agreements disposing of property belonging to the United States have been concluded pursuant to or contingent upon congressional authorization.

Thus precedents supporting the power to dispose of property by treaty alone can be found in the boundary treaties with neighboring powers, especially in the treaties between the United States and Great Britain of 1842 [The Webster-Ashburton Treaty between the United States and the United Kingdom signed August 9, 1842 (12 Bevans 82; 8 Stat. 572; TS 119; entered into force October 13, 1842)] and 1846 [Treaty between the United States and the United Kingdom Establishing the Boundary in the Territory on the Northwest Coast of America Lying Westward of the Rocky Mountains (Oregon Treaty) signed June 14, 1846 (12 Bevans 95; 9 Stat. 869; TS 120; entered into force July 17, 1846)] for the location of our northeast and northwest boundaries, and in the treaty with Spain of 1819 [Treaty of Amity.

Settlement, and Limits between the United States and Spain signed on February 22, 1819 (11 Bevans 528; 8 Stat. 252; TS 327; entered into force February 22, 1821; terminated April 14, 1903)] which effectuated the cession of Florida and determined the boundary west of the Mississippi, ceding lands claimed by the United States on the Spanish side of the boundary.

I would like to call your special attention to the treaty with Mexico of 1933 [Convention for the Rectification of the Rio Grande (Rio Bravo del Norte) in the El Paso-Juarez Valley, and exchanges of notes of February 1 and September 8, 1933 (TS 864; 48 Stat. 1621; 9 Bevans 976; entered into force November 10, 1933)] and the treaty with Mexico of 1970. [Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary between the United States and Mexico signed on November 23, 1970 (TIAS 7312; 23 UST 371; entered into force April 18, 1972).] Both of these treaties provided for the rectification of the [Rio Grande] river channel and the cession of lands which would have been left on the other side of the channel. [The treaties were subsequently implemented by the Act of August 19, 1935, 49 Stat. 660; American-Mexican Boundary Treaty Act, 1972, 86 Stat. 1161.]

Other recent examples of treaties transferring or providing for the transfer of real and personal property are the treaties between the United States and Honduras of 1971 recognizing the sovereignty of Honduras over the Swan Islands [signed on November 22, 1971 (TIAS 7453; 23 UST 2630; entered into force September 1, 1972)] and the treaty between the United States and Japan of 1971 for the return to Japan of the Ryukyu and Daito Islands [signed June 17, 1971 (TIAS 7314; 23 UST 446; entered into force May 15, 1972)]. Both treaties included provisions for the transfer of real and personal property belonging to the United States or its agencies. The terms of the treaties either transferred the property directly or agreed upon the transfer of property. The transfers were made without implementing legislation apparently in reliance on the treaty or general statutory authority to dispose of foreign excess property.

In the history of transfers of property to Panama we have had a mixed practice. Property has been transferred by executive agreement [Agreement between the United States and Panama respecting General Relations effected by exchange of notes on May 18, 1942 (59 Stat. 1289; EAS 542; 124 UNTS 221; entered into force May 18, 1942) implemented by a Joint Resolution of May 3, 1943 (57 Stat. 74)]; by treaty providing specifically for legislation [Article V of the Treaty of Mutual Understanding and Cooperation between the United States and Panama, and Memorandum of Understanding Reached, signed January 25, 1955 (TIAS 3297; 6 UST 2273; 243 UNTS 211; entered into force August 23, 1955); implemented by the Act to implement a treaty and agreement with the Republic of Panama of August 30, 1957, Public Law 85-223, §102(a), 71 Stat. 509], and in at least one instance by treaty alone [article VI and paragraph 2 of article VII of the U.S.-Panamanian Treaty of 1955]. In the legislation implementing the 1955 treaty [between the United States and Panama], Congress recognized the validity of conveyance made by operation of the treaty [§102(b)].

Thus, . . . for all of these reasons, we conclude that the President and the Senate, in the exercise of the treaty power, have concurrent

power with the Congress to transfer property belonging to the United States.²

Attorney General Griffin Bell rendered an opinion on August 11, 1977, which concluded that property of the United States may be transferred by treaty statutory authorization.³

On September 15, 1977, Senator William Lloyd Scott received unanimous consent to publish in the *Congressional Record* a legal memorandum entitled "The Treaty Power and Congressional Power in Conflict: Cession of U.S. Property in the Canal Zone to Panama." This lengthy memorandum, prepared by Kenneth Merin, Legislative Attorney of the American Law Division of the Congressional Research Service, Library of Congress, considers, *inter alia*, Articles I, II, IV, and VI of the U.S. Constitution and various treaties of the United States including the Agreement between the United States and Japan concerning the Ryukyu Islands and the Daito Islands with related arrangements signed on June 17, 1971,⁴ treaties between the United States and the Indian tribes, and the Treaty of Mutual Understanding and Cooperation, and Memorandum of Understandings reached between the United States and Panama signed on January 25, 1955.⁵ The conclusion of the memorandum follows:

We have seen that the treaty making power, vested in the President to be exercised with the advice and consent of the Senate, is extremely broad in scope. That power is limited when the Constitution confers an exclusive grant of authority on Congress. Although there are excellent arguments in favor of the proposition that the authority to dispose of property is concurrent and may therefore be exercised under the treaty making power, those arguments are not altogether free from doubt. Supreme Court decisions have recognized the exclusive nature of [C]ongress' Article IV powers as they relate to the federal-state relationship. Those rulings have never been qualified by other decisions characterizing those powers as concurrent when used by the executive under the treaty making powers. It does not appear that past treaty practice with either foreign nations or Indian tribes provides authoritative precedent establishing, with any degree of certainty, the exclusive or concurrent nature of Article IV, as that provision relates to disposal of land to a foreign sovereign.

It is clear that Congress has often asserted an exclusive right to dispose of federal territory and property. It is also apparent that both

² Dept. of State File No. P77-0126-1797. The following are the footnotes to the Legal Adviser's testimony.

^a 133 U. S. 258 at 267 (1890).

^b *Geofroy v. Riggs*, 133 U.S. 258 (1890).

^c *Holden v. Joy*, 17 Wall. (84 U.S.) 211, 242, 243 (1872); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); *Missouri v. Holland*, 252 U.S. 416, 433 (1920); *Asakura v. Seattle*, 265 U.S. 332, 341 (1924); *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931); *Reid v. Covert*, 354 U.S. 1, 16 (1957).

^d *Holden v. Joy*, 17 Wall. (84 U.S.) 211 at 247 (1872).

³ General Bell's testimony on this subject as well as the testimony of Legal Adviser Hansell and others on related issues may be found in 123 CONG. REC. S15945 (daily ed. Sept. 29, 1977).

⁴ 23 UST 446, TIAS No. 7314, entered into force on May 15, 1972.

⁵ 6 UST 2273, TIAS No. 3297, 243 UNTS 211, entered into force on Aug. 23, 1955.

the Executive and the Senate have recognized that claim in past dispositions of property in the Canal Zone to Panama. Therefore, while it is impossible to make a categorical assertion that Article IV Section 3, clause 2 is either exclusive or concurrent, it appears that those powers have been recognized as exclusive for purposes of disposal of property in the Canal Zone to Panama.

Finally, regardless of the exclusive nature of the Article IV power, the co-operation of all three branches of government is necessary for the effective implementation of American foreign policy. Although the President is the sole organ of communications with other nations, conclusion of a treaty without prior regard for Congressional attitudes might adversely affect the continuing Executive/Congressional relationship.

It is a very serious matter for the treaty-making power to enter into an engagement calling for action by Congress unless there is every reason to believe that Congress will act accordingly.⁶

RESERVATIONS AND SENATE DECLARATIONS

(U.S. *Digest*, Ch. 5, §1)

During the daily news briefing of September 27, 1977, John H. Trattner, Director of the Office of Press Relations in the Department of State, answered a question whether "a unilateral reservation or interpretation" of a treaty "appended by the Senate during the ratification process would require renegotiation of the treaty." The question arose in the context of a discussion of the Panama Canal Treaty and the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal. A portion of Mr. Trattner's answer appears below:

...[A]ny Senate action other than unqualified approval could create the possibility of renegotiation.

Now, since a reservation modifies or limits the terms of a treaty, the Senate's imposition of a reservation could lead to renegotiation.

On the other hand, an understanding does not modify or limit treaty obligations but rather clarifies or interprets treaty provisions or states policy or principle concerning some matter incidental to the treaty.¹

On September 28, 1977, Mr. Trattner caused to be posted a statement supplementing his answer of September 27, 1977. A portion of his posted statement appears below:

... An understanding is a statement which one party may make concerning the interpretation of a treaty. This would not reopen a treaty for further negotiation unless the other party considered it to be a change in the original agreement and thus it would be treated as a reservation.

Therefore, it is not the form of the statement of understanding which is important, but the substance and how it is viewed by the other party to the treaty.²

⁶ 123 CONG. REC. S14952 (daily ed. Sept. 15, 1977) (footnote omitted).

¹ Dept. of State News Briefing, DPC 190, Sept. 27, 1977.

² Dept. of State News Briefing, DPC 191, Sept. 28, 1977.

STATE TERRITORY, JURISDICTION, AND JURISDICTIONAL IMMUNITIES
(U.S. *Digest*, Ch. 6, §6)

The Hague Service Convention

In letters dated January 3, 1977, and July 11, 1977, M. H. van Hoogstraten, Secretary General of the Permanent Bureau of The Hague Conference on Private International Law, requested all States Members of the Conference to attend a Special Commission meeting from November 21 to 25, 1977, "to stimulate an exchange of views on any difficulties which may have been experienced in putting The Hague Service Convention¹ into practice, and also to study the best means of avoiding such difficulties."

In preparation for this Special Commission meeting, the U.S. Embassy at The Hague submitted a memorandum to Secretary General van Hoogstraten written by Bruno A. Ristau, Chief of the Foreign Litigation Unit in the Civil Division of the U.S. Department of Justice. Mr. Ristau submitted his memorandum in behalf of the Department of Justice, which has been designated as the Office of the Central Authority of the United States under Article 2 of The Hague Service Convention. The memorandum, which was circulated by The Hague Conference on September 18, 1977, discussed such problems as the requirement that all requests be accompanied by prescribed forms, the authority of U.S. Marshals to serve documents, the time needed for requests to be served, U.S. service fees, who is a proper "Requesting Authority," questions concerning translations, and other like questions. The memorandum also listed the countries party to the Convention and the number of service requests received from countries that are party as well as those that are not party to the Convention. Portions of Mr. Ristau's memorandum follow:

We commence our discussion with an optimistic note; from the point of view of the United States the Convention has well succeeded in accomplishing its purposes. We welcome, however, the opportunity to exchange views with our fellow Central Authorities in a mutual endeavor to correct certain—mostly minor—problems which we have encountered in the implementation of the Convention.

The Convention entered into force with respect to the United States on February 10, 1969. From that date until December 30, 1973, the functions of the Central Authority for the United States were performed by the United States Department of State. Effective December 31, 1973, the functions of the Central Authority were transferred to the United States Department of Justice, Washington, D.C. 20530. (See L.C.A. No. 7(74) and L.C. ON. No. 8(74), February 19, 1974.)

We understand that the Convention is now in force between the United States and the following 18 countries:

<i>Country</i>	<i>Date of Entry into Force</i>
Barbados	October 1, 1969
Belgium	January 18, 1971

¹ Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, done at The Hague on November 15, 1965, 20 UST 361, TIAS No. 6638, 658 UNTS 163, entered into force for the United States on Feb. 10, 1969.

<i>Country</i>	<i>Date of Entry into Force</i>
Botswana	September 1, 1969
Denmark	October 1, 1969
Egypt (U.A.R.)	February 10, 1969
Fiji	February 10, 1969
Finland	November 10, 1969
France	September 1, 1972
Israel	October 13, 1972
Japan	July 27, 1970
Luxembourg	September 7, 1975
Malawi	December 1, 1972
Netherlands	January 2, 1976
Norway	October 1, 1969
Portugal	February 25, 1974
Sweden	October 1, 1969
Turkey	April 28, 1972
United Kingdom	February 10, 1969

(The United Kingdom has also extended the Convention to: Antigua; Bermuda; British Honduras; British Solomon Islands Protectorate; British Virgin Islands; Cayman Islands; Central and Southern Line Islands; Falkland Islands and Dependencies; Gibraltar; Gilbert and Ellice Islands Colony; Guernsey; Hong Kong; Isle of Man; Jersey; Montserrat; Pitcairn; St. Helena and Dependencies; St. Lucia; St. Vincent; Seychelles; and the Turks and Caicos Islands.)

We further understand that the following eight countries have *signed*, but not yet ratified, the Convention: Austria; Federal Republic of Germany; Greece; Italy; Ireland; Spain; Switzerland and Yugoslavia.

As additional countries have joined the Convention, and as litigants and courts have become more fully acquainted with the time and money-saving features of the Convention, we have witnessed a steady increase in the annual number of Convention service requests. Thus, for the period October 1, 1976–September 1, 1977, we have received and processed in excess of 1,000 service requests from our Convention partners:

<i>Country</i>	<i>Number of Requests</i>
Barbados	3
Belgium	162
Denmark	29
Egypt	22
Finland	65
France	340
Israel	16
Netherlands	104
Norway	54
Portugal	3
Sweden	104
Turkey	61
United Kingdom	54
Total	1017

It may also be of interest to note how many service requests were received during the same period from countries who have not yet joined the Convention:

<i>Country</i>	<i>Number of Requests</i>
Austria	3
Brazil	4
Bulgaria	14
Cyprus	2
West Germany	106
East Germany	8
Greece	34
Guatemala	1
Kuwait	3
Libya	2
Morocco	12
Nicaragua	1
Singapore	1
Spain	5
Thailand	1
Yugoslavia	3
Total	200

In the course of receiving and processing service requests from our Convention partners, we have noted the following recurring shortcomings:

1. *General.* It bears emphasis at the outset that the Central Authority for the United States deals exclusively with *incoming* Convention requests. As a result, we receive little information concerning how well (or how poorly) American litigants are complying with the Convention requirements. For example, we have no way of knowing the number of Americans who avail themselves of the Convention or the degree of success or failure which they encounter abroad. Since the Convention is reciprocal, it would be of interest to learn how American requesting authorities are complying with the Convention. We have no doubt that other of our fellow Central Authorities share our interest in this regard. We are pleased to report that as of this writing we have not received from our counterparts abroad any real problems concerning the failure of our requesting authorities to comply with the terms of the Convention.

2. *Central Authority for the United States.* As previously noted, effective December 31, 1973, the United States Department of Justice, Washington, D.C. 20530, has been designated as the Central Authority for the United States under article 2 of the Convention. Unfortunately, some requesting authorities have apparently not learned of this change and continue to transmit their Convention requests to the Department of State. While this is not a major problem, failure to transmit Convention requests directly to us results in unnecessary delay and inconvenience to foreign requesting authorities.²

.....

On June 15, 1977, Barbara Allen Babcock, Assistant Attorney General of the Civil Division of the Department of Justice, issued to all U.S. Marshals memorandum number 386; revision number 2, providing "Instructions for serving foreign judicial documents in the United States and for

² Dept. of State File No. P77 0161-214.

processing requests by litigants in this country for service of American judicial documents abroad." The first part of the two part Instructions deals with service of foreign judicial documents in the United States under The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters as well as service in the absence of a treaty or convention. The first part includes descriptions of the responsibilities of the Department of Justice and the U.S. Marshals Service, the time limit for service, the \$15 service fee, and "mail and nail" service.

The second part of the Instructions bears the title "Service of American Judicial Documents in Foreign Countries" and outlines procedures for service under The Hague Service Convention, for service in foreign countries which have not joined The Hague Service Convention, and service of American subpoenas in foreign countries. Attached to these Instructions are several appendices quoting reservations and declarations of the parties to The Hague Service Convention, providing names and mailing addresses of foreign "Central Authorities," and setting forth sample forms for an application for the issuance of a letter of request for service in a foreign country.³

The Hague Evidence Convention

In his letter of July 11, 1977, to all States Members of The Hague Conference on Private International Law, Secretary General M. H. van Hoogstraten suggested the possibility that the discussion of The Hague Service Convention scheduled for the Special Commission meeting of November 21 to 25, 1977, may "touch, although in the subsidiary order, the field of the Convention on Taking of Evidence Abroad" in Civil or Commercial Matters done at The Hague on March 18, 1970.¹ Secretary General van Hoogstraten suggested this possibility "[s]ince some of the mechanisms" of The Hague Service Convention have also been used in The Hague Evidence Convention.

In his preparatory memorandum responding to Secretary General van Hoogstraten's inquiry, Bruno A. Ristau of the U.S. Department of Justice, which has been designated the U.S. Office of the Central Authority under Article 2 of the Evidence Convention, provided information concerning the parties to the Evidence Convention, the number of requests for evidence from countries party and not party to the Evidence Convention, and his observations on the U.S. experience with the Evidence Convention. A portion of Mr. Ristau's memorandum, which was circulated by The Hague Conference on September 18, 1977, appears below:

1. The Evidence Convention entered into force for the United States on October 7, 1972. The functions of the Central Authority for this Convention are also performed by the United States Department of Justice, Washington, D.C. 20530.

³ For full text of the Instructions, see 16 ILM 1331 (1977).

¹ 23 UST 2555, TIAS No. 7444, entered into force for the United States on Oct. 7, 1972.

2. We understand that the Convention is now in force between the United States and the following nine countries:

<i>Country</i>	<i>Entered into Force</i>
Czechoslovakia	July 11, 1976
Denmark	June 20, 1972
Finland	June 6, 1976
France	October 6, 1974
Luxembourg	September 24, 1977
Norway	October 7, 1972
Portugal	May 11, 1975
Sweden	July 1, 1975
United Kingdom	September 4, 1976

We further understand that the Evidence Convention has been signed, but not yet ratified, by: Spain (October 21, 1976); West Germany (March 18, 1970) and Italy (February 6, 1975).

3. For the period October 1, 1976—September 1, 1977, we have received evidence requests from the following countries:

<i>Country</i>	<i>Number of Requests</i>
Argentina	2
Austria	8
Belgium	1
Canada	4
Chile	1
France	11
East Germany	1
West Germany	21
Greece	1
Italy	2
Norway	10
Poland	1
Spain	7
United Kingdom	2
Venezuela	2
Total	74

(The foregoing list reflects evidence requests received from all countries regardless of whether the countries are members of The Hague Evidence Convention. Because of the liberal United States policies with respect to honoring foreign requests for evidence, American courts have also honored other evidence requests which were transmitted directly to the courts, although the number of such direct-referrals is unknown to this Department.)

4. Our experience with the Evidence Convention has been extremely gratifying. In all respects, the Convention appears to be a great step forward in the area of international judicial assistance in civil and commercial matters.²

CANALS

(U.S. Digest, Ch. 7, §7)

On September 16, 1977, President Carter sent to the U.S. Senate a letter of transmittal requesting its advice and consent to ratification of the

² Dept. of State File No. P77 0161-214.

Panama Canal Treaty and the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal which he signed with General Omar Torrijos Herrera, Head of Government of the Republic of Panama, at the headquarters of the Organization of American States on September 7, 1977.¹ The following portions of the President's letter of transmittal outline the purposes of the two treaties:

When ratified, the Treaties will establish new arrangements for operating and defending the Panama Canal, and for ensuring its continuing neutrality and accessibility to all shipping. These objectives will be achieved through a new, cooperative relationship between the United States and Panama under which the United States will continue to operate the Canal until December 31, 1999. After this period of preparation, Panama will assume control of Canal operations, with the United States sharing permanent responsibility for maintaining the Canal's neutrality.

The Treaties serve the essential interest of the United States in an efficient and safe Canal. They permit a new relationship with Panama based on friendship and mutual respect. Moreover, they remove a major obstacle to the betterment of our relations with the countries of Latin America and the Caribbean area, and will substantially improve our standing with other nations, particularly those of the developing world.

I believe that these Treaties are fair to both countries, consistent with our heritage, and right for our times. They protect United States interests in the Panama Canal for the future better than the 1903 Convention which they will replace. Undue delay in ratification could cause serious problems for our foreign relations and jeopardize our long term interests in the Canal and in the Hemisphere. Accordingly, I urge the Senate to give these Treaties early and favorable consideration.²

President Carter's letter of transmittal forwarded to the Senate the report of the Department of State concerning these two treaties. This report included a letter of submittal from Secretary Vance to President Carter dated September 15, 1977, describing the negotiating history of the treaties and their basic provisions, a schedule of all of the documents related to the treaties, a summary of the terms of these treaties, as well as the text of the treaties themselves. Portions of the letter of submittal and the schedule of documents appear below:

In my view these Treaties will protect fully the United States' interests in the future operation and security of the Panama Canal. They will provide a basis for further improvement of our relations with Panama and the other nations of the Hemisphere. Moreover, the Treaties protect not only the interests of the two signatories, but also the interest of world commerce in a Canal which functions efficiently and is permanently open to vessels of all countries on a nondiscriminatory basis.

¹ For the texts of the two treaties, see *Official Documents* section, *infra* p. 225.

² 77 DEPT. STATE BULL. 486 (1977), S. EXEC. DOC. N, 95th Cong., 1st Sess. 1 (1977).

It will be recalled that negotiations with Panama looking toward a new, mutually satisfactory relationship began in 1964. Following demonstrations in Panama in January of that year and a three-month suspension of diplomatic relations, the two countries, with the co-operation of the Organization of American States, agreed on April 3, 1964, to a Joint Declaration in which they undertook to seek the prompt elimination of the causes of conflict between them without limitations or preconditions of any kind. On September 24 of the following year, President Johnson and President Robles of Panama announced agreement to negotiate a new treaty based on certain principles, including abrogation of the 1903 Convention, recognition of Panama's sovereignty over all its territory and provision for the possible construction of a sea-level canal. President Johnson reached the decision to negotiate with Panama after consulting with Presidents Truman and Eisenhower and other leaders of both major political parties.

Draft treaties were completed in 1967 but were not signed. In 1970 the Government of Panama formally rejected those treaties and proposed new negotiations. Additional negotiations in 1971 and 1972 failed to produce agreement. Negotiations resumed in late 1973. In February 1974, Secretary of State Kissinger initialed with Panama's Foreign Minister Tack a Joint Statement of Principles to guide the negotiations, which were similar in content to those established by Presidents Johnson and Robles as guidance for the 1965-1967 negotiations. This Administration endorsed these basic concepts earlier this year, and the Treaties which Ambassadors Bunker and Linowitz have negotiated and I am submitting to you reflect those principles.

Under the new Panama Canal Treaty, the United States will operate the Canal and have primary responsibility for its defense until December 31, 1999. The Treaty grants to the United States all of the rights necessary for the operation, maintenance and defense of the Canal, including the use of specific land and water areas necessary for these purposes. United States operation and maintenance of the Canal will be carried out by the Panama Canal Commission, a new United States Government agency that will replace the present Panama Canal Company and Canal Zone Government.

Panama will participate increasingly in the operation and defense of the Canal during the duration of the Treaty, and will assume responsibility for the Canal upon expiration of the Treaty.

In addition, the Panama Canal Treaty establishes basic employment policies for the Panama Canal Commission, provides for payments to the Republic of Panama out of Canal operating revenues, provides for protection of the environment and commits the two countries to study the feasibility of constructing a sea-level canal in Panama and to deal with each other regarding construction of a new interoceanic canal.

The Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal will enter into force simultaneously with the Panama Canal Treaty. This Treaty establishes a regime of permanent neutrality of the Canal to ensure that the Canal, both in time of peace and time of war, "shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire equality."

The United States and Panama agree to maintain the regime of neutrality established in the Treaty notwithstanding the termination of any other treaties between the two countries. The Treaty does not limit in any way the measures the United States might take to ensure the maintenance of the neutrality regime. In recognition of the important contributions of the United States and Panama to the Canal, their vessels of war and auxiliary vessels shall be entitled to transit the Canal expeditiously.

The Neutrality Treaty provides for a Protocol, open to accession by all States, by which signatories would acknowledge, associate themselves with the objectives of and agree to observe and respect the regime of permanent neutrality established by that Treaty.

.....

The terms of these Treaties are implemented and supplemented by a number of separate agreements and other instruments between the United States and Panama. Additionally, arrangements have been entered into concerning continuation by United States agencies of various activities in Panama not directly related to the Canal, and efforts to provide to Panama certain loans, guaranties and credits to assist with its economic development and to strengthen its capability to contribute to the defense of the Canal.³

SCHEDULE OF DOCUMENTS ⁴

I. DOCUMENTS IMPLEMENTING THE PANAMA CANAL TREATY

Agreement in Implementation of Article III of the Panama Canal Treaty, with Annexes and Agreed Minute.
Agreement in Implementation of Article IV of the Panama Canal Treaty, with Annexes and Agreed Minute.
Maps of the Land and Water Areas for the Operation and Defense of the Panama Canal, Referred to in the Agreements in Implementation of Articles III and IV of the Panama Canal Treaty.
Exchange of Notes Relating to Postal Services.
Exchange of Notes Relating to Use of Commissary and Post Exchange Facilities.
Letter Describing Application of the Wholesale Price Index Referred to in Paragraph 4(A) of Article XIII of the Panama Canal Treaty.
Letter Regarding Termination of Article XVII of the United States-Panama Air Transport Services Agreement.

II. OTHER DOCUMENTS

Agreement on Certain Activities of the United States of America in the Republic of Panama.
Agreement Pursuant to Article VI of the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere.
Note Regarding Economic and Military Cooperation.
Exchange of Notes Relating to Air Traffic Control Services.
Note Regarding the Establishment of the Panama Bureau of the United States Foreign Broadcast Information Service.
Exchange of Notes Relating to the Gorgas Memorial Institute of

³ 77 DEPT. STATE BULL. 484 (1977).

⁴ These documents, except for the map, appear at 16 ILM 1043 (1977). The map appears at 77 DEPT. STATE BULL. 499 (1977).

Tropical and Preventive Medicine, Incorporated, and to the Gorgas Memorial Laboratory.

Exchange of Notes Relating to Scientific Activities in Panama of the Smithsonian Tropical Research Institute.

Exchange of Notes Relating to Custodianship of the Barro Colorado Native Monument by the Smithsonian Tropical Research Institute.

Subsequent to a meeting in Washington, D.C. on October 14, 1977, between President Carter and General Torrijos, the White House issued a Statement of Understanding with regard to the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal signed on September 7, 1977. The Statement of Understanding, which was also issued by the Government of Panama on October 18, 1977, deals with the rights of the parties to act against any aggression or threat directed against the Canal, nonintervention in the internal affairs of Panama, and the expeditious transit of the Canal by vessels of war.

Under the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal (the Neutrality Treaty), Panama and the United States have the responsibility to assure that the Panama Canal will remain open and secure to ships of all nations. The correct interpretation of this principle is that each of the two countries shall, in accordance with their respective constitutional processes, defend the Canal against any threat to the regime of neutrality and consequently shall have the right to act against any aggression or threat directed against the Canal or against the peaceful transit of vessels through the Canal.

This does not mean, nor shall it be interpreted as a right of intervention of the United States in the internal affairs of Panama. Any United States action will be directed at insuring that the Canal will remain open, secure and accessible, and it shall never be directed against the territorial integrity or political independence of Panama.

The Neutrality Treaty provides that the vessels of war and auxiliary vessels of the United States and Panama will be entitled to transit the Canal expeditiously. This is intended, and it shall so be interpreted, to assure the transit of such vessels through the Canal as quickly as possible, without any impediment, with expedited treatment, and in case of need or emergency, to go to the head of the line of vessels in order to transit the Canal rapidly.⁵

NEGOTIATIONS; INQUIRY; CONCILIATION; MEDIATION; GOOD OFFICES

(U.S. *Digest*, Ch. 13, §1)

On July 26, 1977, Hodding Carter III, Spokesman of the Department of State, responded during the Department's daily news briefing to a question concerning a report that Israel had announced new settlements in the occupied territories in part as follows:

We have been in touch with the Israeli Government about this report and it has informed us that it is taking action to give legal status to three existing settlements on the West Bank. It is our understanding that the former Government had refused to legalize at least one of these settlements. We have consistently made clear, including in our

⁵ *Id.* 631.

recent talks in Washington, our view that the establishment of settlements in the occupied territories is not only contrary to the Fourth Geneva Convention but also constitutes an obstacle to progress in the peacemaking process. We are deeply disappointed by this development.¹

In response to a follow-up question concerning the Fourth Geneva Convention² Mr. Carter caused to be posted on July 26, 1977, the following answer:

We are speaking of article 49 (Deportations, Transfers, Evacuations) of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, of August 12, 1949.

Article 49 speaks directly to the issue of population transfer: "The occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies."

On July 28, 1977, President Carter answered several questions concerning the Israeli announcement of settlements in the occupied territories in the following fashion:

... I think that any move toward making permanent the settlements in the occupied territories or the establishment of new settlements obviously increases the difficulty in ultimate peace.

It's not an insurmountable problem. The matter of legalizing existing settlements was a subject that was never discussed by me or Prime Minister Begin. My own concern was with the establishment of new settlements. And I let him know very strongly that this would be a matter that would cause our own Government deep concern.

This matter of settlements in the occupied territories has always been characterized by our Government, by me and my predecessors as an illegal action. . . .³

In response to a question during the daily news briefing of August 18, 1977, Spokesman Carter made the following statement concerning the announcement by Israel earlier in the week that it was extending "equal rights" to the inhabitants of the West Bank:

The full legal impact of the Israeli Government's decision, which we understand was taken in principle with details of implementation to be worked out in the coming weeks, is not yet clear. The Israeli Government has emphasized the potential benefit to the population in the occupied territories of the humanitarian aims of this decision. At the same time, however, the action creates an impression of permanence of Israel's occupation of the lands which came under Israeli control as a result of the June 1967 war, which is not helpful. In this connection we have noted with regret the statement of the Cabinet Secretary, when announcing the decision, that Israel cannot "annex the land of Israel for the people of Israel since it already belongs to them."⁴

¹ Dept. of State News Briefing, DPC 137, July 26, 1977.

² Convention Relative to the Protection of Civilian Persons in Time of War, *done* at Geneva, Aug. 12, 1949, entered into force for the United States on Feb. 2, 1956. 6 UST 3516, TIAS No. 3365, 75 UNTS 287.

³ 13 WEEKLY COMP. OF PRES. DOC. 1120-21 (Aug. 1, 1977).

⁴ Dept. of State News Briefing, DPC 153, Aug. 18, 1977.

On September 12, 1977, Spokesman Carter offered a statement "in answer to the question what and why is the United States paying so much attention to the question of the Palestinians in its Middle East discussion." The statement follows:

Along with the issues of the nature of peace, recognition, security, and borders, the status of the Palestinians must be settled in a comprehensive Arab-Israeli peace agreement. This issue cannot be ignored if the others are to be solved.

Moreover, to be lasting, a peace agreement must be positively supported by all of the parties to the conflict, including the Palestinians.

This means that the Palestinians must be involved in the peacemaking process. Their representatives will have to be at Geneva for the Palestinian question to be solved.

As cochairman of the Geneva Conference, the United States has a special responsibility for insuring the success of the conference. We have therefore been exploring with the confrontation states and Saudi Arabia a number of alternatives with regard to the participation of the Palestinians in the peace negotiations.

With respect to U.N. Resolution 242, all of the participants in the peace conference should adhere to the terms of that resolution and Resolution 338, which presently form the only agreed basis for negotiations.⁵

Set forth below is the text of the joint U.S.-Soviet statement on the Middle East, which was released by the U.S. Mission to the United Nations in New York on October 1, 1977:

Having exchanged views regarding the unsafe situation which remains in the Middle East, United States Secretary of State Cyrus Vance and member of the Politburo of the Central Committee of the Communist Party of the Soviet Union, Minister for Foreign Affairs of the U.S.S.R. A. A. Gromyko, have the following statement to make on behalf of their countries which are cochairmen of the Geneva Peace Conference on the Middle East:

1. Both governments are convinced that vital interests of the peoples of this area as well as the interests of strengthening peace and international security in general urgently dictate the necessity of achieving as soon as possible a just and lasting settlement of the Arab-Israeli conflict. This settlement should be comprehensive, incorporating all parties concerned and all questions.

The United States and the Soviet Union believe that, within the framework of a comprehensive settlement of the Middle East problem, all specific questions of the settlement should be resolved, including such key issues as withdrawal of Israeli armed forces from territories occupied in the 1967 conflict; the resolution of the Palestinian question including insuring the legitimate rights of the Palestinian people; termination of the state of war and establishment of normal peaceful relations on the basis of mutual recognition of the principles of sovereignty, territorial integrity and political independence.

⁵ Dept. of State News Briefing, DPC 179, Sept. 12, 1977.

The two governments believe that, in addition to such measures for insuring the security of the borders within Israel and the neighboring Arab States as the establishment of demilitarized zones and the agreed stationing in them of U.N. troops or observers, international guarantees of such borders as well as of the observance of the terms of the settlement can also be established, should the contracting parties so desire. The United States and the Soviet Union are ready to participate in these guarantees subject to their constitutional processes.

2. The United States and the Soviet Union believe that the only right and effective way for achieving a fundamental solution to all aspects of the Middle East problem in its entirety is negotiating within the framework of the Geneva Peace Conference, specially convened for these purposes, with participation in its work of the representatives of all the parties involved in the conflict including those of the Palestinian people, and legal and contractual formalization of the decisions reached at the conference.

In their capacity as cochairmen of the Geneva Conference, the U.S. and the U.S.S.R. affirm their intention through joint efforts and in their contacts with the parties concerned to facilitate in every way the resumption of the work of the conference not later than December 1977. The cochairmen note that there still exist several questions of a procedural and organizational nature which remain to be agreed upon by the participants to the conference.

3. Guided by the goal of achieving a just political settlement in the Middle East and of eliminating the explosive situation in this area of the world, the U.S. and the U.S.S.R. appeal to all the parties in the conflict to understand the necessity for careful consideration of each other's legitimate rights and interests and to demonstrate mutual readiness to act accordingly.⁶

During his remarks to the UN General Assembly on October 4, 1977, President Carter described U.S. consultations with representatives of Israel and the Arab nations in the search for peace in the Middle East. He spoke of Security Council Resolutions 242 and 338, mentioned some essential elements for good faith negotiations, emphasized the U.S. intention not to impose a settlement on the nations of the Middle East, and called for the resumption of the Geneva Peace Conference on the Middle East by the end of 1977. The portion of the President's speech dealing with the Middle East follows:

Of all the regional conflicts in the world, none holds more menace than the Middle East. War there has carried the world to the edge of nuclear confrontation. It has disrupted the world economy and imposed severe hardships on the people in the developed and developing nations alike. So true peace—peace embodied in binding treaties—is essential. It will be in the interest of the Israelis and the Arabs. It is in the interest of the American people. It is in the interest of the entire world.

The United Nations Security Council has provided the basis for peace in Resolutions 242 and 338, but negotiation in good faith by all parties is needed to give substance to peace.

⁶ Washington Post, Oct. 1, 1977, at 14.

Such good faith negotiations must be inspired by a recognition that all nations in the area—Israel and the Arab countries—have a right to exist in peace, with early establishment of normal diplomatic relations and economic and cultural exchanges. Peace must include a process in which the bitter divisions of generations—even centuries—hatreds, and suspicions can be overcome. Negotiations cannot be successful if any of the parties harbor the deceitful view that peace is simply an interlude in which to prepare for war.

Good faith negotiations also require acceptance by all sides of the fundamental rights and interests of everyone involved.

—For Israel this must mean borders that are recognized and secure. Security arrangements are crucial to a nation that has fought for its survival in each of the last four decades. The commitment of the United States to Israel's security is unquestionable.

—For the Arabs the legitimate rights of the Palestinians must be recognized. One of the things that binds the American people to Israel is our shared respect for human rights and the courage with which Israel has defended such rights. It is clear that a true and lasting peace in the Middle East must also respect the rights of all the peoples of the area. How these rights are to be defined and implemented is, of course, for the interested parties to decide in negotiations and not for us to dictate.

We do not intend to impose from the outside a settlement on the nations of the Middle East.

The United States has been meeting with the Foreign Ministers of Israel and the Arab nations involved in the search for peace. We are staying in close contact with the Soviet Union, with whom we share responsibility for reconvening the Geneva Conference. As a result of these consultations, the Soviet Union and the United States have agreed to call for the resumption of the Geneva Conference before the end of this year. While a number of procedural questions remain, if the parties continue to act in good faith, I believe they can be answered.⁷

During an early morning news briefing by Israeli Foreign Minister Dayan and White House Press Secretary Jody Powell, held in New York on October 5, 1977, the United States and Israel issued the following joint statement:

The United States and Israel agree that Security Council Resolutions 242 and 338 remain the agreed basis for the resumption of the Geneva Peace Conference and that all understandings and agreements between them on this subject remain in force.

Proposals for removing remaining obstacles to reconvening the Geneva Conference were developed. Foreign Minister Dayan will consult his government on the results of these discussions. Secretary Vance will discuss these proposals with the other parties to the Geneva Conference.

Acceptance of the joint United States-U.S.S.R. Statement of October 1, 1977, by the parties is not a prerequisite for the reconvening and conduct of the Geneva Conference.⁸

⁷ 13 WEEKLY COMP. PRES. DOC. 1474-75 (Oct. 10, 1977).

⁸ Statement released by Dept. of State, Oct., 5, 1977.

On October 11, 1977, the Office of Department of State Spokesman Hodding Carter III posted a press statement concerning the acceptance by the Israeli Cabinet of a working paper on convening a Geneva Conference on the Middle East. The text of this press statement appears below:

We welcome the decision announced by the Israeli Cabinet accepting the working paper. We will now be in touch with the Arab governments concerned. . . . We note, however, that what has been accepted is still a working paper which may require further negotiation after the Arab governments have given their views on it.⁹

During the daily news briefing of October 14, 1977, Spokesman Carter confirmed that the text of the working paper released on October 13, 1977, by Foreign Minister Dayan and widely reported in the press is the one agreed upon by the United States and Israel.¹⁰

As reported in the *Washington Post* in a story datelined Jerusalem, October 13, 1977, the "working paper in its entirety says" the following:

- The Arab parties will be represented by a unified Arab delegation which will include Palestinian Arabs. After the opening session, the conference will split into working groups.
- The working groups for the negotiations and conclusion of peace treaties will be formed as follows: a) Egypt-Israel, b) Jordan-Israel, c) Syria-Israel, d) Lebanon-Israel. (All the parties agree that Lebanon may join the conference when it so requests).
- The West Bank and Gaza issues will be discussed in a working group to consist of Israel, Jordan, Egypt and the Palestinian Arabs.
- The solution of the problem of the Arab refugees and of the Jewish refugees will be discussed in accordance with terms to be agreed upon.
- The agreed basis for the negotiations at the Geneva peace conference on the Middle East are U.N. Security Council Resolutions 242 and 338.
- All the initial terms of reference of the Geneva peace conference remain in force, except as may be agreed by the parties.¹¹

During that October 14 daily news briefing, Spokesman Carter indicated that the working paper had been transmitted through diplomatic channels to the Egyptian, Jordanian, and Syrian Governments because they "in the first instance, are involved" in the negotiation process. In answer to a question, Mr. Carter stated that the Lebanese Government had not received a copy of the working paper because "they were not direct participants in the process of the old Geneva Conference" nor are they directly involved "right now."¹²

On October 16, 1977, Secretary Vance entertained several questions concerning the working paper and the Middle East negotiations during an interview on the National Broadcasting Company's television show "Meet

⁹ Statement released by Dept. of State, Oct. 11, 1977.

¹⁰ Dept. of State News Briefing, DPC 202, Oct. 14, 1977.

¹¹ *Washington Post*, Oct. 14, 1977, at A-14.

¹² Dept. of State News Briefing, DPC 202, Oct. 14, 1977.

the Press." When asked if the working paper rules out the participation of the Palestine Liberation Organization in the proposed Geneva Conference, Secretary Vance answered in the negative, indicating "that there shall be a unified Arab delegation and that within the unified Arab delegation there will be Palestinians."¹³

Secretary Vance summarized recent progress in the negotiations in the following terms:

— First, everyone has now agreed that the way of including a Palestinian voice—which is absolutely necessary in the Middle East negotiations if we are to have a just and lasting peace—is to have them represented at the table. All parties have now agreed that this can be done by having Palestinians in a united Arab delegation. The question is now, which Palestinians? And that is the question which still has to be resolved.

— The second question with respect to getting to Geneva, is what should the form of organization be? We now have an increasing consensus that the way to organize it will be to have both bilateral and multilateral working groups. Before, there was substantial division, not only between Israel and the Arabs, but among the Arabs themselves. We have made good progress in narrowing the differences between the parties in that area as well.¹⁴

On October 18, 1977, Spokesman Carter made the following statement in response to a question asking whether the United States and Israel had reached an understanding concerning representation of the Palestine Liberation Organization (PLO) at a Geneva Conference:

We have reached agreement on a minute summarizing a part of our conversation of October 4th with Foreign Minister Dayan. I can't go into detail about our diplomatic exchanges, which are still clearly at a delicate stage, but let me make two points about this whole matter.

At our meeting in New York on October 4th, . . . Secretary Vance confirmed that it remains our position that any new participants in the Geneva conference must be agreed to by all the original parties.

. . . Israel, like the other parties, therefore, has the right to object to any new participants. In this connection, we have been fully informed of Israel's objection to participation of the PLO—which is also no secret. As the Secretary suggested on "Meet the Press" Sunday, the question of how the Palestinians would be represented at Geneva remains to be worked out. We will be discussing this further with both the Arabs and the Israelis.¹⁵

MILITARY ASSISTANCE AND SALES (U.S. *Digest*, Ch. 14, §9)

On August 19, 1977, Under Secretary Benson amended the regulations concerning International Traffic in Arms to further strengthen controls on the export of defense articles and services from the United States. Her

¹³ 77 DEPT. STATE BULL. 579 (1977). ¹⁴ *Id.* 580-81.

¹⁵ Dept. of State News Briefing, DPC 204, Oct. 18, 1977.

introductory statement read in part as follows:

... This amendment establishes means for imposing civil penalties for violation and for disqualifying from munitions exports persons who jeopardize the integrity of the regulatory system. The procedures are designed to ensure administrative fairness in deciding whether a civil penalty or disqualification is appropriate in each individual case.¹

Parts 123, 124, 127, and 128 of Title 22 of the *Code of Federal Regulations* were amended effective September 1, 1977. Portions of some of the amendments follow:

§124.12. Agreement disapproval and revocation, suspension or amendment of approval.

(a) A manufacturing license or technical assistance agreement may be disapproved, and a previously granted approval of such an agreement may be revoked, suspended or amended by the Department of State without prior notice whenever the Department deems such action to be advisable in furtherance of (1) World peace; (2) The security of the United States; (3) The foreign policy of the United States; (4) Whenever the Department of State believes that 22 U.S.C. 2778 or any regulation contained in this subchapter, has been violated; or (5) Whenever a party to the agreement has been debarred under §127.07 of this chapter or suspended under §127.08 of this chapter or whenever an order of debarment or suspension has been made applicable to such a party under §127.09 of this chapter, or whenever a person who has been debarred or suspended has a significant interest in the transaction.

§127.01. Violations in general.

(a) It is unlawful to export or attempt to export from the United States any article or technical data for which a license or approval is required by this subchapter without first obtaining the required license or written approval from the Department of State.

§127.02. Misrepresentation and omission of facts.

(a) It is unlawful to use any export or intransit control document containing a false statement or misrepresenting or omitting a material fact for the purpose of exporting any article or technical data for which license approval is required by this subchapter. . . .

§127.07. Debarment.

(a) *Debarment orders.* The Director, Bureau of Politico-Military Affairs, is authorized to debar (prohibit) any person from participating directly or indirectly in the export of articles or technical data for which license or approval is required by this subchapter for any of the causes listed below when to do so is important for the maintenance of the regulatory scheme. The following are cause for debarment.

(1) Conviction of a criminal offense as defined in §127.03.

(2) The violation of 22 U.S.C. 2778 or of any rule or regulation issued thereunder when such a violation is of such character as to provide a reasonable basis to believe and determine that the violator cannot be relied upon to comply with the statute, rules, or regulations in the future, and when such a violation is established in accordance with §§128.02 through 128.16 of this chapter.

(3) The violation of any provision of 22 U.S.C. 2778, or of any rule

¹ 42 Fed. Reg. 42,851 (1977).

or regulation issued thereunder when, because it is a second or subsequent violation, it impels the belief that the violator cannot be relied upon to comply with the statute, rules or regulations in the future and when the violations are established in accordance with §§128.02 through 128.16 of this chapter.

(4) A decision by the Office of Export Administration, Bureau of East-West Trade of the Department of Commerce, to deny, suspend, or revoke export privileges to the person under 15 CFR 388.1 and the Export Administration Act of 1969 or to exclude the person from practice before the Bureau of East-West Trade under 15 CFR 390.2 and the Export Administration Act of 1969, where the Hearing Commissioner makes a further finding that the facts reasonably impel a decision that they form a reasonable basis for concluding that the person cannot be relied upon to comply in the future with 22 U.S.C. 2778, or with the rules or regulations issued thereunder.

§127.08. Interim suspension.

(a) *Interim suspension orders.* The Director of the Office of Munitions Control is authorized to order the interim suspension of any person, prohibiting that person from participating directly or indirectly in the export of any article or technical data for which a license or approval is required by this subchapter, when he believes grounds for debarment as defined in §127.07 exist, and where and to the extent he finds interim suspension is reasonably necessary to protect world peace or the national security or foreign policy of the United States, pending final disposition of debarment proceedings. . . .

§127.09. Applicability of orders.

For the purpose of preventing evasion, orders of the Director, Bureau of Politico-Military Affairs, debarring a person under §127.07, and orders of the Director, Office of Munitions Control, suspending a person under §127.08, may be made applicable to any other person who may then or thereafter (during the term of the order) be related by affiliation, ownership, control, position of responsibility, or other commercial connection. Appropriate notice and opportunity to respond to charges will be given.

§127.10. Civil penalty.

(a) The Director, Bureau of Politico-Military Affairs, is authorized to impose a civil penalty in an amount not to exceed that authorized by 50 U.S.C. 2405(c) for each violation of 22 U.S.C. 2778, or any regulation, order, license or approval issued thereunder. . . .²

The amendment of Part 123 of Title 22 of the *Code of Federal Regulations* revised Section 123.05 to permit the Department of State to deny, revoke, suspend, or amend licenses for unclassified arms, ammunition, and implements of war without prior notice on substantially the same grounds that a manufacturing license or technical assistance agreement may be disapproved in the amended Section 124.12.³ The amendments to Part 128 provide for administrative procedures for debarment proceedings.⁴

² *Id.* 42,852-53.

³ *Id.* 42,851-52.

⁴ *Id.*

JUDICIAL DECISIONS

ALONA E. EVANS

International air transport—carrier employees' liability—treaty interpretation—Warsaw Convention of 1929

REED v. WISER. 555 F.2d 1079.

U.S. Court of Appeals, 2d Cir., April 26, 1977.

Plaintiffs were the administrators and executors of persons who had been killed in the crash of a Trans World Airlines aircraft off the coast of Greece as a result of a bomb explosion on board. They brought suit for damages against the President of Trans World Airlines and the Vice-President of Audit and Security, alleging that the disaster had been caused by defendants' negligence in failing to maintain adequate security controls over the aircraft. Denying the allegation of negligence, defendants invoked the provisions on carrier liability of the Convention of 1929 for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention) (49 Stat. 3000, TS No. 876, 137 LNTS 11), as modified by the Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol (Montreal Agreement) (Agreement CAB 18990, approved by order E-28680, May 13, 1966),¹ which limited carrier liability to \$75,000 per passenger unless willful misconduct on the part of the carrier could be shown. Plaintiffs moved to strike this defense. The District Court granted plaintiffs' motion (414 F.Supp. 863 (1976)) and certified to the Court of Appeals the question whether defendants were entitled to assert the Warsaw Convention-Montreal Agreement limits on liability (28 U.S.C. §1292(b)). The Court of Appeals reversed the District Court's decision and remanded the case with instructions to reinstate this defense.

Circuit Judge Mansfield observed that suits arising out of international aviation disasters are usually directed against the owner, operator, or manufacturer of the aircraft. Under both common and civil law doctrine, an action might also be brought against the pilot. If such suits could be maintained against the employees of carriers generally and the liability limits of the Warsaw Convention were not available to them, carriers would have to indemnify their employees with a resulting increase in the cost of air transport.

The Court then carefully examined the official French texts and the unofficial English texts of Articles 17, 22, and 24 of the Convention, which deal with carrier liability for death or injury to passengers, as well as commentaries on these texts. Circuit Judge Mansfield found that "the Convention was intended to act as an international uniform law . . . and therefore must be read in the context of the national legal systems

¹ Footnote by Court; other footnotes by Court omitted.

of all of its members.”² Within this frame of reference, the term “transporteur” (carrier) as used in the Convention would comprehend not only the carrier as a corporation per se but also the employees who discharged its functions. In the opinion of the Court, this interpretation was more appropriate than the common law doctrine of separation of the liability of the agent from that of the principal.

The use of the word “case” presented another problem. It was translated in Article 17 as “event” and in Article 24 as “cases.” The Court considered that the latter translation was ambiguous in that it suggested a lawsuit, whereas “events” would be more accurate in the contexts of Articles 24 and 17. Consequently, Article 24 could be interpreted as “imply[ing] that the ‘conditions and limits set out in this convention’ . . . apply to the present case, since (1) the suit against the carrier’s employees is an ‘action for damages, however founded’ (Art. 24(1)) and (2) it seeks damages sustained in the event of the death . . . of a passenger . . . on board the aircraft . . . (Art. 17).”³ Admittedly, the history of the Convention did not directly support this interpretation, but neither did it negate this interpretation. The issue was clarified in 1955 by the adoption of an amendment, Article 25A, which recognized that a carrier’s employees would be covered by the Convention’s limits on liability.

Circuit Judge Mansfield did not agree with the District Court’s view that the United States was not bound by Article 25A because it was contained in the Hague Protocol of 1955, which the United States signed but did not ratify. The Court of Appeals pointed out that the U. S. objection to the Protocol was not directed to Article 25A but to the increase of the limit on absolute carrier liability to \$16,600, which was too low a figure in the opinion of the United States. This impasse was resolved by the conclusion in 1966 of the Montreal Agreement, which contained the \$75,000 limit.

The Court then inquired into the matter of whether the provisions at issue could be clarified by a consideration of the objectives of the Warsaw Convention. The history of the Convention showed that the fundamental purpose of Article 22 “was to fix at a definite level *the cost to airlines* of damages sustained by their passengers and of insurance to cover such damages,”⁴ and that this purpose had not changed over the years since 1929. Circuit Judge Mansfield said:

To permit a suit for an unlimited amount of damages against a carrier’s employees for personal injuries to a passenger would unquestionably undermine this purpose behind Article 22, since it would permit plaintiffs to recover from the carrier through its employees damages in excess of the Convention’s limits.

Faced with indemnification as a modern-day reality, our function, in the absence of proof that the language of Articles 22 and 24 was not intended to apply to a carrier’s employees, should be to interpret these provisions in a manner that will carry out the framers’ intent.⁵

² 555 F.2d 1079, 1083.

³ *Id.* 1084.

⁴ *Id.* 1089 (emphasis by Court).

⁵ *Id.* 1089–90.

The Court continued:

Another fundamental purpose of the signatories to the Warsaw Convention, which is entitled to great weight in interpreting that pact, was their desire to establish a uniform body of world-wide liability rules to govern international aviation which would supersede with respect to international flights the scores of differing domestic laws, leaving the latter applicable only to the internal flights of each of the countries involved.⁶

The Convention clearly distinguished between those aspects of litigation of international aviation disasters in which the common rules set out in the Convention would apply (e.g., venue, burden of proof, statute of limitations) and those which would be governed by the law of the forum (e.g., contributory negligence, fault equivalent to *dol*). To follow the District Court's decision would be to change the Convention's objective of establishing a uniform system of liability. Circuit Judge Mansfield concluded that "[w]e believe, on the other hand, that a construction of the language of Articles 22(1) and 24 which extends the Convention's liability limitation to passenger claims against employess not only reflects the plain meaning and purpose of the French text of these articles but accomplishes all of the Convention's objectives."

Treaties—enforcement of treaty obligations—Single Convention on Narcotic Drugs of 1961

NATIONAL ORGANIZATION FOR REFORM OF MARIJUANA LAWS (NORML) v. DRUG ENFORCEMENT ADMINISTRATION, U.S. DEPARTMENT OF JUSTICE. 559 F.2d 735.

U.S. Court of Appeals, D.C. Cir., April 26, 1977.

The National Organization for the Reform of Marijuana Laws (NORML) and two other organizations petitioned the Director of the Bureau of Narcotics and Dangerous Drugs (BNDD) to remove marijuana from control under the Controlled Substances Act of 1970 (CSA) (21 U.S.C. §801 *et seq.*) or, in the alternative, to transfer marijuana from Schedule I (no medical use, severe penalties) to Schedule V (medical use, low penalties). The Director of BNDD, as delegee of the Attorney General, refused to accept the petition on the ground that any change in the legal status of marijuana would violate the terms of the Single Convention on Narcotic Drugs of 1961 (Convention) (18 UST 1407, TIAS No. 6298, 520 UNTS 204). He also stated that he had the authority under the Convention to reschedule drugs irrespective of procedures provided in Section 201(a)-(c) of the CSA (21 U.S.C. §811(a)-(c)). On review by the Court of Appeals, this decision was reversed, and the case was remanded to the agency for consideration of the merits (*National Organization for Reform of Marijuana Laws (NORML) v. Ingersoll*, 497 F.2d 654 (D.C. Cir. 1974)). After hearings, the Administrative Law Judge held that pursuant to the Convention "cannabis" and "cannabis resin" could be re-scheduled to CSA Schedule II, cannabis leaves to CSA Schedule V, and

⁶ *Id.* 1090.

⁷ *Id.* 1092.

cannabis seeds and "synthetic cannabis" could be decontrolled. He also held that the agency, now entitled the Drug Enforcement Administration (DEA), should follow the procedures set out in the CSA. NORML appealed from this ruling and petitioned for full rescheduling. The Acting Director of DEA denied the petition and held that under the Convention cannabis and cannabis resin could be rescheduled to CSA Schedule II, separated cannabis leaves could be rescheduled to CSA Schedule III or IV, and that synthetic tetrahydrocannabinol (THC) and cannabis seeds incapable of germination could be decontrolled. He made no disposition of cannabis seeds which were capable of germination. Pursuant to his discretionary powers and in accordance with a letter from the Food and Drug Administration, HEW, to the effect that marijuana had no medical use in the United States, the Acting Director decided to leave marijuana on Schedule I. He also took the view that in arriving at this conclusion, it was not necessary to decide whether Section 201(d) (21 U.S.C. §811(d))¹ required the Attorney General to consult HEW about the status of a substance included in the Convention.

NORML appealed, asking for the reversal of the Acting Director's decision and remand of the case for further proceedings, including the matter of whether a rescheduling petition should be submitted to HEW. DEA argued *inter alia* that where the rescheduling of drugs subject to international control is concerned, under Section 201(d) it was not necessary to use the procedure set out in Section 201(a)-(c). The Court of Appeals remanded the case.

Considering the issue of Section 201(d), Circuit Judge Wright pointed out that the legislative history of the CSA showed that decisionmaking with respect to the rescheduling of drugs was supposed to be shared by the Attorney General with HEW, the latter Department providing the medical and scientific information relative to any decision. The letter from a member of the staff of the Food and Drug Administration to the Acting Administrator of DEA would not satisfy the referral and hearing procedures of Section 201(a)-(c). Section 201(d) would allow the Attorney General to reschedule drugs without consultation with HEW only where such an act was required by the Convention. As the Court saw the process, the Attorney General would first determine a minimum schedule of control in terms of the Convention and any further restrictions would be determined on consultation with HEW.

With regard to the scheduling of cannabis and cannabis resin, both parties agreed that these substances which were listed in Schedules I and IV of the Convention could be properly listed under Schedule II of the

¹ Section 201(d):

If control is required by United States obligations under international treaties, conventions, or protocols in effect on the effective date of this part, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by subsection (a) of this section or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section.

(Quoted by Court; footnotes by Court omitted).

CSA. The parties also agreed that listing these substances in Schedule II of the CSA met the requirements of the Convention. The decision to place these substances in this schedule rather than to create a separate schedule for them, as demanded by NORML, was within the scope of the Attorney General's discretion. Circuit Judge Wright found, however, that the Acting Administrator's decision to place cannabis leaves without tops in CSA Schedule III or IV rather than in Schedule V was not based upon sufficient evidence and should have been supported by medical and scientific evaluations from HEW, pursuant to Section 201(a)-(c).

As for cannabis seeds without tops, the Court pointed out that the Convention did not specifically control this substance. In view of the fact that the matter was left to the discretion of member states, the Court found that the Acting Director properly ordered decontrol of seeds incapable of germination while retaining control over seeds capable of germination; however, the Court stated that determination of the schedule for the latter type of seed should be made in consultation with HEW.

Synthetic THC was not subject to control under the Convention, and the Acting Director did not make a decision regarding it on the ground that it was not at issue here. As this conclusion was apparently based solely on the fact that NORML had not filed a petition respecting the rescheduling of THC, the Court ordered that petitioner be allowed to do so in order to complete these proceedings.

Circuit Judge Robb, dissenting, took the view that the Attorney General had broad discretionary powers over the scheduling of controlled substances under the Convention and that the CSA "[did] not limit this discretion when more than one schedule would satisfy the country's treaty commitments."²

Consuls—standing to intervene in suit—Consular Convention with Mexico of 1942—Vienna Convention on Consular Relations of 1963

DUPREE v. UNITED STATES. 559 F.2d 1151.
U.S. Court of Appeals, 9th Cir., Aug. 25, 1977.

Plaintiffs, three Mexican nationals who were being held in prison as material witnesses, brought an action to compel the United States to pay them \$20 per day for each day of court attendance instead of a \$1.00 per day and to reimburse them for attorneys' fees. In the course of the proceedings, the Mexican Consul at San Diego sought to intervene in the action (Fed.R.Civ. P 24(a)) on behalf of plaintiffs and "all other Mexican nationals 'similarly detained by the United States authorities in prison for want of security for their appearance' from January 1969 to October 1974."¹ The District Court dismissed the complaint for want of prosecution and denied the Consul's motion on the ground that he lacked standing to intervene in the case. On appeal, the Court of Appeals affirmed this decision.

Circuit Judge Sneed pointed out that a party asserting standing in

¹ 559 F.2d 1151, 1153.

² 559 F.2d 735, 758.

federal litigation must show that he has sustained an injury or the threat of injury by the action about which he is complaining and, where a class action is being brought, that he is a member of the affected class. By statute, and presumably by treaty, an injured party could be authorized to sue on behalf of third parties or to effectuate a "public interest." In the opinion of the Court, the Consul did not have standing under general international law to intervene on behalf of plaintiffs. Although the Consular Convention of 1942 with Mexico (57 Stat. 800, TS No. 985, 125 UNTS 301) authorized a consul to "assist" his nationals in judicial proceedings in the receiving state (Art. VI(2)(d)), "assist" could not be interpreted as comprehending intervention. This view was in accord with a memorandum which the Department of Justice had drafted in conjunction with the Department of State and had sent to the Court. Circuit Judge Sneed also pointed out that according to Article 5(1) of the Vienna Convention of 1963 on Consular Relations (21 UST 77, TIAS No. 6820, 596 UNTS 261) a consul in representing his nationals would be governed by the procedural requirements of the receiving state.

United Nations—whether Security Council resolution is self-executing

DIGGS v. RICHARDSON. 555 F.2d 848.

U.S. Court of Appeals, D.C. Cir., Dec. 17, 1976.

Plaintiffs sought judicial enforcement of UN Security Council Resolution 301 which provided, in effect, that UN members should have no dealings with South Africa from which it might be inferred that they had recognized South African control over Namibia.¹ It was argued on behalf of defendant that plaintiffs lacked standing, that the question raised was political in nature, that UN resolutions were not enforceable as law, and that this resolution did not confer enforceable rights because it was not self-executing. The District Court dismissed the suit. On appeal, the Court of Appeals affirmed this decision.

Circuit Judge Leventhal found that plaintiffs lacked standing to bring the action. With regard to the legal status of the resolution, the Court observed that an international agreement is self-executing if the intent of the parties so indicates and that it is the function of a court to make the necessary determination of intent. In the opinion of the Court, the provisions of the resolution did not confer rights upon citizens which were judicially enforceable. It appeared to be addressed to governments; hence its enforcement would fall within the area of political rather than judicial action.

Jurisdiction—suit by unrecognized government—Republic of Vietnam

REPUBLIC OF VIETNAM v. PFIZER, INC. 556 F.2d 892.

U.S. Court of Appeals, 8th Cir., June 15, 1977.

The Republic of Vietnam filed a suit against certain American drug companies in 1970, alleging that defendants had violated the antitrust

¹26 U.N. SCOR, 1598th Meeting 7 (1971). Footnote by Court; other footnotes by Court omitted.

laws in the sale of broad spectrum antibiotics. The government of the Republic surrendered to North Vietnamese forces in April 1975; the territory of the Republic was incorporated into the territory of North Vietnam in July 1976, to form the Socialist Republic of Vietnam, an entity which has not been recognized by the United States. In September 1975, defendants moved to dismiss this action on the ground that plaintiff lacked the legal capacity to maintain this suit. The District Court dismissed the suit with prejudice. On appeal, the Court of Appeals affirmed this decision.

In a per curiam opinion, the Court pointed out that "[t]he law is well settled that a foreign government that is not recognized by the United States may not maintain suit in state or federal court."¹ Recognition of a foreign government is a matter for decision by the executive branch, although the legal consequences of a grant or refusal of recognition would be determined by the courts. In a case such as this one, a court might dismiss the action or suspend it *sine die*, pending future recognition. To plaintiff's contention that the District Court should have suspended the action, the Court of Appeals responded that the decision rested upon the discretion of the trial court and would not be set aside unless an abuse of that discretion could be shown, which plaintiff was unable to do.

*Jurisdiction—protection of trademarks—service of process—alien defendant
—“minimum contacts” test—reach of Lanham Act*

WELLS FARGO & COMPANY V. WELLS FARGO EXPRESS COMPANY. 556 F.2d 406.

U.S. Court of Appeals, 9th Cir., April 22, 1977.

The first plaintiff, a California corporation, was engaged in international business activities, including banking, trust services, toy manufacturing, restaurant business, and the travel agency business. These subsidiary enterprises used the name "Wells Fargo" in various forms in their activities. This name was registered in the United States under the Lanham Act (15 U.S.C. §§1051-1127) and in certain foreign countries. The second plaintiff, a Delaware corporation, used "Wells Fargo" as the trademark in its armored car and protective services business. Plaintiffs complained that defendant, Wells Fargo Express Co., A.G. (A.G.), a Liechtenstein corporation which was headed by a German national who resided in Gibraltar, and which engaged in the business of money lending, was using "Wells Fargo" in its activities or those of its subsidiaries in Europe and the United States. The other defendant, Wells Fargo Express Co. (Express), a Nevada corporation, had been established in 1961 for the purpose of issuing travelers checks but had apparently engaged instead in research and development of electronic protective devices. In their original suit in 1970, plaintiffs had sought damages and injunctive relief against Express. Shortly after this suit was filed, Express changed its

¹ 556 F.2d 892, 894, citing *Guaranty Trust Co. v. United States*, 304 U. S. 126 (1938) (footnotes by Court omitted).

name and all of A.G.'s shares therein were transferred to a private individual. The District Court (D. Nev.) held that it had both personal and subject-matter jurisdiction over plaintiffs' initial suit against Express. In 1971, however, plaintiffs filed an amended complaint naming A.G. as a defendant. Service was made on A.G. in Liechtenstein pursuant to Fed.R.Civ.P. 4(e) and 4(i)(1)(D) and Nev. Rev. Stat. §14.065. A.G. notified the District Court that it would not appear on the grounds that the Court lacked personal jurisdiction over it. The District Court decided that it did not have personal jurisdiction over A.G. or subject-matter jurisdiction over the complaint under the Lanham Act (28 U.S.C. §1338(a)), and, although diversity jurisdiction could be shown (28 U.S.C. §1332), the problem of determining applicable foreign law warranted a finding of *forum non conveniens* (358 F.Supp. 1065 (1973)). On appeal, the Court of Appeals vacated the judgment of the District Court and remanded the case for further proceedings.

With regard to personal jurisdiction over A.G., the District Court had ruled that A.G. would not be liable to service of process solely on the ground that it owned Express, which was doing business in Nevada. Circuit Judge Choy pointed out, however, that beginning with *International Shoe Co. v. Washington* (326 U.S. 310 (1945)), it has become the rule that:

If the defendant corporation has sufficient deliberate "minimum contacts" with the forum state, a court may acquire *in personam* jurisdiction over it in actions which arise from those forum contacts. If, however, a corporation's activities in the forum are so "continuous and systematic" that the corporation may in fact be said already to be "present" there, it may also be served in causes of action unrelated to its forum activities.¹

The fact that A.G. made a \$10,000 loan to Express in Nevada was sufficient to establish the necessary contact upon which an action could be brought by plaintiffs. On the other hand, two loans made by A.G. in California would not meet this jurisdictional test.

Plaintiffs contended that A.G. could be reached through Express's activities in Nevada on the theory that Express acted as the "special agent" or "instrumentality" of A.G. in Nevada. The Court considered that this argument should have been examined by the District Court in the light of the Nevada long-arm statute. Similarly, the trial court should have examined the effect of the transfer of Express's shares to a private owner on A.G.'s relationship to Express and whether the theory of alter ego liability would admit a cause of action against A.G.

With regard to plaintiffs' desire to reach A.G. not only for alleged wrongs attributable to its minimum contacts with Nevada but also for all wrongs which A.G. might have committed against them outside Nevada, both in the United States and in foreign countries, the Court pointed out that plaintiffs would have to show that A.G. was "present" in Nevada and hence subject to the state's general jurisdiction. As plaintiffs appeared

¹ 556 F.2d 406, 413.

to have some difficulty in supporting their argument about A.G.'s presence, they resorted to the theory that Express, although apparently an independent corporation, was, in fact, the "general agent" of A.G. in Nevada, so that its activities could be attributed to A.G., thus bringing A.G. under the state's general jurisdiction as to A.G.'s activities wherever they might take place. In the opinion of the Court, there was ample authority for this theory of general agency, so that service on Express could be treated as service on A.G., provided that plaintiffs could show that A.G. was carrying on "continuous and systematic" activities in Nevada in the form of Express's activities there.

Another basis for personal jurisdiction over A.G. relative to its activities anywhere which was offered by plaintiffs was the argument that Express was not an independent operator but only the "veil" for A.G. and hence that business activities carried on by Express constituted "continuous and systematic" activities by A.G. so that A.G. could be reached under Fed. R.Civ.P. 4(d)(3) and 4(f). Circuit Judge Choy observed that "the same factors which would demonstrate an 'alter ego' relationship between a corporation and its shareholders for purposes of holding the shareholders liable for the unmet obligations of the corporation are for the most part relevant in the jurisdictional context as well,"² and that this was another aspect of the "minimum contacts" theory which the trial court should have considered.

As to subject-matter jurisdiction under the Lanham Act, the District Court had found that, whereas the intrastate activities of Express could be reached if they could be shown to have had an adverse effect upon the interstate activities of plaintiffs, the foreign activities of A.G. could only be reached if all of the following factors could be shown:

- (1) Defendant's conduct must have had a substantial effect on United States commerce; (2) defendant must be a United States citizen, as the United States has broad powers to regulate the conduct of its citizens in foreign countries; (3) there must be no conflict with trademark rights established under the foreign law.³

As these factors could not be shown with regard to A.G., the District Court found no subject-matter jurisdiction. In the opinion of Circuit Judge Choy, relying particularly upon *Timberlane Lbr. Co. v. Bank of America, N.T. & S.A.* (549 F.2d 597 (9th Cir. 1976)), the District Court was in error in interpreting the extraterritorial scope of the Lanham Act in terms of the "locus of the activity sought to be reached" whereas the focus should be on "the nature of its effect on that commerce which Congress may regulate."⁴ The "effect" need not be "substantial," as the District Court had held, nor was it necessary that all three factors cited be present in order to decide the issue.

With regard to plaintiffs' argument that A.G.'s American activities could

² *Id.* 425-26.

³ *Id.* 427.

⁴ *Id.* 428.

be examined separately from its foreign activities, the Court observed:

If anything, judging A.G.'s American activities as part of its overall infringing scheme under the test of *Timberlane*—which was fashioned in the context of activities that were primarily foreign and were carried out by defendants of both American and foreign nationalities, see 549 F.2d at 615—might make it easier for plaintiffs to attack the entire scheme of A.G. than if the domestic and foreign activities of A.G. are viewed separately. In any event, of course, A.G.'s domestic activities are clearly reachable, and the district court on remand should explore possible violations of the Lanham Act arising therefrom.⁵

The whole issue of subject-matter jurisdiction required examination in the light of the recent decision in *Timberlane*. The Court concluded that once the jurisdictional issues had been resolved by the District Court, that court could consider whether or not Nevada constituted a convenient forum for litigation of the merits.

Jurisdiction—exclusion of ship from port for reasons of national security—sovereign immunity—Convention on Facilitation of International Maritime Traffic of 1965—political question

CANADIAN TRANSPORT CO. v. UNITED STATES. 430 F.Supp. 1168.
U.S. District Court, D.D.C., April 26, 1977.

Plaintiffs, the Canadian charterer and Belgian subcharterer of the *Tropwave*, a ship which was owned by a Swiss corporation and registered in Singapore, brought an action for damages for expenses incurred when the ship was denied entry into Norfolk, Va., because its crew was composed of Polish nationals whose presence would constitute a risk to United States security according to the Special Interests Security program. Plaintiffs, who had been unaware of the existence of this program, had been compelled to send the ship to Baltimore to pick up an appropriate crew so that it could dock in Norfolk. After loading coal at Norfolk, the *Tropwave* returned to Baltimore to pick up the Polish crew before continuing to its next destination. Defendant moved for summary judgment. The District Court granted this motion.

In a memorandum opinion, District Judge Pratt pointed out that plaintiffs' claim for monetary relief could not be brought under the Administrative Procedure Act (5 U.S.C. §706) which only provides equitable relief nor under the Federal Tort Claims Act which bars a claim for tortious interference with contract rights unless sovereign immunity has been waived (28 U.S.C. §2680(h)). The action could, however, be brought under the Suits in Admiralty Act (46 U.S.C. §§741-52). The Court found that the claim here was barred by sovereign immunity on both the discretionary or planning level and the operational level.

Plaintiffs also argued that exclusion of the ship from the port violated the terms of the Convention of 1965 on Facilitation of International Maritime Traffic (18 UST 411, TIAS No. 6251, 591 UNTS 265). In the opinion

⁵ *Id.* 430.

of the Court, this contention could not be sustained. Judge Pratt said:

[A] federal court has no inherent power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation if the Government of the United States, as a sovereign power, chooses to disregard it. . . . This is a political question for which there is a textually demonstrable constitutional commitment to the Executive and Legislative branches.¹

Finally, the Court observed that the doctrine of sovereign immunity barred plaintiffs' claim that their rights under the Fifth Amendment had been violated. The Court concluded that plaintiffs' only recourse was to seek relief from the political branches of the federal government.

Jurisdiction—service upon foreign shipping corporation—necessary minimum contacts

GREVAS v. M/V OLYMPIC PEGASUS. 557 F.2d 65.

U.S. Court of Appeals, 4th Cir., June 7, 1977. Rehearing and rehearing en banc denied, Aug. 5, 1977.

Plaintiff, a seaman of Greek nationality, was injured while serving on the *M/V Olympic Pegasus*, a ship owned by a Panamanian corporation and registered in Liberia. The injury occurred while the ship was en route from Odessa to Norfolk. Plaintiff was treated in Norfolk. After the ship had left he remained there until he had recovered, whereupon he returned to Greece. Plaintiff sued defendant shipowner for damages for personal injuries, failure to treat them, maintenance, and wages. Defendant moved to quash service of process and to dismiss for want of personal jurisdiction (Fed.R.Civ.P. 12(b)(2)), arguing that as the corporation maintained no resident agent in Virginia and none of its officers or stockholders was an American national, it had no contacts with Virginia for purposes of jurisdiction. The District Court granted defendant's motion. On appeal, the Court of Appeals affirmed this decision.

Senior District Judge Thomsen (D.Md., sitting by designation) observed that service of process was made upon defendant's New York agent and the Virginia Secretary of State as statutory agent for defendant under the Virginia "long-arm" statute (Code of Virginia, §§8-81.2, 81.3) pursuant to plaintiff's claim for unpaid wages which, if granted, would vest the court with jurisdiction over plaintiff's other claims. The Court of Appeals agreed with the District Court that plaintiff had not been able to support his claim to overtime wages, based upon an alleged oral agreement with the chief mate, which was his only ground for a wage claim. In the opinion of the Court, plaintiff's three months in a federal hospital in Norfolk and the occasional visits of the ship to Norfolk to pick up cargo constituted contacts which were too slight to meet the necessary "minimum contacts" test upon which service of process under the Virginia statute (Code of Virginia, §8-60) or Rule 4, Fed.R.Civ.P., could be made (*See International Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

Circuit Judge Widener voted to grant rehearing en banc.

¹ 430 F.Supp. 1168, 1172 (footnotes by Court omitted).

Extradition—whether bail should be granted pending extradition proceedings

BEAULIEU v. HARTIGAN. 430 F.Supp. 915.
U.S. District Court, D. Mass., March 14, 1977.

Petitioner, who was being held for extradition at the request of Canadian authorities, sought his release on bail pending extradition proceedings. The District Court granted bail. The Court of Appeals reversed this decision and requested the District Court to hold further hearings on the advisability of bail. The District Court reaffirmed the order for bail.

District Judge Tauro, in a memorandum opinion, pointed out that the Supreme Court in *Wright v. Henkel*, 190 U.S. 40 (1903), had approved of the grant of bail to persons being held for extradition only in "special circumstances."¹ In the opinion of Judge Tauro,

[this doctrine] though still viable, must be viewed in the light of modern concepts of fundamental fairness, as providing a district judge with flexibility and discretion in considering whether bail should be granted in these extradition cases. The standard of scrutiny and concern exercised by a district judge in an extradition case should be greater than in the typical bail situation, given the delicate nature of international relations. . . . Fundamentally it is a judgment call by the district court based on the totality of the circumstances, including the extremely important consideration of this country's treaty agreements with other nations.²

Aliens—deportation—plea of political persecution

MARTINEAU v. IMMIGRATION & NATURALIZATION SERVICE. 556 F.2d 306.
U.S. Court of Appeals, 5th Cir., July 22, 1977.

Petitioner, a Haitian national, entered the United States with a tourist visa in 1970. Thereafter, she took a position and married an American citizen. Her effort to be classified for immigration purposes as the wife of an American citizen was frustrated when her husband deserted her. After petitioner was found deportable for overstaying her visa (8 U.S.C. §1251(a)(2)), she applied for the reopening of the immigration proceedings and for withholding of deportation on the grounds that she feared political persecution if she returned to Haiti (8 U.S.C. §1253(h)). Her petition to withhold deportation was denied after a hearing in which the evidence included a telegram from the Department of State which indicated that there were no grounds for granting her asylum in the United States. The Board of Immigration Appeals affirmed this decision. On appeal, the Court of Appeals affirmed the Board's decision.

In a per curiam opinion, the Court pointed out that petitioner had the burden of proof as to her contention that she would be subjected to political persecution in Haiti (8 C.F.R. §242.17(c)). Petitioner offered no evidence in support of this contention beyond conjecture, nor could she show any activities in Haiti, such as membership of a political party or

¹ 430 F.Supp. 915, 916 (footnotes by Court omitted).

² *Id.* 917.

of the armed forces, which might lead to persecution. The Court observed that the telegram from the Department of State could be properly entered in the record as further evidence of petitioner's failure to prove her claim, although it would not constitute the basis for the immigration judge's decision.

Aliens—permanent residents—employment on public construction jobs

C.D.R. ENTERPRISES, LTD. v. BOARD OF EDUCATION OF THE CITY OF NEW YORK. 412 F.Supp. 1164.

U.S. District Court, E.D.N.Y., March 24, 1976.

Aff'd U.S. Supreme Court, 97 S.Ct. 721 (1977).

Plaintiffs were contractors who had contracts with New York City for painting public school buildings. They sought a judgment declaring that Section 222 of the New York Labor Law was unconstitutional because it forbade the employment of resident aliens on such jobs, as well as injunctions against the cancellation of their contracts. A three-judge District Court found that the statute violated the equal protection clause of the Fourteenth Amendment and granted injunctive relief. The Supreme Court affirmed this decision without opinion.

Circuit Judge Gurfein pointed out that the trend of Supreme Court decisions in recent times with respect to the access of resident aliens to public benefits such as welfare assistance or civil service employment has been away from a distinction between "right" and "privilege." The Supreme Court is now concerned with the factor of discrimination against resident aliens as a particular class of persons. Such discrimination is evident here, and it is not relieved by the fact that the New York statute also barred from employment U. S. citizens who had not lived in New York for a period of twelve months.

District Judge Neaher, concurring, emphasized the discriminatory thrust of the statute against out of state residents, including both natural and legal persons.

CURRENT DEVELOPMENTS REGARDING JUDICIAL DECISIONS REPORTED IN
THE JOURNAL, 1976-1977

Antypas v. Cía. Marítima San Basilio, S. A., 541 F.2d 307 (2d Cir. 1976), 71 AJIL 353 (1977); *cert. denied*, 97 S.Ct. 1116 (1977).

Cisternas-Estay v. Immigration and Naturalization Service, 531 F.2d 155 (3d Cir. 1976), 70 AJIL 843 (1976); *cert. denied*, 429 U.S. 853 (1976).

De Tenorio v. McGowan, 510 F.2d 92 (5th Cir. 1975), 69 AJIL 892 (1975); *cert. denied*, 423 U.S. 877 (1975).

Dreyfus v. Von Finck, 534 F.2d 24 (2d Cir. 1976), 71 AJIL 149 (1977); *cert. denied*, 429 U.S. 835 (1976).

Evangelinos v. Trans World Airlines, Inc., No. 75-1990 (3d Cir. 1976), 70 AJIL 835 (1976); *reported at* 550 F.2d 152 (3d Cir. 1976).

Fund for Animals v. Frizzell, 402 F. Supp. 35 (D.D.C. 1975), 70 AJIL 837 (1976); *aff'd per curiam*, 530 F.2d 982 (D.C. Cir. 1975; *amended* 1976).

- In re Grand Jury Proceedings. United States v. Field*, 532 F.2d 404 (5th Cir. 1976), 70 AJIL 845 (1976); *cert. denied*, 97 S.Ct. 354 (1976).
- Jhirad v. Ferrandina*, 536 F.2d 478 (2d Cir. 1976), 71 AJIL 152 (1977); *cert. denied*, 429 U.S. 833 (1976), *rehearing denied*, 97 S.Ct. 511 (1976).
- Mathews v. Diaz*, 96 S.Ct. 1883 (1976), 71 AJIL 146 (1977); *reported at* 426 U.S. 67 (1976).
- Peroff v. Hylton*, 542 F.2d 1247 (4th Cir. 1976), 71 AJIL 356 (1977); *cert. denied*, 97 S.Ct. 787 (1977), *rehearing denied*, 97 S.Ct. 1163 (1977).
- Pfizer, Inc. v. Government of India*, 44 U.S.L.W. 2541 (General, June 1, 1976), 70 AJIL 839 (1976); *reported at* 550 F.2d 396 (8th Cir. 1976), *cert. granted*, 97 S.Ct. 1643 (1977).
- State of New Hampshire v. State of Maine*, 96 S.Ct. 2113 (1976), 71 AJIL 144 (1977); *reported at* 426 U.S. 363 (1976).
- State of Texas v. State of Louisiana*, 96 S.Ct. 2155 (1976), 71 AJIL 145 (1977); *reported at* 426 U.S. 465 (1976).
- Stevens v. Warden, U.S. Penitentiary, Leavenworth, Kansas*, 536 F.2d 1334 (10th Cir. 1976), 71 AJIL 790 (1977); *cert. denied*, 97 S.Ct. 392 (1976).
- United States v. Matheson*, 532 F.2d 809 (2d Cir. 1976), 70 AJIL 840 (1976); *cert. denied*, 429 U.S. 823 (1976).
- United States v. Rossi*, 545 F.2d 814 (2d Cir. 1976), 71 AJIL 785 (1977); *cert. denied*, 97 S.Ct. 1178 (1977).
- Vardy v. United States*, 529 F.2d 404 (5th Cir. 1976), 70 AJIL 842 (1976); *cert. denied*, 429 U.S. 978 (1976).

BOOK REVIEWS AND NOTES

EDITED BY LEO GROSS

Toward World Order and Human Dignity. Essays in Honor of Myres S. McDougal. Edited by W. Michael Reisman and Burns H. Weston. New York: The Free Press; London: Collier Macmillan Publishers, 1976. Pp. xviii, 603. Index. \$20.00.

In welcome contrast to most festschriften this collection, diverse as it is in subject matter, is unified by the vision and ideas of the remarkable man it honors. Once viewed as an enfant terrible, Myres McDougal has evolved into a much honored senior statesman of international law. The jurisprudential edifice which he has constructed with Harold Lasswell has become a familiar landmark in our intellectual landscape. But familiarity has not removed its disturbing character. Its conception of policy-oriented international law still evokes passionate reaction. The battlelines remain drawn on whether the "jurisprudence of values" would politicize law and destroy its distinctive character and whether its complex methodology for relating social phenomena, basic values, and law does not promise more than it can deliver. Whatever stand one takes on these issues, it will be granted not only that McDougal and Lasswell have launched a powerful challenge to conventional jurisprudence but that international lawyers need all the help they can get to understand the issues raised. This festschrift, well conceived by its editors (and long in gestation), is a valuable contribution to that end.

Happily the editors have not neglected the personality of McDougal himself. Lasswell's introduction provides a scintillating biographical sketch of the young Mississippian, teacher of classical Greek, Rhodes scholar, and student of English legal history unexpectedly metamorphosing into an audacious innovator, stimulated by fresh ideas from anthropology, psychology, and urban planning, yet not going overboard in imitation but tenaciously developing his own distinctive vision. In a delightful "Afterword," Eugene Rostow tells of the many sides of McDougal. Those who know McDougal only as the committed scholar, fierce in attack and scornful of opponents, may be surprised to learn of the two other McDougals: the "consummate politician," who gathers and uses power and the kindest and most generous of friends, indefatigable in seeking places for students and colleagues. Rostow also tells of the nurturing of the McDougal-Lasswell philosophy in the soil of American legal realism and of the later influence of ethical and natural law conceptions which agitated the intellectual world in the thirties. The Lasswell introduction fills in the subsequent scientific influences, and together they give us an intellectual biography which almost, but not quite, explains the McDougal phenomenon.

A longer and more detailed study is the paper by Professor William Morison of the University of Sydney on McDougal's jurisprudential ideas compared to the relevant views of the major legal theorists of this century: Roscoe Pound, Max Weber, Hans Kelsen, E. Ehrlich, Alf Ross, Lon Fuller, and H. L. A. Hart. This is a closely reasoned, sophisticated, and thoroughly interesting analysis of the complex structure of the McDougal-Lasswell theory, viewed sympathetically against the different positions taken by the others. It is highly recommended to both followers and skeptics and indeed to anyone interested in the theory of law and the clash of ideas.

Nearly all of the remaining contributions are devoted to international law, some on a general level, others on specific topics. Three former McDougal students offer different perspectives on the role of law and lawyers. Rosalyn Higgins contributes a concise *tour d'horizon* of contemporary ideas, stressing especially their inadequate recognition of the inescapable policy choices in legal decisions and their excessive concentration on law as restraint. In contrast to many of the other articles, this piece is readily accessible to those who have not learned McDouglian terminology. John Norton Moore takes the issue of the role of law and lawyers into much deeper waters by examining the controversies over realism versus legalism in the management of national security. In showing how law can be used in a significant way for long-range planning and crisis management, Moore answers both the realists who find no significant place for law and the legal idealists who minimize factors of power and interest. His detailed administrative proposals are not quite so persuasive as his discussion of issues but the article is, on the whole, an impressive and original contribution. Richard Falk is candidly utopian calling for replacement of the present state system by a world order, "dominated by the Gandhian ethos." International law, he finds, serves to perpetuate the existing system and in "war/peace settings," law functions "largely as an opiate." These views are in sharp contrast to the affirmative conception of international law which runs strongly through this book.

Several of the articles seek to throw light on the application of McDougal theory to specific problems. One of the most ambitious is that of Dr. K. Venkata Raman, "Toward a General Theory of International Customary Law." Raman, following McDougal, lays stress on "contextuality" and community policy. He makes a valiant effort to show how an open-ended approach to all possibly relevant factors bearing on the creation of "expectations of authority and control" can be systematically carried out. His "frame of reference" to help identify the significant factors and his illustrative material from judicial cases are instructive but the breadth of inquiry remains daunting. Raman regards custom as "socially positive," serving common interests and community policies. If it does not, he would deny it prescriptive effect, notwithstanding the expectations of the parties, suggesting *jus cogens* as an implicit basis. The article merits close reading and one hopes it will soon be followed by the book which the author has completed.

The difficulties of applying an all-embracing contextual approach to specific problems are also suggested by two well-researched and thoughtful articles: one on "Self-Determination" by Lung-fu Chen, the other on "Recognition and Social Change" by Michael Reisman and Eisuke Suzuki. Both articles list the numerous factors that should be considered to reach conclusions on the issues of law and policy raised. They both contain extensive material on relevant treaties, judicial decisions, writings of publicists, and other conventional sources of past decisions. They call for achieving human dignity and world order and assert the overriding importance of these goals as criteria for decisions. But they leave to others or to their own future writings the task of answering the many specific questions about social processes and their relation to varied and often conflicting goals. In consequence, we get the feeling that while they (like their mentors) have pointed to the Promised Land of systematic examination of goals, conditions, strategies, and consequences, they have not yet attained it.

Why not? It only requires that we relate events to their causes and consequences, the particular case to general goals, the part to the whole, the principles to their functions, the past to the future, the whole process to the basic purposes and values of mankind; and in doing so, that we free ourselves from the constricting effects of our own biases. There is a grandeur to these aspirations, even if one has a nagging doubt that they are realizable by anyone lower than the angels.

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Droit international public. Tome III. *Les compétences*. By Charles Rousseau. Paris: Editions Sirey, 1977. Pp. 611. F.180.

In reviewing Volume II of Professor Rousseau's monumental work,¹ this writer has frankly confessed her uneasiness in face of the editorial decision to split its subject matter into two volumes. While fully justified by the dimensions of what had originally been conceived as one volume on subjects of international law, it left the reviewer somewhat perplexed by the absence of several key problems, traditionally discussed under that heading. Happily all of them have now appeared in Volume III under the general heading "Les compétences." The latter is thus the indispensable companion of Volume II within the framework of the whole work.

Professor Rousseau's *summa juridica* continues to unfold in the new volume in the same majestic way his readers have learned to know, to admire, and, indeed, to expect. Once again, there are all the qualities which go into the making of a great book, the admirable breadth and depth in the treatment of the subject which characterize Rousseau's writings.

Part I deals with territorial sovereignty and its many limitations such as condominium, leases, concessions, peacetime military occupation, military bases, etc. Since belligerent occupation is, rightly, omitted in this

¹ 70 AJIL 370 (1976).

context and will probably be dealt with in connection with war, the inclusion in this part of the Allied occupation of Germany during and after the Second World War is somewhat unexpected. While it was certainly not a case of classical *occupatio bellica* as codified in the Hague Rules, it can hardly be afforded a place alongside occupations in peacetime. On the other hand, less dramatic limitations of territorial sovereignty resulting mainly from the international law of communications (international airports, railway stations, etc.) are relegated to the chapter on "Voisinage." A large section on the history of capitulations all over the world deserves particular mention; indeed, it may turn out to be more directly relevant as the shortsighted view would have it, e.g., Communist China's insistent rejection of unequal treaties of the past in its diplomatic exchanges with the Soviet Union.

Part II, dealing with modes of acquisition of territory, is based on what to the reviewer seems a somewhat startling categorization of such modes into "juridical" (occupation, cession, acquisitive prescription, adjudication), "historico-political" (*debellatio*), and "geographical" (contiguity). But it would seem that they are all "juridical" inasmuch as they confer a title to a territory which cannot be but a legal title. There, of course, remains the question of the present legality or relevance of some of them, such as *debellatio* or occupation, a question which unfortunately is not discussed. It may perhaps also be a matter of regret that post-World War II territorial changes in the world are neither listed nor analyzed, particularly in so history-conscious a work.

Questions of boundaries, treated rather cursorily in most treatises, are developed at great length, with an impressive wealth of information in Part III, a whole chapter dealing in detail with the frontiers of France.

Part IV on state succession has the stature of a true monograph on the subject, owing both to its length and its richness. Having distinguished problems of state continuity, Rousseau deals with state succession proper, as resulting from changes of sovereignty over a given territory, and examines in the first place the consequences of such changes on the status of the populations concerned, *viz.* the plebiscite and the option. It may be asked whether the former should not have been discussed rather in connection with the cession of territory since, where it is genuine it constitutes a precondition of a territorial change and not its consequence and, where it is not genuine ("plebiscite de ratification"), it carries no consequence whatsoever. However that may be, the broad historical survey given by Rousseau makes sad reading, showing the nearly complete decline of what had been conceived as an enlightened and progressive institution. In fact, all post-World War II territorial changes in Europe were effected without plebiscites (the Tende and Brigue case being no genuine exception). Their catalogue (p. 361) is thus either redundant or incomplete, as it omits all cases of Soviet territorial expansion other than those effected at the expense of Germany. Rousseau notes a similar, though slightly less drastic, decline of the institution of option which, while refusing the local population the right to make itself heard in matters of territorial changes, was at least designed to mitigate their fate post factum.

The two following chapters bear respectively on what may be considered the actual effects of state succession, *i.e.*, the rights and obligations of successor states in economic and legal matters. They thus cover what is probably one of the most controversial and, at the same time, most highly technical fields of international law. The persistent reluctance of all successor states to assume obligations of their predecessors and the uncertainties and fluctuations of the practice have prevented the formation of undisputed customary rules on the subject. In this difficult field, Rousseau has provided the reader with a maximum of guidance, supplying him with theory, state practice, and conventional solutions as well as arbitral and judicial decisions, due place being given to succession problems arising out of decolonization and the emergence of new states.

The last part, devoted to the general theory of recognition, carries a short first chapter on the birth of states. Rousseau declares himself in favor of the theory which considers the birth of states as a metajuridical phenomenon (p. 514), a theory which goes back to highly respectable authors (Jellinek, Carré de Malberg) and can claim the support of a highly respectable international decision (the Aaland Islands case) but which is difficult to reconcile with, at least the conceptual, primacy of international law. The assertions, (a) that the birth of a state is not subject to the qualification of lawfulness or unlawfulness (as long, of course, as it is a genuine state and not a puppet creation) and (b) that a state exists regardless of recognition (p. 515) do not need to be presented as the consequences of the "metajuridical theory"; they are fully justifiable on other grounds. In this connection the reviewer respectfully disagrees with Rousseau's interpretation of the Stimson doctrine of nonrecognition as applying essentially to the creation of an unlawful state (p. 515). In fact, and according to its own terms, it proclaimed the nonrecognition of all situations resulting from lawbreaking. In practice it was applied precisely to cases not of state creation but of state destruction of which Rousseau himself gives a long list (Ethiopia, Austria, Czechoslovakia, the Baltic States, pp. 520-26) or, at least, of illegal seizure of territory only thinly disguised by the creation of puppet states (Manchukuo, Slovakia). Admittedly, the cases of Rhodesia and Transkei (p. 520) do not fit into this scheme, but neither do they fit into the original Stimson doctrine.

Concerning recognition proper, Rousseau firmly adheres to the declaratory theory of the recognition of both states and governments, an attitude which is consistent with the classical doctrine and with international and municipal decisions as well as, it is submitted, with the realities of international life. In the absence of any equally clear affirmation regarding insurgents and belligerents, it may be deduced that in their case Rousseau rightly considers recognition as constitutive.

Rousseau's views of tacit recognition may perhaps give rise to some doubts. Recent developments have shown that, with the exception of regular diplomatic relations, states engage in an evergrowing practice of entering into all sorts of legal relations in the absence of any recognition, such as concluding treaties (*e.g.*, Arab States and Israel), establishing and maintaining relations which are diplomatic in everything but name (a

practice which goes back to Soviet commercial missions after World War I), sending consuls (*e.g.*, to Israel prior to recognition by the sending states), being parties to contentious proceedings before the ICJ (the Corfu Channel case), not to mention official state visits (President Nixon in China). Are all such phenomena to be construed as acts of tacit recognition, which is clearly impossible in the case of an express disclaimer, or as supporting an iconoclast view, *i.e.*, that recognition has become obsolete and useless as a juridical institution (Kopelmanas in *Comunicazioni e Studi*, quoted on p. 528)?

The now defunct Hallstein doctrine is considered by Rousseau under a separate heading as a special case (p. 553) and assimilated to the Stimson doctrine. This reviewer is inclined to see it as the classic case of a parent state reacting against premature recognition of a secessionist entity. Rousseau himself gives a long list of such cases, from Great Britain's attitude in matters of American independence to Pakistan's refusal to recognize Bangladesh (pp. 535, 541-43). Nigeria in breaking off relations with states which recognized Biafra, Pakistan in doing the same over Bangladesh, France in withdrawing ambassadors from states which recognized the provisional government of Algeria (p. 542) were all practising their Hallstein doctrine which, after all, was a moderate reaction compared with the British declaration of war on France following French recognition of the thirteen rebel American colonies (p. 537). The Hallstein doctrine dropped out of existence at exactly the same juncture all similar policies ceased to exist, *i.e.*, at a moment when the parent state resigned itself to the loss of the seceding entity, whatever the possible *reservatio mentalis* for a distant future may be.

Rousseau rightly notes the decline of the recognition of belligerency in contemporary practice. Has not this classical formula come to be replaced by the admittedly unorthodox and strictly specific recognition of the so-called "liberation movements"? Whatever views may be held regarding this new development, it may be regretted that Rousseau has not made it a subject of his invariably penetrating analysis, limiting himself to a passing reference to the Palestinian Liberation Movement (p. 611).

As in the previous volumes, the reader will find in the present one an immense bibliography on every subject examined, ranging from older authors to the most recent publications. (With apologies to Rousseau, and to Belgium, the reviewer would like to claim Alphonse Rivier for Switzerland where he rightly belongs, p. 536). The traditionally detailed table of contents is of great assistance to the reader. Nonetheless, the reviewer continues to hope for a general table of cases and perhaps even for a cumulative analytical index at the end of the last volume.

It is hardly necessary to say that the argumentative part of this review, far from implying the slightest underestimation, on the contrary bears witness to the stimulating and enriching character of this great work. In intellectual rigor, in erudition, in the lucidity of legal analysis, and, above

all, in scholarly integrity, Rousseau sets a standard by which future works on international law will have to be measured.

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Universelles Völkerrecht. Theorie und Praxis. By Alfred Verdross and Bruno Simma. Berlin: Duncker & Humblot. Pp. 687. Index. DM 58.

The present treatise of international law is the fruit of the collaboration of "the oldest and one of the youngest German speaking teachers of international law," both of Austrian origin. It does not constitute a new edition of Alfred Verdross' well-known treatise *Völkerrecht* which appeared in five editions between 1937 and 1964. Rather it is a completely new book which takes into account the rapid evolution of international law. It shows the same qualities as the former work of which Josef L. Kunz said that it was "one of the best, finest, deepest, and most original treatments of international law in any language."¹ There is hardly any other treatise on international law which, within one volume of this size, presents such a wealth of knowledge and materials in a clear and readable form. Decisions of courts and tribunals, United Nations and state practice, as well as the literature of international law in many languages, are carefully and critically taken into consideration. While the size is the same as that of Verdross' former treatise, the emphasis is differently distributed within the book. The chapters on the history of international law are substantially reduced in favor of contemporary problems. The laws of armed conflict and neutrality have been omitted, but it is intended to include them in a possible later edition. As the book's title indicates, the law of regional organizations is also left out.

A remarkable innovation, compared with the former treatise, consists in its new arrangement. The former work was divided into three parts: foundations and evolution of international law, general international law, and the law of the organized community of nations (the United Nations). In the present book, the first part (pp. 23-70), although considerably shorter, deals again with fundamental questions of international law (concept, evolution, and nature of international law), but the second and the third parts have changed their order. Part two (pp. 71-199) entitled "constitutional principles of the community of nations" describes, on the one hand, the unwritten principles which form the basis of international law and, on the other hand, the structure and the powers of the United Nations. Part three (pp. 200-654), by far the largest one, deals with general international law under the rather complicated heading "The reception of the norms of classical international law by the Charter of the United Nations and their further development." By this arrangement, general international law and the law of the United Nations are brought

¹ Reviewed in 45 AJIL 393 (1951).

together in a single system which rests upon the Charter of the United Nations and the unwritten constitutional principles of the community of nations.

The new arrangement does not, however, have a major impact on the content of the two parts. The second part gives an excellently documented and concise description of the organization and development of the United Nations and its specialized agencies. The third part is divided mainly according to traditional lines of international law books: subjects of international law, fundamental rights and duties of states, sources of international law, international transactions, internal execution of international legal duties, organs of international intercourse, unions of states, delimitation of the spheres of state sovereignty, individuals, responsibility, settlement of international disputes, and self-help. Contemporary problems of international law are discussed with special attention. For example, the chapter on "Fundamental rights and duties of states" shows a new content; it serves for the discussion of the principles laid down in the Declaration on Friendly Relations of the UN General Assembly, *e.g.*, the prohibition of the use of force, the principle of nonintervention, and the right of self-determination. The chapters on the sources of international law and on treaties are also particularly rich in new elements and insights. The whole book excels through its fresh and original approach, its comprehensive documentation, its clear legal reasoning, and its precise language.

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International Institutional Law. By Henry G. Schermers. Leiden: A. W. Sijthoff. Vol. I, *Structure*, 1972. Pp. xxiv, 303. Dfl. 53; Vol. II, *Functioning and Legal Order*, 1972. Pp. xvii, 305-790. Dfl. 82; Vol. III, *Teaching and Materials*, 1974. Pp. vi, 300. Dfl. 39. Index to Vols. I and 2.

The first two volumes of this treatise contain a systematic analysis of common problems of international organizations. The third volume provides suggestions and materials for teaching a course on the subject.

Schermers, a professor of law at the University of Amsterdam, departs from the past practice of studying each international organization separately; instead he considers them together, subject by subject. He limits the scope of his book to the institutional aspects of international organizations. He distinguishes "international institutional law" from the "law of international organizations," which, according to him, covers also rules of law formulated by such organizations (*e.g.*, monetary rules of the International Monetary Fund or sanitary regulations adopted by the World Health Organization). He is concerned only with public international organizations, as distinguished from private or nongovernmental organizations. He considers as public international organizations those which fulfill the following three requirements: (1) are established by an international agreement; (2) have their own organs; and (3) have been es-

tablished under international law. He does not interpret this narrow definition too rigorously, accepting, for instance, organizations established by a decision of an international conference without a treaty requiring ratification. His other criteria can also lead to difficulties in certain situations, *e.g.*, with respect to the Bank for International Settlements or the International Telecommunications Satellite Organization (INTELSAT).

After an introductory definitional chapter, the author deals first with such structural problems as organization membership and composition and the functioning of main organs (including policymaking, parliamentary, and judicial ones). Volume II contains chapters concerning the decisionmaking process (majority required, consensus, mechanics of voting), financing, the "legal order" (constitution, rules, types of decisions), interpretation and dispute settlement, enforcement, legal status, and external relations. As one can easily see, the order of chapters is rather arbitrary, and some teachers might prefer to deal with these subjects in a different way.

Unlike some other writers on this subject who limit themselves to an abstract interpretation of constitutional provisions, the author has an in-depth knowledge of the practice of international organizations and is able to give many apposite examples of actual interpretation of various provisions through decisions of international organs and tribunals (especially of the Court of Justice of the European Communities). He is thus able to show how this new area of international law has grown over the last thirty years and what an important role is played in this development by various international organizations, both global and regional. Of course, this pioneering book cannot encompass all the relevant sources, the thousands upon thousands of decisions, documents, and summary records of several hundreds of international institutions; and a careful reader might note some minor mistakes and important omissions and the need for more coordination. For instance, in discussing the obligations of a state which has not ratified a constitutional instrument but has behaved as if it were a member (p. 40), the author does not mention the Guatemalan contention before the Security Council of the United Nations in 1954 with respect to its alleged nonmembership in the Organization of American States. The name of Professor Sereni is misspelled on several occasions (*e.g.*, pp. 84, 98). The question of privileges and immunities is considered not only in Chapter XI but also in Chapters III and IV. Expulsion and suspension of members are discussed in both Chapter II and Chapter X.

In Volume III the author guides a prospective teacher of the subject through the practical problems involved in teaching a course in international institutional law. He includes detailed reading assignments for twenty-five class sessions, topics for student papers, and questions to be discussed. Some of the suggested readings are contained in the second part of this volume; they include several cases before the International Court of Justice and the Court of Justice of the European Communities and some other materials. Some of these cases might have been edited

more, instead of being reproduced *in toto*. On the other hand, some excerpts from dissenting opinions might have been added to balance the picture.

The minor flaws mentioned here do not detract from the value of this book. It is an important contribution to the study of the subject and makes a wealth of materials available not only to teachers and students but also to international civil servants and government officials, who seldom are familiar with more than one international organization and will find in this book many relevant precedents from other organizations.

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Hague Academy, *Recueil des Cours*, 1974. 4 Vols. (Vols. 140, 141, 142, and 143 of the collection). Leiden: Sijthoff. Vol. I, 1974. Pp. 426; Vol. II, 1975, Pp. 417; Vol. III, 1975, Pp. 755; Vol. IV, 1976, Pp. 429.

The General Course was given in 1974 by Hermann Mosler, then Professor and Director of the Max Planck Institute for Comparative Public Law and Public International Law at Heidelberg and now a judge of the International Court of Justice, under the title *The International Society as a Legal Community*. By an oddity of numbering related to the failure to print the General Course of 1973, it appears in the volume numbered last among the 1974 volumes (1974, IV) but in the first volume of the collection devoted to 1974 (Vol. 140 of the collection).

Mosler views the current international legal order as a stage in the evolution of relations among states. Side by side with the evolving legal order is an evolving political order: the principles contained in the UN General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States of 1970. Those principles are seen as bases for legislation in the international legal order but not as "law" properly so-called until translated into law through a consensus mechanism that reflects not mere political compromise but the legal opinion in the community of states.

In Part II of the course Mosler analyzes the mechanisms by which rules of international law are created by consensus of the international community. Treaties are seen as a source of rules. So is customary practice coupled with a psychological element, "opinio juris," which must be evidenced by the state sought to be bound. So are general principles and rules of municipal law applied by states to their external legal relations. Mosler derives another category of general principles from the nature of the international community independent of municipal law analogies, although the precise content of these "cogent" principles remains in dispute among states. Part II ends with a short chapter on state responsibility.

Part III of the course addresses the various forms of institutionalized international cooperation. Mosler isolates four different categories of relations resulting from the creation of an international organization: relations among the organs of the organization; relations between the organs and member states; relations between the organs and other subjects of

international law; and relations between member states in their capacity as members. He notes that relations among member states and non-member states may also be affected by the existence of the organization. This part closes with a section on international "régimes" that govern areas of common interest, such as the seas and outer space.

Part IV contains two chapters dealing with economic relations among states. The final part, Part V, International Disputes, reviews the prohibition on the use of force and various noncoercive institutions for settling international disputes, concluding with a chapter on the place of the ICJ and other tribunals in the legal order.

Mosler has chosen the path of overview rather than selective detailed analysis for his general course. The course is clearly written, learned, and accomplishes its objective with insight and distinction.

The first of the shorter courses in public international law is "La Compétence Interne des Etats et la Non-Intervention dans le Droit International Contemporain" by N. A. Ouchakov (Academy of Sciences, USSR). Doctrinal development is traced from 1793 to the adoption of the Principles of Friendly Relations. There is very little citation to state practice, although repeated emphasis is given to the assertion that the Soviet Union has consistently followed a policy of nonintervention throughout its history.

Manuel Diez de Velasco (Madrid) addressed "La Protection Diplomatique des Sociétés et des Actionnaires." He suggests that the "genuine link" requirement for *jus standi* pronounced in the *Nottebohm* case might not be satisfied by mere incorporation in a state, and that the *Barcelona Traction* case, holding Canadian *jus standi* to be exclusive in the light of the incorporation of the company in Canada, did not cast much light on the issue. As to claims on behalf of shareholders in corporations organized under the laws of a nationalizing state, Diez de Velasco concludes that the *Delagoa Bay Co.* correspondence and other precedents indicate general international law approving the competence of the state of the shareholders to present a claim on their behalf. Practice since 1945 in settling shareholder claims brought by their national states has been fully analyzed by Richard B. Lillich and his associates, with whom Diez de Velasco appears to agree. With regard to the claims of shareholders in second state companies expropriated by third states, going beyond the decision in the *Barcelona Traction* case Diez de Velasco suggests that the law remains unclear. In practice, disputes are avoided through the growing use of loan guarantees and agreements on dispute-settlement machinery.

Maurice Flory (Aix-Marseille III) lectured on "Souveraineté des Etats et Coopération pour le Développement." Cooperation between economically more developed and less developed states with a view to improving the lot of the latter presupposes an unequal partnership which is necessarily reflected in many aspects of economic cooperation agreements, mitigated only in part by the possibility of the less developed state's insisting on its rights as a sovereign legally equal to the aiding state. Attempts by the poorer states to urge the need for equality of economic opportunity,

including an adjustment of terms of trade by agreement rather than by market forces alone, result in "soft law" resolutions and declarations not significantly influencing the actions of the richer states. Flory hopes that a dialogue among states perceiving their own longer term interest in a more equitable disposition of the world's resources will modify current narrow definitions of legal equality and lead to a more just society in which all states will have equal opportunity to reach their fullest potential.

In "Le Rôle de l'Accord dans le Système des Nations Unies," Benedetto Conforti (Naples) considers the powers of UN organs and the degree to which states may be bound by the actions and resolutions of those organs. After setting out the provisions of the Charter that define the legal powers of the organs of the United Nations, particularly the General Assembly and the Security Council, and noting the 1962 advisory opinion of the ICJ on *Certain Expenses of the United Nations*, he turns to the concept of acquiescence as a path through which a nonbinding resolution may become binding on particular states. Nonmember states, in his view, may find themselves committed to accepting the validity of the acts of an organ by accepting an invitation to participate in the deliberations of the organ. Members abstaining or voting against an act of the organ are bound under their consent to membership to whatever legal effects the act has. Members voting in favor of an act impliedly consent to the legitimacy of that act; they can avoid that effect by an explicit denial. With regard to acts which appear clearly beyond the powers of the organ, such as the waiver of Article 19 to permit the USSR and France to join in the votes of the General Assembly in 1965, and the acceptance as valid of the Security Council votes of 1950 relative to operations in Korea, ignoring the Soviet Union's literal interpretation of Article 27(3) of the Charter under which "the concurring votes" of all permanent members appear necessary for a "decision," Conforti concludes that the consensus of the organization in the light of political realities ultimately determines their validity and legal effect. The course concludes with an analysis of the ways in which nonbinding resolutions may take on a binding force as statements of general international law or as treaties when accepted by states as such.

The course on "The Regulation of Foreign Intervention in Civil Armed Conflict" by Tom J. Farer (Rutgers) begins by classifying jurists along a spectrum from "formalists" (naming Kelsen) to "behavioralists" (naming McDougal). In his view, classical international law inevitably favored recognized governments and stability over the claims of rebels prior to the recognition of a status of belligerency that forced third states to assume a posture of neutrality or suffer the consequences of cobelligerency. Turning to the current law, Farer views explicit emphasis on international peace and security in the UN Charter and the more qualified language supporting self-determination and decolonization as indicating that in a legal dispute involving peace on one hand and self-determination on the other, peace must win. Since the former colonial powers were in fact major participants in the drafting of the Charter, this conclusion, he points

out, is hardly surprising. With foreign intervention in a civil armed conflict thus *prima facie* illegal, some attempts to justify foreign intervention in civil armed conflicts are examined; possible inconsistencies are found in each of the writings examined, particularly those of Reisman and Lillich. There may be some overkill, but the overall treatment is convincing and illuminating, as well as at once entertaining¹ and depressing.

Philippe Cahier (Geneva) examined "Le Problème des Effets des Traités à l'Égard des États Tiers." Pointing out major differences between the practice of states on the one hand and the doctrine, including the drafts of the International Law Commission and Articles 34-38 of the resulting Vienna Convention of 1969 on the Law of Treaties, on the other, Cahier concludes that the law regarding third-party beneficiaries and third-party obligations has not yet been adequately codified. His argument is clear and will be convincing to those like this reviewer who have found the Vienna formulation to be internally inconsistent and the discussions of the International Law Commission unpersuasive. Cahier's suggested formulations to reflect actual state practice seem to make sense in theory and to relate to reality. In several parts of his analysis, Cahier acknowledges a debt to a thesis written by J. F. Prevost (Paris 1973), which, judging by the insights provided in this short course, must itself be well worth publishing.

An eloquent introduction by Nobel laureate René Cassin precedes a course given by Karel Vasak (Secretary General of the International Institute of Human Rights, Strasburg), titled "Le Droit International des Droits de l'Homme." Vasak classifies the substantive international law regarding human rights not only in the usual form of the 1966 Conventions as civil and political rights distinguished from economic, social, and cultural rights, but points out a new class of emerging rights, rights of "solidarite" including rights to a livable physical environment. He finds that expression has been given to human rights law in many instruments, including, of course, the Universal Declaration of Human Rights of 1948 and its elaborations and derivatives, but also the Hague Conventions of 1907 and Geneva Conventions of 1949, parts of the UN Charter, and in many other expressions of concern for life, liberty, and property. He reviews the general institutionalization of human rights, emphasizing their function of "promoting" as well as enforcing, supervising, or protecting human rights, and points out the role they play in helping to alleviate human rights controversies. Vasak concludes by analyzing the relationship between human rights law, as law applicable to protect individuals directly, and general international law, which he conceives as a law applicable between states and not normally directly applicable to individuals. He ends with a re-

¹ Tacitus, who published his *Agricola*, sec. 30, in 98 A.D., attributed to a British chieftain a condemnation of Rome's occupation policy—*solitudinem faciunt pacem appellant*. He would probably not be entertained by Farer's attributing a translation of this pithy phrase to an unnamed "commentator" on the suppression of the Scottish uprising of 1745 (II, 380). Many commentators on many "pacification" schemes have borrowed from Tacitus, secure in their belief that their erudition would be appreciated.

view of current action in the international human rights area, particularly the elaboration of the law to protect special classes of frequent victims (such as women, refugees, journalists, and accused criminals), the attempts to make violators of human rights (like those who commit "grave breaches" of the Geneva Conventions of 1949) personally liable as criminals, and the endeavors to unify on a worldwide basis the perception of human rights law.

One course, on the borderline between private and public international law, ought to be mentioned specially: "The Enforcement of Treaties by a Federal State," given by Covey Oliver (Pennsylvania). The private international law courses were: "General Problems of Private International Law" by O. Kahn-Freund (Oxford); "Problems of Private International Law in Non-Unified Legal Systems" by R. Graveson (London); "The Antagonism between Legal Security and the Search for Justice in the Field of Contracts" by F. Vischer (Basel); "Le Rattachement Autonome de la Transmission Successorale en Droit International Privé" by M. Ferid (Munich); "Régimes Matrimoniaux en Droit International Privé" by G. A. L. Droz (The Hague); and "Les Conventions Relatives à la Prorogation et à la Derogation à la Compétence Internationale en Matière Civile" by J. Jodkowski (Warsaw).

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International Law—The Conduct of Armed Conflict and Air Operations.

By the U.S. Air Force. (Pamphlet 110-31, 19 Nov. 1976) Washington: Department of the Air Force, 1976. Pp. 200. \$2.70.

The armed conflicts of this century, widespread and regional, have witnessed the emergence of air power as a major force in international hostilities. In the past some great air commanders have clouded with uncertainty the question of the limitations imposed by international law on air warfare. General Giulio Douhet wrote that limitations on the means of air war were nothing but "international demagogic hypocrisies." Shortly after World War II, Air Marshal Arthur Harris of the British Bomber Command asserted that "in the matter of the use of aircraft in air warfare, there is, it so happens, no international law at all." These views were in effect echoed by Julius Stone in 1955, when he wrote that only in a rhetorical sense could there be said to be any laws on the subject. The famous comment of General LeMay that one's opponent should be bombed back into the Stone Age did not represent an isolated view. The U.S. Air Force departs from this pessimistic approach in *AFP 110-31*. This document represents a well-researched and balanced analysis of the legal controls applicable to air operations. It completes the trilogy of instruction for the armed forces on the law of war. The instructions on the law of land warfare are contained in *Army Field Manual 27-10*, and those concerning naval warfare in Navy instructions *NWIP 10-2*.

The Air Force pamphlet is different in tone and style from the manuals of its sister services. For example, *FM 27-10* is pronounced to be "authoritative guidance" and an "official publication of the U.S. Army." *AFP*

110-31 however is not "directive in nature" and does not represent "official Government policy." Despite this disclaimer, however, it marks the most authoritative American source of the law of air warfare to date.

Each short chapter is supported by extensive references reflecting the twenty years of research which preceded its publication. Unlike the Army and Navy manuals, it seeks to place the evolving rules of warfare in historical perspective, and no attempt is made to lay down definitive rules where the law is still unsettled.

The fifteen chapters of the guide fall into three main divisions. Chapters 1 through 3 cover the status of airspace, air combatants, and aircraft. Chapters 4 through 9 consider combatant activity in the airspace in all its forms and the use of airborne weapons. Chapters 11 through 14 review the Geneva Conventions of 1949 for the protection of war victims. The last chapter instructs aircrews on their individual and command responsibility. Throughout the guide there is a strong sensitivity to the "key legal principles" of humanity and proportionality and the need to minimize loss of civilian life (Chapter 6-1). Air commanders must cancel or suspend air attacks "when excessive incidental injury or damage" to the civilian population is apparent (Chapter 5-11). They must refrain from any attack where civilian loss is disproportionate to the value of the military objective.

Less definitive is the treatment of the nature of the military objective (Chapter 5-8). Urban areas containing military targets remain subject to attack (Chapter 5-10). So do dikes, dams, and nuclear generating stations "if under the circumstances ruling at the time, they are lawful military objectives" (Chapter 5-11). There is an inherent weakness in any rule which limits attacks to a specified category (military) but leaves undefined and uncircumscribed the category itself. Area bombing remains permitted under international law, although there is "reduced reliance" upon this method as a useful technique (Chapter 5-15). The use of nuclear weapons is held "not to violate existing international law," but they are only to be employed at the direction of the President (Chapter 6-5). Since the legal restraints on the executive are not specified, the legitimacy of nuclear use, at least in limited conflicts, is still open to question.

Some apparent contradictions are disclosed. For example, the military overflights of Cuba in 1962 during the missile crisis are justified on the basis of the "inherent right of self defense" (Chapter 2-6). However, the right of every state to prevent foreign military aircraft from penetrating national airspace without permission is also recognized (Chapter 2-6). The pamphlet asserts it is common practice for military aircraft to fly adjacent to the national airspace of foreign countries for military reconnaissance. At the same time it recognizes the establishment of air defense identification zones beyond territorial airspace for national security and possible intercept missions (Chapter 2-2).

Air operations have become increasingly complex. It would have been instructive if the pamphlet had included recent examples of air combat experience in the Vietnamese and Middle East armed conflicts. Tech-

niques" developed there are not so fully analyzed as those employed in World War II and in the Korean War.

Also the pamphlet gingerly sidesteps the delicate dilemma raised by the sometimes conflicting concerns for economy of force and for increased accuracy through the use of expensive weapons systems. Modern electronic warfare provides greater opportunity for refined target selection than ever before possible. Yet sophisticated guidance methods using radar, laser, or heat-seeking controls represent investments of hundreds of millions of dollars. Obviously, some balance between the use of costly high precision weapons and the maximum economy of force must be struck. Where this balance lies for a high technology air power is one of the most critical legal issues in modern warfare.

Overall *AFP 110-31* is a landmark publication. It is the first official comprehensive review devoted to identifying the law of air warfare. It should be required reading at all command and staff schools of the armed forces and all universities which have international law in their curriculum.

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The Legal Status of Prisoners of War. A Study in International Humanitarian Law Applicable in Armed Conflicts. By Allan Rosas. Helsinki: Suomalainen Tiedeakatemia; Academic Bookstore, 1976. Pp. 523. Fmk. 145, 35; \$37.

Allan Rosas, a Finnish scholar, has significantly contributed to the literature with respect to the legal status of prisoners of war in this outstanding book. He begins his study with a review of the general aspects on the limitations of warfare, appraising the limitations of law in reducing the accepted course of violence among nations; then examines the evolution of the law relating to prisoners of war; and finally analyzes the legal conditions for prisoner-of-war status, the treatment of prisoners of war, and their release and repatriation. The structure and analysis mutually support this first major scholarly effort to draw on the practice of states since the adoption of the Geneva Conventions of 1949 and the shift from a reliance on practice to "codify" the future law to a reliance on legislative efforts of delegates to a diplomatic, lawmaking conference.

As Rosas indicates, the treatment of prisoners of war has long been associated with the policies of states. The ebb and flow in these policies has been reflected in the evolution of international law. Prisoners of war have been variously subjected to torture, imprisonment and ransom, slavery and life-time hard labor, and death by the conquering armies, under policies apparently acceptable and followed in state practice until the 18th century. Improvements in treatment and changes in policy are marked by the instructions of Catherine II of Russia with respect to the treatment of Turkish prisoners in 1778; the Treaty of Amity and Commerce of 1780 between Prussia and the United States recognizing reciprocally humane treatment, the Lieber Code of 1863, and the work of Henry Dunant that led to the Red Cross movement. Flowing from these developments, the

policy of humane treatment became a "community" policy and interest, shared by the world community at large, and imposed by that community upon belligerents, who might otherwise seek to impose unilateral policies.

From a 500-page text, rich in detail, I can select for this review only a few of the major threads. Among the most significant areas which Rosas explores is the fundamental arena of contention between the Western states and the Communist bloc, exemplified in the debates and disagreements over "wars of national liberation." The Communist bloc has sought to enlarge the group of persons entitled to prisoner-of-war treatment by giving preferential treatment (when measured against the traditional law) to freedom and guerrilla fighters, particularly if they are fighting against alien or racist regimes, which are of course to be found only in Western states or colonies. According to Rosas the Communist states are seeking, primarily, to protect noncombatants. Yet these same states, by reservations to the Geneva Conventions of 1949, have sought to restrict prisoner-of-war status by excluding those who have been convicted of war crimes under their law. Perhaps the fundamental concern of the Western states opposing this position has been with the exclusive or nationalistic nature of these positions; in effect they use a humanitarian framework to further Socialist or Communist ideals and only those.

Another major theme is also examined in detail. The Geneva Conventions of 1949 could build very substantially on customary international law, but they also lay down new law in the form of numerous detailed procedures on the treatment of prisoners of war. The recent diplomatic conference in Geneva that has proposed supplements to this conventional and customary international law has moved toward a lawmaking process akin to that of the legislatures of states, but in a substantively differing context of interstate lawmaking. As in the law of the sea and elsewhere, the new "law" is apparently being established to an increasing degree in conferences, operating by consensus rather than vote and shaped to a substantial degree by the current policies and political and even polemical predilections of states. Because such a lawmaking process is not conducive to reaching a shared policy for a law to be widely respected, the treaties formed at the Geneva Conference on Humanitarian Law will unquestionably remain of doubtful value until tempered by the realities of the practice of states in armed conflict itself.

However, for the legal scholars, such as Rosas, and the contribution which they may make to the overall process of clarification, the development of new law by conference affords a formidable challenge. Rosas pursues his inquiry by examining past practice, the trends, and the conditioning factors, and with these in view he is in the best position to assess and provide his recommendations with respect to the future practice of states. This, however, will require a book to follow the one under review.

The lack of an index and the use of empirical data are weaknesses but they are not such as to detract from the quality of the work and its valuable analysis. The text leads us directly to the real need to accommodate

competing policies of states over the prisoner-of-war issues. The impact of these developments upon a world community interest in establishing a framework of law under a humanitarian policy to be shared by the world community is obvious. The book is therefore fair warning of the emphasis that we must give in the development of international law to pursuing the struggle, already evidenced in the Geneva Conference, to seek out a shared element of humanitarian as opposed to nationalistic policies. If this struggle is lost, and if the Geneva Protocols represent a new trend away from this objective, then the humanitarian law of war is in danger of erosion.

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Diritto internazionale. By Mario Giuliano. Milan: Dott A. Giuffrè editore, 1974. Vol. I, *La Società internazionale e il diritto*. Pp. xliii, 611. L.10,000. Vol. II, *Gli aspetti giuridici della coesistenza degli Stati*. Pp. xxxv, 520. L.9,000.

These are the first two volumes of a three-volume work. The first volume, on *The International Society and its Legal Rules*, includes a historical introduction covering the development of both international law and society and the study of international law from 16th century literature to contemporary post-positivist theories. The volume also contains sections on the sources of international law (the breadth and depth of the part dealing with the law of treaties is worthy of note), the subjects of international law, and international responsibility. The second volume, on the *Legal Aspects of Co-existence among States*, deals with problems related to territory (territorial sovereignty, territorial sea, high seas, air space, outer space, etc.) and hence with the "exercise of state authority and its protection in the territory of other states" (admission and treatment of foreign organs, in particular of diplomatic and consular agents etc.). The third volume will deal with the *Legal Aspects of Co-operation among States* and, in addition, will contain a complete index to all three volumes.

The author is professor of international law at the State University of Milan and editor of *Rivista di diritto internazionale privato e processuale*. The results of his previous far-reaching and penetrating research converge in this treatise, which explains why certain aspects of international law are discussed in detail, while others are only touched upon. In the past Giuliano has written monographs on the historical evolution of the international community and of international legal theories,¹ general international law concerning territory,² and customary international law and treaty law relating to diplomatic relations.³ All these works show an extraordinary knowledge of international practice and of legal literature ranging from the classics to the most recent works of contemporary authors.

¹ *LA COMUNITÀ INTERNAZIONALE E IL DIRITTO* (1950).

² *I DIRITTI E GLI OBBLIGHI DEGLI STATI* (1956).

³ *Les relations et immunités diplomatiques*, 100 REC. DES COURS 81-193 (1960-II).

Giuliano has also made important contributions to general legal theory; it suffices to mention his book on the legal rules and the rights and duties deriving therefrom⁴ and his contribution to the theory of "spontaneous" international law.⁵

What is most striking in these two volumes, as in Giuliano's previous works, is the author's wide, deep, and up-to-date knowledge of international practice and treaty law and his ability to consider them within a concrete and realistic framework of scientific concepts as well as his remarkable knowledge of the history and literature of international law. In this respect, the sections devoted to the development of international legal doctrine (I, pp. 117-31), the law of treaties (I, pp. 341-506), territorial sovereignty and, more generally, the legal status of territory in international law (II, pp. 3-310), diplomatic relations (II, pp. 313-447), and the immunity of foreign states from civil jurisdiction (II, pp. 483-515), are particularly noteworthy.

In general, this treatise is one of the best standard works on the subject both because of its scientific merit and because of the wealth of up-to-date information it contains.

ANTONIO CASSESE

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La Nazioni Unite. Lezioni di Organizzazione internazionale. By Benedetto Conforti. (2d ed.) Padua: Edizioni Cedam, 1975. Vol. I, *Introduzione, l'Appartenenza all'Organizzazione, gli Organi.* Pp. xii, 128. L.3,500. Vol. II, *Le Funzioni, gli Atti.* Pp. ix, 224. L.5,000.

In these two volumes on the United Nations, the author approaches this complex subject from a purely legal angle. This book is thus very different from those which study the United Nations from the viewpoint of political science (as, for example, the well-known books by I. Claude, Jr.), or which endeavor to combine the legal method with that of political science (such as A. Ross, *The United Nations, Peace and Progress* (1966) or M. Virally, *L'ONU d'hier à demain* (1961) and *L'Organisation Mondiale* (1972)). However, despite the purely legal approach, this treatise does not suffer by comparison with other books on the subject written with a more formal and logical approach, such as Kelsen's classic *The Law of the United Nations* (1951). Conforti's works are always characterized by perceptive and intelligent realism. He does not waste time on points of purely academic interest, holding reality of greater importance than abstract doctrines and theoretical concepts. Similarly, considering the United Nations as an evolving institution, he gives great weight to UN practice.

After a brief, essentially historical introduction, the author deals with UN membership (pp. 21-64), i.e., with the vicissitudes related to the acquisition of membership in the Organization, and then with UN organs (pp. 65-128). Special emphasis is placed on the Security Council, the

⁴ NORMA GIURIDICA, DIRITTO SOGGETTIVO E OBBLIGO GIURIDICA (1952).

⁵ See Kunz, Roberto Ago's Theory of a "Spontaneous" International Law, 52 AJIL 85 ff. (1958).

General Assembly, and the Secretariat, while only a few pages are devoted to the remaining UN organs.

The second volume covers the "functions" and "acts" of the United Nations. With regard to functions, Conforti first deals with the general limitations on the activity of the Organization: the limitation *ratione personarum*, that is, the relationship of the United Nations with nonmember states (pp. 2-12), and then the limitation *ratione materiae*, namely, domestic jurisdiction (pp. 12-48). He then considers the functions of the United Nations in the maintenance of peace, the furtherance of cooperation in the economic, social, cultural and humanitarian field, decolonization, the registration of treaties, the jurisdictional and advisory functions of the International Court of Justice, financing and fund raising. In the last section of the book, Conforti surveys the various "acts" adopted by UN bodies: recommendations, decisions, other resolutions, declarations of principles, etc. He examines both the possible contents and the legal effects of all these "acts."

The author combines traditional presentation with original ideas. The latter are particularly visible in the sections on the vicissitudes of UN membership (I, pp. 38-64), where Conforti, in addition to dealing with the suspension, expulsion, and withdrawal of member states, also considers the repercussions on membership of modifications of states as international persons (revolutionary changes of government, governments in exile, the impact on credentials, the Chinese question). The sections concerning the concept of domestic jurisdiction (II, pp. 12-48), decolonization (II, pp. 137-49), registration of treaties (II, pp. 149-54), the functions of the International Court of Justice (II, pp. 154-62) and the whole section on the "acts" of UN organs (II, pp. 171-200) are also particularly important.

With regard to recommendations of UN organs, Conforti shares Lauterpacht's opinion that the effect produced by recommendations is such that they oblige the states to which they are addressed to explain why, having voted in favor, they do not intend to carry them out. He adds, however, that a recommendation can also produce another legal effect: the "effect of lawfulness." The recommendation makes lawful the behavior of a member state which would otherwise be contrary to international agreements or customary law. He illustrates this view by pointing out that this effect was brought about in 1966 when the Security Council, after reiterating its ban on the sale of oil to Southern Rhodesia, called upon the United Kingdom to prevent by every means the shipment to Beira of oil destined to Southern Rhodesia. As a result of this authorization, the British interception and search of the Greek ship *Manuela* on the high seas—which would otherwise have been contrary to customary international law—was considered lawful, even by the Greek Government which did not protest (II, pp. 172-73). Conforti's views on the role of consent and acquiescence of member states in resolutions of UN organs are also interesting. In his opinion, if a state has voted in favor of, or abstained on, a UN resolution without challenging its lawfulness, it is barred from subsequently raising

objections concerning its conformity with the Charter (II, pp. 193–200). Furthermore, with specific regard to General Assembly declarations, he considers that in some instances these declarations become binding on the states which did not oppose them. The declarations thus amount to international agreements “concluded in simplified form” (or “executive agreements”), while for member states which did not vote for them, they are *res inter alios acta*. For Conforti the major criterion for determining whether a UN declaration is vested with this legal value consists in establishing whether the declaration, besides setting forth general principles in clear-cut terms, equates nonobservance of these principles with a violation of the Charter (II, pp. 181–85). Instances of this kind of declaration given by Conforti include the declaration on genocide (1946), on independence of colonial peoples (1960), on the banning of nuclear and thermonuclear weapons (1961), on sovereignty over natural resources (1962), and others.

Not all of Conforti's views are equally convincing, at least not to the present writer. However, as it is impossible to examine the more questionable ones here, I shall only stress that the volumes under consideration are wanting in certain places. It would, for example, have been desirable to devote more space to the way in which the various UN peacekeeping operations are actually carried out (Conforti speaks of them only briefly and only to consider whether or not they conform with the Charter). Similarly, UN activity in the field of human rights is dealt with somewhat scantily. Furthermore, the increasingly important UN activities in the promotion of a new international economic order and the codification and progressive development of international law and the UN contribution generally to the evolution of international law have hardly been dealt with at all, although the section on UN “acts” contains a number of useful ideas on the last point.

Despite these shortcomings, Conforti's work is unquestionably of high scholarly merit and would be well worth completing and then translating into a language that is more widely used than Italian.

ANTONIO CASSESE

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The International Monetary Fund, 1966–1971: The System Under Stress. Written and edited by Margaret Garritsen de Vries. Washington, D.C.: International Monetary Fund, 1976. Vol. I, *Narrative*. Pp. xxii, 699. Index. Vol. II, *Documents*. Pp. vii, 339. \$15.00.

This historical study by the official historian of the IMF is a major contribution to the literature on international organizations as well as to the literature on international monetary affairs. It consists of a narrative volume and a volume of documents and is a sequel to *The International Monetary Fund, 1945–1965*, a three-volume history written and edited by J. Keith Horsefield and Mrs. de Vries, published in 1969.

A major part of the narrative volume is devoted to the negotiations leading to the creation of the special drawing right (SDR). It will no

doubt stand as the definitive treatment of the preparatory work for the first amendment to the IMF Articles of Agreement (effective July 28, 1969) and the legal rules surrounding the SDR. These fascinating chapters are extremely well done and reflect thorough research. Negotiations proceeded in two forums: the Deputies of the Group of Ten and the IMF's Executive Board. This caused considerable awkwardness, for example, when IMF staff, who attended G-10 meetings as personal representatives of the Managing Director of the Fund, briefed members of the IMF's Executive Board who were not permitted to attend. In part to overcome this problem, joint meetings of the Deputies of the Group of Ten and the IMF's Executive Directors were held in 1966 and 1967.

A major early question, whether the new financial instrument would be available to all IMF members or only to members of the Group of Ten, was resolved in favor of universality coupled with special majorities for important decisions. Reading this study one is impressed by the many issues that had to be faced in the creation of the SDR and the extent to which the decisions taken resulted from compromises struck during the negotiations. One is also impressed by the persistence of the negotiators in attempting to resolve their differences and the role of lawyers in suggesting language that finessed ideological commitments. The future role of the SDR is today still uncertain. Will it become the principal reserve asset in the international monetary system or will it play only a subsidiary role to national currencies? Regardless of the outcome, scholars and officials are likely to seek clues in these volumes.

"Exchange Rates in Crisis" is the theme of seven chapters that deal with the turbulent events in the exchange markets in 1966-1971 and the IMF's activities relating to exchange rates. They describe the Fund's dealings with British authorities in connection with the decision of the United Kingdom to devalue the pound sterling in 1967. Decisions surrounding the devaluation of the French franc and the revaluation of the Deutsche mark in 1969, particularly the timing and magnitude of the changes, are recounted. Readers may be somewhat disappointed in the treatment of the event that preceded and followed the dramatic U.S. announcement of August 15, 1971, that it was temporarily suspending the convertibility of the dollar into gold or other reserve assets, and in the treatment of the negotiations that led to the Smithsonian Agreement of December 1971 on the devaluation of the dollar and the realignment of exchange rates. Mrs. de Vries describes in detail deliberations at IMF Executive Board meetings during 1971 but provides little information on confidential discussions between the Managing Director, Pierre-Paul Schweitzer, and IMF staff members with national authorities during 1970 and 1971; thus, reinforcing the popular impression that the IMF was very much on the outside of critical negotiations during the 1970-1971 period. It is to be hoped that further details will be brought to light with the passage of time.¹

¹ R. SOLOMON, *THE INTERNATIONAL MONETARY SYSTEM, 1945-1976: AN INSIDER'S VIEW* (1977), is also strangely silent on the direct contacts of Mr. Schweitzer and IMF staff with U.S. officials during this period.

One of the principal functions of the IMF is providing financial assistance to members through arrangements for drawings on its resources. Several chapters describe the evolution of IMF policies respecting standby arrangements, the liberalization of the IMF policies on the compensatory financing of export fluctuations, and the enlargement of quotas. A chapter is devoted to the IMF's policies with respect to gold. The narrative volume concludes with a survey of the development of the IMF as an institution during the period under review.

The companion volume brings together in convenient form various documents referred to in the narrative volume. Since this is an IMF history, the documents reproduced are IMF documents. Consequently, one of the most important early documents relating to the development of the SDR is excluded because it had its origin outside the IMF.²

The IMF issues a variety of current publications, but these only report internal discussions with the greatest of circumspection. The discussions at meetings of the Executive Board are not published. Meetings between the Managing Director and the IMF staff with authorities of member countries also take place on a confidential basis and often without any public announcement at all. Thus, this history is an invaluable source of information not otherwise available. For the lawyer it is of great help for its descriptions of how legal provisions have been applied in practice as well as for its insights into the expectations of those who have fashioned new and amended monetary arrangements. The author has taken seriously the burden to maintain the objectivity that falls upon her as a privileged scholar with access to materials denied to others. This carefully prepared study deserves re-reading many years into the future.

RICHARD W. EDWARDS, JR.
University of Toledo

Crimes against Internationally Protected Persons: Prevention and Punishment—An Analysis of the UN Convention. By Louis M. Bloomfield and Gerald F. FitzGerald. New York, Washington, and London: Praeger Publishers, 1975. Pp. viii, 272. Index. \$18.50.

The adoption by the UN General Assembly on December 14, 1973, of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents was, in effect, the first successful outcome of intensive efforts by the United States and other interested countries to induce the United Nations to take action against international terrorism. As such the Convention has generated considerable interest among government officials, scholars, and private practitioners.

² GROUP OF TEN, REPORT OF THE STUDY GROUP ON THE CREATION OF RESERVE ASSETS: REPORT TO THE DEPUTIES OF THE GROUP OF TEN (transmitted by R. Ossola; Rome: Bank of Italy, May 31, 1965), reprinted in *Balance of Payments—1965: Hearings before a Subcomm. of the Senate Comm. on Banking and Currency*, 89th Cong., 1st Sess., part 2, at 1103 (1965).

Bloomfield and FitzGerald, two Canadians with impressive credentials both as scholars and practitioners, have accordingly produced a most timely book. Their express purpose is to "ease the task of those who wish to recommend that their governments ratify or adhere to the convention and encourage scholars to delve more deeply into the study of a convention that, though developed in haste, promises to set the legal norms in its field for many years to come."

To this end the authors devote the major part of their volume (Chapter 5, pp. 57-144) to an examination of the drafting history of the Convention, thoroughly and skillfully highlighting key moments of the debates on the Convention in the International Law Commission and in the Sixth (Legal) Committee of the General Assembly. This review of legislative history should greatly assist statesmen and other interested persons in deciding whether to ratify the Convention or in interpreting and applying it.

The book also has chapters which give some typical examples of attacks on internationally protected persons and their premises (Chapter 1); describe generally the law governing internationally protected persons prior to adoption of the Convention (Chapter 2); summarize the debates in the United Nations on the need for a convention on the prevention and punishment of crimes against internationally protected persons (Chapter 3); and refer to the primary sources of the Convention and describe it in brief overview (Chapter 4). The book also contains a series of twenty-three appendices which include the texts of relevant conventions, declarations, UN resolutions, and other materials, as well as a brief bibliography.

The most serious weakness of the book, in this reviewer's opinion, is its paucity of analysis. Specifically, the book would have benefited considerably from a description and an assessment of the problem of attacks on internationally protected persons followed by a critical analysis of the strengths and weaknesses of the Convention and of its potential as a measure toward the prevention and punishment of international terrorism. To be sure, the chapter on legislative history contains several perceptive comments on individual articles of the Convention. It is unfortunate that these were not expanded upon in a chapter containing an overall analysis of the Convention. There would seem *prima facie* to be some difficulties with a convention which, at the time of this review, only thirty countries have ratified, in spite of the passage of four years since the Convention was adopted unanimously by the General Assembly.

One may hope that the authors' invitation to delve more deeply into a study of the Convention will be accepted. Those who do so will find this book a useful point of departure.

JOHN F. MURPHY
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Freedom of Navigation, With Special Reference to International Waterways in the Middle East. By Ruth Lapidoth. Jerusalem: The Jerusalem Post Press, 1975. Pp. 122. Index. \$1.

This interesting monograph has ninety-five pages of text, an excellent selective bibliography of eighteen pages, and an eight-page index. While

Lapidoth does not purport to be espousing the views of the Israeli Government, the monograph could, with minor modifications, be used as a memorial supporting Israel before the International Court of Justice. Lapidoth makes no claim to impartiality. The general propositions she sets forth are consistent with accepted rules of international law on straits, canals, and treaty interpretation, but when detailed analyses of specific points are made the arguments are somewhat heavyhanded with unresolved points of international law being stated as established rules.

In some particulars the arguments are, at least in part, based on the theory that all territories acquired or occupied by Israel are integral soil of Israel, a view not inconsistent with positions enunciated by Prime Minister Begin after his July 1977 trip to Washington. Lapidoth makes only limited references to the centuries-long enmities of the Middle East, or to East-West power and oil politics, or to domestic forces influencing American policy which collectively exercise a greater impact than does international law.

Lapidoth argues that the Straits of Bab-al-Mandeb and Tiran, and the Suez Canal (by treaty), are open to the traffic of all nations and disputes the right claimed by Egypt to close the Canal to Israel. Acknowledgment is made of the fact that the Strait of Messina was closed during World War I while Italy was still a neutral. These positions are broadly compatible with the Geneva Conventions on the Law of the Sea, as well as the 1975 "Single Negotiating Text."

Lapidoth supports Israel's use of the Suez Canal with a combination of arguments taken from the 1888 Constantinople Convention, UN Security Council resolutions (which may constitute evidence of international law but which do not *create* international law), customary international law, and some statements of Egypt subsequent to its final independence from the Ottoman Empire and more recently from England. Lapidoth argues that all closures of the Suez Canal are contrary to positive and customary international law and refers to the Suez, Panama, and Kiel Canals as being three great manmade international waterways not subject to closure.

Brief references are made to the Egyptian arguments that Israel is not a party to the Constantinople Convention, that Israel is not recognized by Egypt, the existence of belligerency, Egypt's right of self-defense, and Egypt's right to defend the Canal.

Lapidoth has made an excellent partisan presentation, the strength of which has not been appreciably changed by the stalemated Conference on the Law of the Sea. Academically, the value of the monograph would be greater had it made an impartial presentation of the difficult issues.

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New Directions in the Law of the Sea. Vol. V: Documents; Vol. VI: Documents and Index to Volumes I-VI. Compiled and Edited by Robin Churchill, Myron Nordquist, and S. Houston Lay. Dobbs Ferry: Oceana Publications, Inc.; London: The British Institute of International and Comparative Law. 1977. Vol. V. Pp. xv, 432; Vol. VI. Pp. viii, 433-975. \$30.00 each.

These volumes bring up to date this valuable series of which the first volume appeared in 1973. In Volume IV¹ the editors indicated that Volume V might contain the results of the Third Law of the Sea Conference. They showed sound judgment in abandoning this plan, for as they point out and the contents of these volumes amply demonstrate, state practice did not stand still but "has evolved at a rapid pace" (V, p. ix). While the Conference proceeds at a leisurely pace, fishing stocks in the North Atlantic are declining and the states in that area, following Iceland's lead, extended "their fishing limits to 200 miles without waiting for the outcome of the Conference" (*id.* p.x). States in other parts of the world, including the United States, have done likewise, expecting, perhaps rightly, that the Conference will put its imprimatur on their unilateral actions. Similarly, anticipating the formal adoption of an exclusive economic zone by the Conference, many states have enacted appropriate legislation, and some have entered as well into agreements with interested states. There is significant material on unilateral definitions and delimitations by agreement of the continental shelf. The editors have included the Order of September 11, 1976, by which the International Court of Justice rejected the Greek request for an indication of provisional measures in the dispute with Turkey relating to the Aegean Sea continental shelf. Included also is the relevant Security Council resolution 395(1976) and the Greco-Turkish Agreement on the Procedure to be Followed for the Delimitation of the Continental Shelf of November 11, 1976. In a quaintly phrased but highly commendable provision, "both parties have agreed to study state practice and international rules on this subject with a view to educating certain principles and practical criteria which could be of use in the delimitation of the continental shelf between the two countries" (*id.* p. 284).

There has been considerable movement in pollution control by bilateral and multilateral agreements. Among the latter the Convention for the Protection of the Mediterranean Sea against Pollution of February 16, 1976, and the West European Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources of May 1, 1977, may be mentioned. The editors draw attention to the Saudi Arabian-Sudan Agreement of May 16, 1974, as "one of the few examples where States have decided to establish a regime of joint uses for the seabed rather than agree on a boundary line" (*id.* p. xii). Another remarkable feature of this Agreement is Article XVI which confers compulsory jurisdiction on the International Court of Justice for the settlement of disputes respecting the interpretation or implementation of the Agreement. In the matter of the exploitation of the deep seabed which is central in the Law of the Sea Conference, the editors include the U.S. Deepwater Port Act of 1974 and the "Deepsea Ventures Inc. Notice of Discovery and Claims of Exclusive Mining Rights, and Request for Diplomatic Protection and Protection of Investment," addressed to the

¹ Reviewed in 69 AJIL 700-02 (1975).

Department of State on November 14, 1974, and apparently to seventy-four other governments (*id.* p. 389). In its response the Department stated that pending the outcome of the Conference, the position of the U.S. Government is "that the mining of the seabed beyond the limits of national jurisdiction may proceed as a freedom of the high seas under existing international law" (*id.* p. 390). The responses of the Canadian, United Kingdom, and Australian Governments were negative (*id.* pp. 391-92).

In addition to some acts of IMCO and the ILO, the editors have included in Volume VI a selection of documents relating to or emanating from the Law of the Sea Conference. Among the former are the Rules of Procedure and among the latter, the Revised Single Negotiating Text dated May 6, 1976, and the Reports of the Chairmen of the First, Second, and Third Committees of the August-September 1976 session of the Conference. Finally, there are: a list of treaties relating to the law of the sea concluded since 1945 but including some earlier treaties, tables of ratification of major multilateral conventions, and tables of "claims made by States to the Territorial Sea, Exclusive Fishing Zones, Continental Shelf and other zones," arranged according to fourteen geographical headings. Volume VI concludes with appendices containing a cumulative table of contents for the six volumes, tables of treaties, municipal legislation, and cases, and an index for the series as a whole. One may share with the editors the inarticulated premise that the next volume will include the results of the Law of the Sea Conference. Whatever these may be, the record of state practice permits the inference that, even in case of failure or only partial success, there will be no anarchy. States will continue to strive with the assistance of existing institutions for the establishment of an acceptable regime for the high seas and, perhaps in a more distant future, for the deep seabed as well. Well-meaning slogans like "common heritage of mankind" will give way to the usual process of bargaining for securing national or regional interests. In any event, the editors of this series, the British Institute of International and Comparative Law, and Professor K. R. Simmonds, its Director, have earned the gratitude of international lawyers throughout the world.

LEO GROSS

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Studies in Space Law: Its Challenges and Prospects. By Stephen Gorove. Leiden: A. W. Sitjhoff, 1977. Pp. 220. Table of Cases. Index.

The author is one of a comparatively small band of international legal scholars who foresaw, early in the beginning of the space age, the advent of space law, "a new discipline dealing with the legal principles and problems arising out of man's activities in outer space," and this book "is the outgrowth of more than twenty years of research and writing in the field of space law."

It is fitting that this book should be published in 1977, the year which marks the 20th anniversary of man's venture into outer space. In 1958, when this reviewer was studying air and space law at the Institut für Luft-

und Weltraumrecht of the University of Cologne, the problem to which most attention was given was that of the upward extent of sovereignty. In other words, where does airspace terminate and outer space begin? Numerous solutions, both scientific and otherwise, have been proposed. The earlier ones are discussed in Chapter 1 of Part 1 of this book. Nevertheless, in this 20th space year, no definition has been universally accepted because of a reluctance to formulate a definition until increased space activities would have made more experience available. It is felt that we have now reached that stage, for this topic has been placed on the agenda of the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space (COPUOS) of the United Nations.

Space Law is made up for the most part of reprints of articles the author has written for other publications from 1958 to 1976. The arrangement is not strictly chronological, but rather the articles are woven into a carefully designed subject-matter structure. The essays "start with a retrospect and an overview of past developments (Part I, Section 1-3), continue with a discussion of some of the basic principles and provisions of the fundamental charter of internationally created space law, the Outer Space Treaty of 1967, and analyze subsequent elaborating agreements, largely following the sequential order of the treaty (Parts II-IV, Sections 4-13). The balance of the study focuses on problems currently under consideration before the United Nations (Parts IV-V, Sections 14-19) and those likely to arise in the future (Part VI, Sections 20-22)."

The reader thus is given an excellent picture of how this new discipline evolved from the early days when "the juridical problems of space were largely theoretical and somewhat remote," to the actual juridical problems of space today, such as those arising from remote sensing of the earth from outer space, from communications satellites, and from the imminent use of the space shuttle for space travel.

We see the development of what may be regarded as a body of law made up of a series of resolutions expressing the guiding principles governing man's exploration and use of outer space, some of which have been incorporated into treaties. The first of these treaties was of a general nature, the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies—usually referred to as the "Outer Space Treaty." This treaty was followed in succession by more specialized agreements; the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space; the Convention on International Liability for Damage Caused by Space Objects; and the Convention on Registration of Objects Launched into Outer Space. The author carefully analyzes each of these agreements as to its intent and its application to successive activities in outer space. The author points out that the Outer Space Treaty was not expected to remain the sole instrument governing the exploration and use of outer space. It was realized that additional international agreements would be required to give more detailed treatment to some general provisions and to implement them. He

notes, also, that the agreements mentioned above are not the only law. Other bilateral or multilateral agreements deal with tracking facilities, remote sensing, docking experiments, launching assistance, space research, telecommunications, and maritime and weather satellites.

Furthermore, as new applications of space technology appear, new international agreements are continuously being studied. Thus, shortly after man landed on the Moon, the Soviet Union proposed the drafting of a treaty relating to the Moon, despite the specific reference to the Moon in the Outer Space Treaty. After considerable study of the Soviet proposals, as well as those of others, the Legal Sub-Committee of COPUOS has produced a tentative Draft Treaty Relating to the Moon. The draft is analyzed in detail in an original contribution to *Space Law*, in Chapter 14, Part IV. While a number of provisions are similar or identical to some in the Outer Space Treaty, as the author comments, several are innovations. Of particular interest in our environment-conscious world is the provision that areas of the Moon having special scientific interest may be designated as international scientific preserves for which special protective arrangements are to be made.

That provision and others with respect to the manner in which scientific investigation can be carried out and with respect to free access are of special value now that we are seriously considering the establishment of a station on the Moon. *Space Law* has the double value of giving those who have a familiarity with that subject an authoritative summary, both historical and contemporary for review purposes, and of providing the newcomer to the subject with needed background information, as well as an introduction to the body of law which has developed, and a scenario of emerging problems. In either case, the reader who wishes to pursue the subject in more detail is aided by the copious footnotes. In some instances the footnotes refer to articles by the author which originally appeared in other legal publications and which are reprinted in this book. It would have been helpful if there could have been internal cross references.

Space Law beckons us to tomorrow's space law problems delineated by the final chapters on "Solar Energy and Space Law," "Legal Aspects of Space Stations," and, finally, "The Future of Space Law: a Legal Regime for Space Colonies."

KATHERINE DREW HALLGARTEN
Of the District of Columbia Bar

Essays on International Law and Relations in Honour of A. J. P. Tammes.
Edited by H. Meijers and E. W. Vierdag. Leiden: Sijthoff, 1977. Pp. viii, 371. Dfl. 65.00; \$26.00.

This festschrift is a reprint of the essays by colleagues, former students, and assistants of Professor Tammes, in 24 *Netherlands International Law Review*, combined issue 1 and 2. There is no unifying theme beyond that reflected in the title. The arrangement alphabetically by author separates essays that should be read together, such as the contributions of W. J. Ford and W. G. Rabus on the rights of irregular combatants in wartime, the

pieces by M. Bos and D. H. M. Meuwissen on the nature and purpose of law, and those by S. R. Chowdhury and J. H. Leurdijk on self-determination and intervention in existing states. As so often happens when individual essays are compiled, there is no index.

Relatively few of the essays offer original ideas or challenging policy analysis. Some are purely descriptive, the most interesting of these being A. M. K. Rabinowicz's historical exposition of transnational efforts by governments and private bodies to intervene nonmilitarily on behalf of persecuted Jews and J. Wildeman's survey of legal theory regarding the extent to which the legitimacy of a government's asserted authority depends on the effectiveness with which it is exercised. Other essays analyze existing practice, but the analysis often seems incomplete. Thus Leurdijk, discussing the problem of intervention in civil wars, recognizes the tension between a right of internal self-determination and the need to restrict military intervention in the interest of preserving world order. To reconcile these conflicting values, he suggests a "threshold of involvement" for third states, but leaves the reader uninformed as to just what he means. E. W. Vierdag does much the same thing when he compares the concept of asylum with the status of refugee, suggesting (*inter alia*) a broadening of the class of persons eligible for asylum without making clear how the definition should be drawn.

More thorough analyses are offered by Chowdhury, H. G. Schermers, and P. Hofer-van Dongen on three unrelated subjects. Chowdhury argues that the principle of internal self-determination does not apply to racial, linguistic, or religious minorities within a state, since the UN Charter contemplates multiracial, multilingual, secular national systems. He asserts, however, that it does exist when a state denies representative government to its people. Moreover, in the latter case there would be a right of third-state intervention (apparently with arms and troops), since the duty of nonintervention, embodied in Principle 3 of the UN Declaration on Principles of International Law concerning Friendly Relations of 1970, is tempered by the need to insure an effective right of self-determination as set forth in Principle 5 of the Declaration. More than a few would disagree with Chowdhury as to the right of internal self-determination, or the right to intervene, or both. One who disagrees as to the use of armed force is B. V. A. Röling, writing in the same collection of essays.

Schermers discusses "indirect obligations" (which include implied obligations) under European Community law. His train of thought is sometimes hard to follow, but it does lead him eventually to the second *Defrenne* case.¹ In that case the European Court of Justice applied Article 119(1) of the EEC Treaty, which calls upon "each Member State" to apply the principle of equal pay for equal work, to an action in a Belgian court by an employee against her employer, Sabena Airlines.² The essay would

¹ *Defrenne v. Sabena*, Case No. 43/75, [1976] E.C.R. 455.

² Although the Belgian Government owns the great majority of Sabena's shares, the company is treated as a private entity under Belgian law and in the European Court's judgment. Thus, for practical purposes, the Court extended the Article 119(1) obligation to private parties.

have been more interesting if it had concentrated primarily on the implications of *Defrenne*.

The Hoefer-van Dongen contribution provides a survey of the views of the ILO Committee of Experts and the Committee on Freedom of Association as to the right to strike, a right not expressly granted in any ILO Convention or Recommendation. He finds considerable evidence that both Committees recognize the right to strike, subject to certain exceptions.

Overall, the essays in this collection seem to this American reviewer to be short on policy analysis. Even on their own terms, they needed better editing than they received.

FREDERIC L. KIRGIS, JR.

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Judicial Protection in the European Communities. By Henry G. Schermers. Deventer: Kluwer, 1976. Distributed in the U.S. by Fred B. Rothman & Co., South Hackensack, N.J. Pp. xviii, 406. Indexes: cases, authors, subject. \$22.75.

While many practicing American lawyers know quite a bit about the competition laws of the European Communities, they often know much less about the legal nature of the European Communities and the supranational system developing in it—a legal and court system distinct from that of the member states. This excellent book provides a concise introduction to that legal system and case law of the Court of Justice of the European Communities, relating it to the functioning of the Court within that system and to the particular types of actions available.

Schermers discusses the Court of Justice of the European Communities in five chapters: the first treats the nature of the Community legal order and the sources of law applied by the Court; the second and third chapters analyze judicial review of Community and member state acts, including Article 173 actions for annulment and the plea of illegality under Article 184; chapter four treats in substantial detail Article 177 actions requesting preliminary rulings for use by national courts; and chapter five reviews the structure and operations of the Court.

Chapter one presents a discussion of two crucial legal developments within this new supranational legal order: the doctrine of incorporation of Community law into the law of the member states, and the concept of direct effects of Community law within the municipal legal systems. However, his most prominent theme, supported by his analysis of the case law of the Court, is that the European Court of Justice plays a role comparable to that played by the Supreme Court of the United States in the early years of the Republic; the European Court has by interpretation developed law in the absence of an effective legislative body in order to foster a more centralized political and economic entity.

The author argues that the case law of the Court has become very important, contrary to the legal methodology often ascribed to the Roman law background of most of the member states and their civil law tradition. Thus, judicial precedent has become exceedingly important in the develop-

ment of the new legal order. This has been possible because of the respect of the rule of law which is a common tradition in all of the member states. Yet, almost amazingly so, as noted by the author, the enforcement of Court decisions has never caused any significant problem.

Schermers quite correctly indicates that private parties cannot bring an Article 173 action for annulment of a regulation; however, under the interpretation of Article 184 by the Court, they can raise the illegality of regulations in private actions, without being subject to the time limitation of Article 173. This indicates the enlightened position of the Court concerning the role of the individual in litigation before it and in the Community legal order generally. It is by no means an undemocratic development, nor an insignificant one in terms of the history of international judicial institutions.

Schermers has presented a well-written and a well-organized study of the European Court of Justice, which is exceedingly useful to both the practicing lawyer and the international law scholar as a primer on the judicial system of the European Communities.

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Die Richtlinie im EWG-Vertrag (Hamburger Abhandlungen, Heft 62). By Nikolaus Weber. Hamburg: Gerold and Appel Verlagsgesellschaft, 1974. Pp. 140. DM 48.

In the regional system of the European Economic Community its principal institutions make and apply "Community law" in one of three distinct forms: "regulation" which has general and direct application to Community citizens, not unlike our federal statute; "decision" which is "binding in its entirety" upon its addressee, be it a government or an individual; and last, but not least, "directive" which is addressed to one or more member states and is binding upon the addressee "as to the result to be achieved" but leaves to the national authorities "the choice of form and methods." It is the "directive"—perhaps the most original and controversial of the three forms, reminiscent of the German federal "Rahmengesetz" (framework law)—that provides the focus of Weber's concise study.

The powers of the Community institutions are delegated powers, and in principle any such delegation in the treaty-constitution specifies the form of the legal act by which the particular power is to be exercised. In those instances where the institutions are left free to choose the appropriate form, they have inclined, as the author points out, toward the "regulation" which assures direct effect and immediate uniformity of the common rule. Thus the intricate scaffolding of the famous Common Agricultural Policy was constructed by "regulations," as were most of the restrictive practices law and customs law (customs valuation, rules of origin, and anti-dumping regulations).

As he explores the lawmaking practice, Weber concludes that for all

practical purposes the "directive" has been employed in three major areas: first, to assure national treatment in the field of establishment and supply of services, including access to medical and legal professions; second, in the harmonization of national legal systems, such as the introduction of the value added tax, removal of technical barriers involving some 90 directives, and harmonization of company laws; and third, in the first timid steps toward structural changes in European agriculture.

Since as a rule directives must be "transformed" into national law, Weber explores the varied procedures employed in the nine member states for this purpose: acts of parliament, executive acts adopted pursuant to a specific or general delegation by the legislature, or administrative regulations. The procedures vary greatly from one national constitution to another, depending upon the allocation of the lawmaking power between the legislative and executive branches.

Some criticism has come from writers and from French governmental quarters because of the minutely detailed provisions in certain directives, which left the national authorities no discretion whatsoever in the process of implementation. One such directive dealing with packaging and labelling of dangerous substances extended over no less than a hundred pages of the *Official Journal*. However, the debate on this issue appears to have now subsided.

Perhaps the most interesting aspect of Weber's study is his treatment of the question whether a directive, like a "regulation," may in certain circumstances be "directly applicable," and, more specifically, whether an interested individual or company may come before a national court to contest the validity of a national law on the ground that it conflicts with a directive which the national authorities failed to implement properly. Building upon its concept of the Community as a unique legal order in international law embracing not only governments but individuals as well, the Court of Justice of the Communities has progressively extended the direct impact of the treaty-constitution upon individuals. In this context, the Court has ruled, not without some raised eyebrows over "excessive judicial activism," that, even though a directive in principle binds governments only, it may nevertheless be invoked by individuals if its content is clear and self-contained and if it lends itself to direct application by a court or administrative authority.

Weber's style, a German version of the notorious American law review note, does not make for easy reading, but the study offers a competent survey of the doctrine and case law with sensible conclusions, generally supporting the forward-looking stance of the Court of Justice.

ERIC STEIN

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Les Décisions de la Cour de Justice des Communautés Européennes et Leurs Effets Juridiques. By Liliane Plouvier. Brussels: Etablissements Emile Bruylant, 1975. Pp. 310. B.F. 1,500.

The European Court of Justice (ECJ) is a complex institution, serving both as a constitutional court and as an administrative tribunal and this

in an ill-defined political context where none of the old adjectives, "supra-national," "international," etc. provide an adequate definition of its functions. The ECJ ensures the observance of law in the interpretation and application of the three treaties which serve as the constitutional basis for the European Economic Community (EEC), as well as implementing rules which have been adopted pursuant to these treaties.

In this regard, the ECJ's functions include the settling of disputes, the giving of binding opinions (exceptionally), and the giving of preliminary rulings, but, in the last analysis, the ECJ's authority is heavily dependent upon the continuing goodwill of its principal "legal subjects," the other EEC institutions and the governments of the nine member states which comprise the EEC.

As the several EEC institutions lack the imperium which is the principal quality of any sovereign state, there are obvious political overtones to any attempt to analyze, as Plouvier has done, the nature and extent of the ECJ's competence. How much authority is one to give to the decisions of the ECJ? Who is bound by them? What proceedings are available for their enforcement? To what extent is such enforcement dependent upon the continuing cooperation of national tribunals?

In examining these questions, Mme. Plouvier has undertaken an in-depth analysis of two basic legal concepts—*res judicata* and the forced execution of court judgments—and has studied each of these concepts in turn, showing how they are applied by the national tribunals of the EEC and then contrasting this application with that of the ECJ. She indicates, and this is certainly one of the byproducts of the United Kingdom's failure to enter the EEC until 1973, that the ECJ relies very heavily on Continental practice, taking over in great part the legal techniques and procedures of the French Council of State.

The great merit of Plouvier's book, which is an extended version of her doctoral thesis on this subject, is that, by means of a scholarly analysis of the views of the ECJ on the scope and binding effect of its own decisions and their enforcement, she provides a very clear picture of the limits of the ECJ's jurisdictional competence and its evolution over time. In this regard Plouvier's book should interest all specialists in EEC law, as well as those who, in their professional capacity, have occasion to study the possibility of bringing suit before the ECJ and wish to know more about the practical consequences of any decision rendered.

CHARLES A. DILLEY
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Die Verträge von Moskau und Warschau. By Claus Arndt. Bonn-Bad Godesberg, Germany: Verlag Neue Gesellschaft GmbH, 1973. Pp. 216.

The *Ostpolitik* of Chancellor Brandt's government led to a network of treaties between the Federal Republic and its eastern neighbors in the early seventies. Among these are the treaties of 1970 with the Soviet Union and Poland and the Basic Treaty of 1972 between the Federal Republic of Germany and the German Democratic Republic. The latter ac-

cord commits both German states to the development of normal good-neighborly relations and establishes the foundation for a gradual expansion of mutual cooperation through negotiations.

As the title indicates, this volume reviews the Treaty on the Renunciation of Force between Moscow and Bonn and the Treaty concerning the Basis for Normalizing Relations with Warsaw. Ratification of the two treaties caused a serious crisis in West Germany and led to an attempt by the Christian Democratic Party to overthrow the Brandt government and to the defeat of the Chancellor's personal budget. Arndt reviews these instruments from the political, constitutional, and international legal aspects. The better part of his study is devoted to an analysis of the Moscow treaty whose provisions are examined seriatim. The conclusion is reached that the West German objective of seeking a unified Germany has not been abandoned and the principle of self-determination has not been affected. This view accords with that of the Bundestag in its Joint Resolution on Foreign Policy, which was adopted by the Lower House when it voted the laws which approved the treaties and enabled the President of the Federal Republic to ratify them. While the instrument is regarded as an international agreement designed to further detente and to renounce the use of force in Soviet-West German relations, it is not considered a peace treaty but a *modus vivendi*. The author is emphatic in declaring that the treaty does not constitute a final recognition of the Oder-Neisse line with Poland which might bind even a unified Germany. Such a conclusion is at variance not only with the views of Eastern European international lawyers but, as is freely admitted, at odds with the position of Professor Wengler. The latter suggests that Article 3 of the treaty, which declares the European borders inviolable, implies recognition of the line. This issue is considered at even greater length, as indeed it must be, in relation to the Polish treaty, the territorial provisions of which were drafted in somewhat more detail and with regard to the applicable results of the Potsdam Conference. Once again Arndt maintains his earlier stand but advances the thesis that a unified Germany can only become a political reality if such a state guarantees the Oder-Neisse line.

Without doubt the author would place the principle on the inviolability of frontiers of the Helsinki Declaration of 1975 on a par with or even below the territorial clauses of the Eastern treaties. The inviolability principle adopted at Helsinki is far less explicit than the language found in the two treaties, language which the Soviets had tenaciously though unsuccessfully sought to incorporate in the Helsinki Declaration.

GUENTER WEISSBERG

The Common Law Zone in Panama: A Case Study in Reception. By Wayne D. Bray. Puerto Rico: Inter-American University Press, 1977. Pp. xxiii, 150. Index. \$20.

The Controversy Over a New Canal Treaty Between the United States and Panama. A Selective Annotated Bibliography of United States,

Panamanian, Colombian, French, and International Organization Sources. Compiled by Wayne D. Bray. Washington: Library of Congress, 1976. Pp. x, 70. \$5.

The first of these works is a carefully reasoned history of the way in which U.S. common law concepts and law were imported into the Panama Canal Zone commencing in 1903 from the Hay-Bunau-Varilla Treaty and replacing the underlying Hispanic American civil law. The author, who spent three years working at the isthmus, has filled in with painstaking research the story of the U.S. acquisition of the Canal Zone. He has faced the ambiguous ground left by the 1903 treaty, and by President Roosevelt's action, concerning whether the United States acquired sovereignty, or merely the right to exercise sovereignty, and has concluded that the United States did not receive full sovereignty. He takes issue with those who assert that the United States owns the Canal Zone. The book goes on to trace the gradual application of common law principles during the period of the Isthmian Canal Commission and following the establishment of the U.S. court system in the Zone. It concludes with a chapter on the evolution of Canal Zone law. On the whole, the author believes that, when the U.S. presence is withdrawn, the underlying Hispanic American concepts will take over in the area. The main body of the work was written while the abortive 1967 treaty terms were still being discussed. He is guardedly optimistic that the current version, signed and clarified by President Carter and General Torrijos, can pave the way for an orderly transition, as well as improved relations with all of Latin America. It is unfortunate that the October 1977 compromise clarifying statement had not been produced when the manuscript was still in the formative stage. One could wish that the author had gone on to flesh out the applications of the common law principles more fully for the interwar and postwar years. But this was not included in his original design, which was to trace the reception of the common law system into the essentially civil law surroundings. For this purpose, he was quite justified in focusing primarily on the period from 1900 through World War I, which is well discussed.

The Bibliography volume deals mainly with materials in the Library of Congress Law Library. It contains extensive annotations by Mr. Bray and covers both source material, legal and historical works, and treaties, along with monographs and selected legal literature. The author's pithy notes are valuable guides to the flavor of the works and often contain short excerpts from the material itself. It is an invaluable guide to an extensive literature and exceedingly timely.

NORMAN J. PADEFORD

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General Problems of Private International Law. By Otto Kahn-Freund. Leiden: A. W. Sijthoff, 1976. Pp. ix, 336. Index. Df. 48.00; \$19.25.

General Problems of Private International Law, by Otto Kahn-Freund, is based on lectures he delivered for the General Course on Private International Law at the Hague Academy of International Law in 1974. This

work is a reaffirmation of the lesson taught by Lipstein in "The General Principles of Private International Law"¹ before the same Academy in 1972—that English scholarship in private international law is without equal in presenting this most complex material in a clear, concise, and scholarly manner.

Not intended to be merely a statement of English conflicts law, the book examines the sources, contexts, and methods of private international law from international, comparative, and domestic perspectives. The student of American conflicts law would be well served by considering the outward-looking nature of the book, something seldom found in American scholarship, which too often shows a devotion to the preparation of casebooks or to "refinements" of fine legal points. In brief, Kahn-Freund's book is an analysis of the philosophy of private international law.

Despite the philosophical nature of this work, no attempt is made to obscure the realities one finds in practice. Asking whether international law can be the source of the conflicts norm, Kahn-Freund tells us that it is not possible, at least for now, because there is "no sufficient supply of conflicts rules, and moreover, the uniform application of enforcement of rules of international law is a 'consummation devoutly to be wished', and alas, no more" (p. 10). Yet, despite the bitter pill that this pronouncement represents for the international lawyer, can it be said that the international codification of private international law is any less advanced than numerous other areas of public international law?

Of particular interest to the student of conflicts law is Chapter X entitled "The Choice of the Connecting Factor." This chapter analyzes the choice and interpretation of the relevant connecting factors in conflicts law and does so in a historical as well as analytical way.

The international lawyer will do well to heed the message of Chapter II entitled "International Law as a Source." As stated earlier, Kahn-Freund does not see international law as a source of conflict norms, but he does recognize the potential of international conventions and treaties, particularly since the Second World War (pp. 41-42). It would seem reasonable, as suggested, that international codification of jurisdiction and recognition of judgments would alleviate the disharmony so disdained by the international lawyer. But, Kahn-Freund sees little hope for the international community's willingness to agree to uniformity in defining choice of law application (p. 50).

General Problems of Private International Law is an excellent work. The teacher of comparative law must have it at his disposal. The teacher and practitioner of public international law should not make the mistake of assuming it is of value only to private international lawyers.

R. DAN WEBSTER

U.S. International Trade Commission

Répertoire suisse de droit international public. Documentaire concernant la Confédération en matière de droit international public 1914-1939.
Vols. I, II, III, IV. Compiled by Paul Guggenheim, with the col-

¹ Lipstein, *The General Principles of Private International Law*, 135 REC. DES COURS 197 (1972, I).

laboration of Lucius Caflisch, Christian Dominicé, Bernard Dutoit, and Jean-Pierre Ritter. Bâle: Helbing & Lichtenhahn Verlag Editions, S.A., 1975. Pp. xxxvi, 2531. Sw.Fr. 700. (Only Volume II, pp. vii, 715 (pp. 569-1284 of the set) has been received thus far and the following refers to that volume alone.)

This volume, commissioned and copyrighted by the Political Department of the Swiss Federal Government, is a rather interesting collection of cases and documents dealing with (a) treatment of aliens and (b) state territory, for the period 1914-1939. The texts are mostly in French, a few in German, and a number in a bilingual two-column format.

Chapter IV (one of the two in Volume II) is entitled "Diplomatic Protection and the Law Governing the Treatment of Aliens, Based on Treaties Concluded by Switzerland." Pages 575-657 cover the diplomatic protection of both natural and legal persons, including acquisition and loss of nationality, expatriation, and the position under international law of a protecting power. Pages 661-973 contain materials on the law governing aliens (transfer of private property, the rights of aliens, and also extradition), with pages 771-973 consisting of somewhat dated interpretations of relevant treaties concluded by Switzerland with a number of other states.

Chapter V is entitled "State Territory" (pp. 977-1284). It deals with questions connected with that subject, primarily with territorial sovereignty. Thus pages 977-1017 contain a mass of relevant cases and problems, of which those that originated during World War I are of some interest even today: military service by aliens, special taxation and aliens, seizure of enemy alien property partly owned by neutral citizens, and the requisitioning of alien private property in time of war. Other topics touched upon in this section include the intrusion by foreign fiscal and police agencies and interference with the right to political asylum. Pages 1021-55 represent a brief coverage of the delimitation of state territory and of international servitudes, followed by an extensive section of duties of abstention relative to all kinds of interference in international waterways and waters. This is followed by a brief treatment (pp. 1138-75) of international comity and by a somewhat longer section (pp. 1179-1255) dealing with limitations placed on territorial sovereignty by the international regulation of communications (land, sea, and air). A miniscule portion of the volume (pp. 1263-64) covers a peculiar problem encountered by Switzerland in 1931 in connection with the pacific occupation of territory.

Finally, a most interesting and instructive section (pp. 1267-84) analyzes the rights of land-locked states to fly their flags on the high seas, with particular reference to Switzerland. It appears, in this connection, that the Swiss flag was first displayed by an ocean-going vessel in 1862.

Judging the four volumes from the one on hand, the set is a substantial collection of material dealing with the international legal relations of a small country from the beginning of World War I to the beginning of World War II. In view of the limited scope of Swiss international

legal involvement, it is questionable whether the contents would justify the high cost of the set, at least as far as most university or law school libraries are concerned.

GERHARD VON GLAHN
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Soviet Yearbook of International Law 1974. Moscow: Izdatel'stvo "Nauka," 1976. Pp. 398. 2 rubles 95 kopecks.

The ever-expanding horizon of socialist international law, developing inevitably as the peoples of the world move progressively toward an ultimate merger within a communist society of free workers (p. 55), is the principal theme of the 1974 *Soviet Yearbook*. The "forces of imperialism and reaction" are seen to have lost their historical initiative, as the USSR and its allies press their advantage of increasing numbers in bodies creating international law.

The Council for Mutual Economic Assistance, known to the West as COMECON, is seen as the rallying point for the progressive world, with a membership open not only to any Marxist-oriented country but also to any country that "puts its foot upon the path of socialist development" (p. 37). There is even available a category of "partial membership," into which Yugoslavia is placed (p. 38). The network of states participating in making new law is seen to be expanding through multilateral treaties, and these should be "universal" (p. 104). This seems to mean that adherence should be open to all states, including those not members of the United Nations, and perhaps even to those not generally recognized. This latter proposition seems to emerge from the argument near the end of the article section that treaties signed with unrecognized states may be registered with the United Nations, since registration is but an act of a technical nature and cannot be interpreted as general recognition (p. 256). This argument, said to have started when the fledgling Soviet Government of 1917 began denouncing secret diplomacy, is buttressed by history. What it means for treaty-making with liberation movements and subsequent registration of the treaties is not spelled out.

As always with these volumes since their inception in 1958, the current volume provides Western readers with documented briefs in support of Soviet diplomatic positions on a wide variety of topics: the law of the sea, the definition of aggression, extradition, pacific settlement of disputes, protection of diplomatic agents, nationalization of foreign property by newly independent former colonies, copyright protection against machine copying, enforcement of human rights, preservation of European frontiers (Helsinki), custom as a source of law, and even the international legal status of INTERPOL. The heavy emphasis of earlier years on decolonization seems to have waned, perhaps because the process has been almost completed. But apartheid is, of course, attacked.

Regrettably, the course of debates among Soviet specialists in formulating an agreed position is less easily traced than in recent volumes of the series, for the report of the annual meeting of the Soviet Society of Inter-

national Law has been omitted for the first time, and the various articles report little current debate. What dispute there is concerns the state with rights to demand extradition, but it seems to have been resolved in favor of including both the state where the crime was committed and the state to which the criminal owes allegiance (p. 214). This would permit the Soviet Government to pursue those who are citizens but who have violated its long-arm statutes abroad, provided, of course, that there be an extradition treaty in force.

The massive attention given international public and private law by Soviet authors is evidenced by a bibliography of 482 titles published in 1973 alone. The concern extends throughout Eastern Europe, for another bibliography covers all Eastern European states except Albania. Curiously, there is not a word about the Chinese People's Republic either as a maker or violator of law.

As in the past, the editors deserve praise for making the detail of the Soviet position on many topics available to the rest of the world, and for including English summaries of the principal articles. It may not be amiss, however, to suggest that the effectiveness of the volume could be enhanced if these summaries were edited and proofread by persons with full knowledge of English.

JOHN N. HAZARD

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United States Legislation on Foreign Relations and International Commerce. A Chronological and Subject Index of Public Laws and Joint Resolutions of the Congress of the United States. Vol. I, 1789-1899; Vol. II, 1900-1929; Vol. III, 1930-1949. Compiled and Edited by Igor I. Kavass and Michael J. Blake. Buffalo: Wm. S. Hein, 1976. Pp. 1,690. \$225.00.

From a word count of the Constitution, Congress has much more responsibility in American foreign policy than the President. Historically, however, with the increasing complexity of international relations, the President has added to his power and an acquiescent Congress has delegated more to him. In the last few years there have been signs of a reshifting: the War Powers Act, the successful judicial fights against presidential impoundment, and renewed congressional sensitivity to the treaty vs. executive agreement issue (the latter, incidentally, taking on aspects of a continuing never resolvable battle). But the very attention engendered by separation-of-powers issues has brought to light powers and practices of Congress that have been relatively overlooked by pundits or apologists of presidential power. An important recent article by Arthur W. Rovine, for example, discusses some of these hidden powers in a strategic consideration of the executive agreements problem.¹

Perhaps not the most decisive, but nevertheless an important factor contributing to the historical underemphasis of the role of Congress in

¹ Rovine, *Separation of Powers and International Executive Agreements*, 52 IND. L. J. 397 (1977).

foreign policy and in international commerce has been the lack of a good index to all the relevant legislation and appropriations of Congress since 1789. The present three-volume work (to which more will be added later) by Igor I. Kavass and Michal J. Blake is a creative act of librarianship that will greatly help to overcome this deficiency. For the fact is that congressional activity in foreign relations has largely been obscured by the burial of acts and resolutions of Congress in the pages of *Statutes at Large*, the official indexes to which are almost useless. Treaties are a different story: the compilation by Charles I. Bevans from 1776 to 1949 have made those accessible to scholars,² and a recent worthwhile compilation of unperfected treaties by Christian L. Wiktor³ rounds out the contractual aspect of international law. But the statutory role of Congress has been extremely important, and the only access to it for the historian until the present volumes has been the hit-and-miss method.

The volumes under review are each organized into two main parts: a chronological listing of all statutes and joint resolutions of Congress and a subject-matter index. The chronological list contains the official name of the act or resolution and either a brief additional description or some notes of general interest. For example, the general appropriations act for April 9, 1818, is annotated to contain funds for "carrying into effect the Treaty of Ghent" and for "prosecuting and defending spoliation claims" (p. 111). The index is useful for researching any general topic or specific subject matter; it is less helpful if one wants to trace a particular act. For example, the Logan Act is nowhere mentioned in the index (popular names of acts in general are not mentioned). Nor could I find it under Foreign, Correspondence, Communication, Citizens, Neutrality, or Trading with the Enemy. But I was finally able to track it down under Crimes and Offenses, under the subhead "correspondence with foreign governments."⁴ A computer retrieval system such as LEXIS would have located the Logan Act much more quickly, and perhaps some day historians will need only a console to write about anything. Until such time, works such as the volumes under review offer the only consolation.

In their Introduction, the authors say that they had to read twice over 60,000 pages of *Statutes at Large* to compile the present three volumes, so I can hardly fault them for not having done enough work. What they did do is a most valuable research addition to any law library or library concerned with the foreign policy role of the United States. But if someday much more work could be done, I would suggest the indexing, under each act of Congress, of the prior laws that the act superseded or amended and the subsequent laws that in turn modified or affected it. Such a list-

² TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949.

³ C. WIKTOR, UNPERFECTED TREATIES OF THE UNITED STATES OF AMERICA 1776-1976 (Vols. I and II, 1976; Vol. III, 1977; six volumes projected). Vol. I reviewed in 71 AJIL 812 (1977).

⁴ The Logan Act of 1799 made it a crime for citizens to carry on correspondence or dealings with a foreign government with intent to influence its conduct with respect to disputes or controversies with the United States.

ing could not be derived merely from what Congress said it was doing, but rather would have to be judged according to the content of each act. The task would indeed be immense, but we would all be the richer for it just as we have benefited from the present volumes.

ANTHONY D'AMATO

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Chung-hua jen-min kung-ho-kuo t'iao-yueh chi (Compilation of Treaties of the People's Republic of China). Vol. 16 (1968-1969) *Chung-hua jen-min kung-ho-kuo wai-chiao-pu* (Ministry of Foreign Affairs of the People's Republic of China) (ed.) Peking: Jen-min ch'u-pan she, 1976.

After the publication of Volumes 17 and 18,¹ Volume 16 of the Compilation of the Treaties of the People's Republic of China (PRC) finally appeared in 1976. This volume covers treaties and agreements concluded by the PRC during the period of the Cultural Revolution, 1968-1969. The format of this volume is generally the same as that of the earlier and subsequent volumes.²

TABLE 1

TYPES OF TREATIES CONCLUDED BY THE PRC IN 1968 AND 1969

(The classification is the same as the classification used in the compilation.)

	1968	1969	TOTAL
POLITICAL			0
LEGAL			0
BOUNDARY PROBLEMS			0
ECONOMIC (1) Commerce and navigation			0
(2) Economic aid, loan and technical cooperation	2	1	3
(3) Trade and payment	27	19	46
(4) General conditions for delivery of goods	3	3	6
(5) Registration			0
(6) Other	1*	1*	2
CULTURAL (1) Cultural cooperation	1		1
(2) Broadcasting and TV cooperation	1		1
(3) Exchange of students			0
(4) Other	1*		1
SCIENCE AND TECHNOLOGY			0
AGRICULTURE AND FOREST			0
FISHERY			0
HEALTH AND SANITATION	1	1	2
POSTAL AND TELECOMMUNICATION			0
COMMUNICATION AND TRANSPORTATION			0
LAW OF WAR			0
MILITARY			0
MULTILATERAL			0
TOTAL	37	25	62

* Indicates semi-official agreements.

¹ See my review in 71 AJIL 378 (1977). That review also covered Volume 15.

² See my review in 61 AJIL 1095 (1967) and 71 AJIL 378 (1977).

TABLE 2

NUMBER OF BILATERAL TREATIES CONCLUDED BY THE PRC IN 1968-1969

COUNTRY	1968	1969	TOTAL
Afghanistan	1	1	2
Albania	1		1
Bulgaria	1	1	2
Ceylon	2	2	4
Cuba	2	1	3
Czechoslovakia	1	1	2
Finland	2	1	3
German Democratic Republic (East Germany)	1	1	2
Guinea	2	2	4
Hungary	2	2	4
Japan	2*	1*	3
Korea (North)	1	1	2
Mali	1		1
Mongolia	1	1	2
Nepal	3		3
Pakistan	1		1
Poland	2	2	4
Romania		2	2
Southern Yemen	1	1	2
Sudan	1	1	2
Tanzania	1		1
UAR (Egypt)	4	1	5
Vietnam (North)	3	2	5
Yugoslavia	1	1	2
TOTAL	37	25	62

* Indicates semi-official agreements.

Included in the volume under review are 59 bilateral treaties and agreements and 3 semi-official agreements. Tables 1 and 2 indicate the range of the PRC's treaty activities in 1968 and 1969.

By comparison with the earlier and subsequent volumes, the Cultural Revolution apparently seriously cut down PRC's treaty activity not only in the number of treaties and treaty partners, but also in the categories of treaties which were concluded. Most treaties concluded during this two-year period were routine trade and payment agreements (46 out of a total of 59 treaties concluded) and there is not a single political treaty or communique among them. The number of the PRC's treaty partners was only 23 in 1968 and 19 in 1969. In 1965, the year before the outbreak of the Cultural Revolution, the PRC's treaty partners numbered 38,³ but in 1966 the number declined to 24 and in 1967, at the height of the Cultural Revolution, it was further reduced to 20.

With the publication of this volume, the only remaining gap between Volumes 1 and 18 of the PRC's compilation is Volume 14 for the year

³ See Table 2, National treaty contracts with the PRC: 1949-67, in JOHNSTON & CHIU, AGREEMENTS OF THE PEOPLE'S REPUBLIC OF CHINA, 1949-1967: A CALENDAR 220-22 (1968).

1965. It is not clear when and how this volume will appear because this volume, if published, would have to include several documents⁴ signed by Liu Shao-ch'i, the Chairman of the PRC who was deposed during the Cultural Revolution.

HUNGDAH CHIU
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BRIEFER NOTICES

Concepts of Just War. By Yehuda Melzer. (Leiden: Sijthoff, 1975. Pp. x, 190. Index. Dfl. 39.00.) In recent years it has become increasingly clear that the majority of members of the United Nations are of opinion that the most "just" of wars is that fought in the name of national liberation and self-determination, a fact which lends point to Melzer's view that it is one's set of moral and political convictions which determines one's sense of just war (p. 14). Nevertheless, and despite his title with its moral and ethical overtones, the author contends that the only positive law relevant to his analysis of *Concepts of Just War* is the Charter, so that "just" and "unjust" become "legal" and "illegal" (p. 17). While the current majority in the United Nations would probably agree with this, the international lawyer will find the compression of ideas somewhat confusing, especially as the decisions in the United Nations are not made on grounds of morals or rightness or law, whatever state representatives might assert in their speeches, but solely for reasons of political expedience. To some extent, Melzer is himself aware of this fact and suggests that it is for this reason that "room was left in the Charter for conflicting interpretations" (p. 37).

Repeating a view at one time put forward by Lauterpacht, Melzer refers to the rationale of arguing that, if one is fighting a just war, obviously no rules of law can operate to protect the opponent (pp. 58-59). The war crimes trials have shown, however, the fallacy of this argument at least on the judicial level (p. 61), while the 1977 Geneva Protocols on Humanitarian Law in Armed Conflict reject any type of discrimination as between belligerents, unless some of the combatants are mercenaries, who can never be regarded as engaged in a just cause.

Perhaps it is because of his equalization of justness with legality that the author devotes so much space, almost one-third of his monograph, to consideration of the Nuremberg Principles, which might be regarded as relevant to *Concepts of Just War* only if, as a result of military necessity, so many criminal acts are committed that what began as a legal war has degenerated into an unjust one (p. 93). Such an argument, however, merely emphasizes terminological ineptness.

Almost as much of the work is devoted to an exposition of pacifism, a matter which again seems hardly relevant to *Concepts of Just War*. However, it would appear that the author's purpose was to analyze the position of those who refused to participate in the U.S. operations against Vietnam on the contention that they were illegal. However, showing

⁴ E.g., Liu Shao-ch'i signed the friendship treaty with Tanzania (February 20, 1965), the Joint Communique on Ugandan President Obote's visit (July 16, 1965), and the Joint Press Communique on Somali President Osman's visit (July 28, 1965). See, *Jen-min jih-pao* (People's Daily), February 21, July 17, and 28, 1965, respectively.

some subjectivity, he rejects the idea of the "justness" of absolute pacifism, in order to imply that when faced with such a manifestation as Nazism, pacifists have "not even a very bad alternative open to them other than fighting" (p. 145). In this way, he merely emphasizes that the "justness" or "legality" of any conflict depends upon one's personal ethical predilections.

Despite the confusion between law and morality, the book is interesting, but it is unfortunately spoiled by complexities of style, numerous misprints, and convoluted statements that at times do not even form proper English sentences.

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Cases on the Law of the Sea. Vol. I. Compiled and edited by Kenneth R. Simmonds with the collaboration of Amrit Sarup. (Dobbs Ferry: Oceana Publications, Inc., 1976. Pp. xxiii, 470. \$40 per vol.) This is the first in a projected eight to ten volume series on the law of the sea, to be sold at \$40 per volume. The editor points out, correctly, that the cases on the law of the sea are scattered and that this series will provide easy access to the multitude of decisions in question. On the other hand, judging only on the basis of Volume I, it must be said that the library of any educational institution at which international law is taught, as well as all major public libraries, will contain casebooks providing more than sufficient material on the law of the sea.

The editor has properly chosen to divide the subject matter into five major and five subsidiary categories, but he has then proceeded to arrange the cases in strictly chronological order, beginning in the year 1800. In Volume I, which covers materials through 1860, he has preceded each case with a number indicating the category into which the case falls. Consequently, one has to leaf through almost 460 pages in order to determine which cases apply, say, to questions of the territorial sea. To be sure, a topical index is promised for the volume ending "phase 1" of the series (covering material through 1919). Until then, no simple clue is supplied as to where to locate relevant materials.

The editor has supplied a brief introduction for each case, normally not exceeding one-third of a page in typescript. The older cases are reproduced photographically from the original printed versions, a feature which is not endearing to the modern reader. And at least one-third of the 31 cases in this volume consist of "standard classics" (*The Twee Gebroeders*, *Church v. Hubbard*, *The Anna*, *Le Louis*, *U.S. v. The La Jeune Eugenie*, *The Antelope*, etc.), with more that may be found in any standard casebook in international law.

It may well be that future volumes in this series will introduce the reader to less common or standard materials on the law of the sea, with more analytical comment by the editor than has been the case in Volume I. Unless such an expansion of materials takes place, the cost per volume and for the entire set would not appear to be warranted. Both professors and practitioners of the law of nations possess, I am certain, a great deal of the case material presented and about to be presented in this series.

GERARD VON GLAHN
University of Minnesota

The Law of the Sea in Our Time. By Shigeru Oda. Vol. I, *New Development, 1966-1975*; Vol. II, *The United Nations Seabed Committee, 1968-1973* (Leiden: Sijthoff, 1977. Vol. I, Pp. xii, 269. Index. Dfl.56.00; \$22.50. Vol. II, Pp. xvi, 332. Indexes. Dfl.64.00; \$25.50.) Seven articles and lectures by Oda are republished in Volume I. The first and longest (113 pages), "The Dawn of a Régime for the Deep Ocean Floor: 1966-1970," is very useful. It traces a variety of official and unofficial statements made during that significant period in the preparation of a comprehensive law of the sea convention. This informative essay concludes with a consideration of the Draft UN Convention on the International Seabed Area submitted by the U.S. Government in 1970. "The Continental Shelf Agreements between Japan and the Republic of Korea, 1974" is the last essay in this volume.

Volume II is intended as a reference book on the work of the UN *Ad Hoc* Seabed Committee in 1968 and of the Seabed Committee from 1969 to 1973. It ends with a brief discussion of General Assembly Resolution 3067 (XXVIII) of November 16, 1973, providing for the convening of the Third UN Conference on the Law of the Sea. This is a very valuable guide to the great variety of proposals and statements made by participants in these two committees as well as in the General Assembly and its committees. While "the positions taken by the Japanese Government are continuously mentioned," Oda has "tried to remain objective when describing the work of the [Seabed] Committee" (p. vii). Obviously one cannot do complete justice in one slim volume to all the views aired in the Committee.

Oda invested six years of his professional life in the work on a new law for the oceans and he has prepared "this very modest volume with infinite attachment and nostalgia for the work of the law of the sea" (p. viii). No doubt, had he not been elected to the International Court of Justice, Oda would still be involved in the protracted efforts of the Third Law of the Sea Conference and the elusive search for principles of "distributive justice in the international community" (Vol. I, p. 140).

LEO GROSS

Fletcher School of Law and Diplomacy

The International Legal Regime of Artificial Islands. By Nikos Papadakis. (Leiden: Sijthoff, 1977. Pp. xxi, 277. Indexes. Dfl. 58.00; \$23.25.) Japanese plans for a "sea-city" of 30 million people by the year 2020 may seem fantastic, but many varieties of artificial island are an immediate or imminent reality. The subject Papadakis addresses could become a major area of practical concern to lawyers. The author opens with a lively account of the already bewildering array of existing or potential uses of artificial islands and of some of their economic and political implications. For instance, landlocked nations or even private individuals might seek to become maritime powers by erecting artificial islands on "seamounts" (submerged volcanoes rising close to the surface).

This technological and geographic backdrop provides perspective valuable in identifying the inadequacies of existing or proposed legal rules, and it underscores the author's plea for a more functional approach to the subject, sadly not reflected in the rather simplistic provisions of the text that has thus far emanated from the Third Law of the Sea Conference. The only two concessions international law has made to this approach—installations to exploit continental shelf resources, and ocean data acqui-

tion systems—are covered in detail in Part II of this work. The busy reader, however, can obtain a good overview of the subject in Part I, where Papadakis examines the three major general international law questions relating to artificial islands: the right to erect them, their juridical nature (*e.g.*, their right to territorial waters), and jurisdiction over activities upon them. While taking a necessarily methodical legal/geographic approach, he maintains a lively narrative and incisive analysis of the legal issues and a sound balance between the views of other commentators and his own perceptions. His analysis draws from a wide array of sources, including the practice of individual nations, such as European efforts to control offshore “pirate” broadcasting stations.

The author is more concerned with the suitability of existing or proposed rules to meet technological realities than with sterile conceptual debates or attenuated efforts to justify unilateral assertions of jurisdiction by nations outside their territorial waters (a trap into which other commentators too easily fall). His political and legal common sense is also displayed in a refreshing realism about and sensitivity to Third World perspectives. Clearly the most authoritative work on artificial islands to date, this book should retain its currency for some years, for whatever Law of the Sea treaty emerges is likely to contain provisions very similar to those considered by the author.

REINIER LOCK
of the San Francisco Bar

Die seewärtige Grenze des Festlandssockels Geschichte, Entwicklung und lex lata, eines seevölkerrechtlichen Grundproblems. By Ulf-Dieter Klemm. (Berlin, Heidelberg, New York: Springer Verlag, 1976. Pp. xiv, 285. DM 98; \$40.20.) The problem discussed in this book—*i.e.*, the seaward boundary of the continental shelf—may belong to legal history if the Law of the Sea Conference finally comes up with a package deal. It does not follow that the description of state practice concerning the shelf boundary given by the author as well as his careful study of the drafting of the Geneva Convention on the Continental Shelf of 1958 would become useless. As an example of a treaty provision which lends itself to all kinds of interpretations, Article 1 of that Convention with its compromise formula “to a depth of 200 metres or, beyond that limit to where the depth . . . admits of the exploitation . . .” is of considerable interest. After a thorough discussion of the practice before and after the entry into force of the Convention, as well as the inconclusive drafting history, the author gives his own interpretation of Article 1 (pp. 165–200). His submission is that no conclusive interpretation is possible for the second criterion and no provision of the Convention therefore applies to exploitation beyond the 200-meters line (pp. 198 ff., 255 ff.). Exploitation in this region is covered, according to the author, by general international law which does not, as he sees it, forbid this kind of use of the high seas. Having reached this result, the author discusses whether international custom gives a clear answer to the question of where the seaward boundary of the shelf is situated. Despite the remarks of the ICJ in the *North Sea Continental Shelf* cases, no solution is found by an analysis of state practice. In a final chapter the work of the Law of the Sea Conference on this problem is discussed.

The book is written with a good knowledge of practice and literature in the field and generally his arguments are well presented. He seems to feel some uneasiness concerning his final conclusion. Indeed, complete capitulation in view of the difficulties that Article 1 presents does not seem very helpful. To say, as the author does, that exploitation in an area

where the water is 250 meters deep and situated fifteen miles from the coast on what is clearly a continental platform would not be covered by Article 1 of the Convention seems to be clearly incorrect. It is one thing to state that Article 1 does not permit fixing an abstract line and another to submit that it is not applicable at all. A concrete case may well be decided by analyzing the two criteria in their relationship. The famous Martin Wolff is on record as saying that jurisprudence often consists in determining at what moment a tail of a horse ceases to be a "tail," when the hairs are plucked out one by one. The tail cannot be defined by the number of hairs.

J. A. FROWEIN
University of Bielefeld

Les Astronomes et le Droit de l'Espace. By Gisele Ringard. (Paris: Presses Universitaires de France, 1977. Pp. iii, 250.) This short text addressing astronomers and the law of space builds upon the fundamental law of outer space and the guiding principles in that law (primarily established under the framework of the Treaty of 1967 on the Principles of Outer Space). The author stresses that under this set of principles, states are ensured freedom of use of outer space, equality of use among states, a regime of peaceful purposes, obligations among them to cooperate and assist one another, a guarantee of the nationality of space objects, and the duty to assume responsibility for harm. The author traces efforts to probe space, particularly through the use of telescopic instruments including those receptive to radio waves. The author believes that more precise rules are needed because these probes will require states to pursue their efforts in outer space itself.

A major portion of the book describes in detail the organizations involved in coordinating the efforts of governments and astronomers and their space activities. The book is largely concerned with the technical details of such organizations and their activities. Its value to international lawyers lies primarily in making us aware of the large number of organizations involved in these activities and providing us with a detailed review of how they are structured and how they pursue their various tasks.

HARRY H. ALMOND, JR.
U.S. Department of Defense

Nuclear Proliferation and the Near-Nuclear Countries. Edited by Onkar Marwah and Ann Schulz. (Cambridge, Mass.: Ballinger Publishing Co., 1975. Pp. xv, 350.) This interesting volume is a compilation of papers prepared for a conference at Clark College in 1975. The book is organized in three main sections, each comprising several papers, followed by short essays representing a summation of the discussion. The dividing line between sections is not precise, and the discussion essays (though skillfully written) are too compressed. However, the various papers, in the aggregate, provide a comprehensive and informative analysis of the complex issues raised by growing prospects for nuclear proliferation.

One of the most provocative is by Theodore Taylor on the inherent dangers of the spread of nuclear technology. He accurately pinpoints (without fully resolving) a complex issue currently confronting the Carter Administration and Congress: whether to develop a uniform policy for nuclear assistance and cooperation or, alternatively, one that makes selective (*i.e.*, discriminatory) distinctions between nations.

Among the papers focusing upon countries or regions is that by K. Subrahmanyam, presenting a blunt but familiar rehearsal of arguments articulated by many Indians in opposition to the Non-Proliferation Treaty (NPT) regime. The author contests the widely held view that the Indian peaceful nuclear explosions (PNE) have accelerated the momentum toward nuclear proliferation but fails to mention that it has also stimulated greater international efforts toward control. Steven Rosen's article challenges conventional wisdom by arguing that a stable system of nuclear deterrence is possible in the Middle East and could contribute to an overall deescalation of the Arab-Israeli conflict. Yet, the view that "nuclearization will induce moderation" is, at the very least, debatable, as the author admits. It is difficult to escape the conclusion that public demonstration or announcement of a nuclear weapons capability by Israel or an Arab nation would set off an unpredictable but dangerous chain of events that would not contribute to peace in the Middle East.

South Africa's nuclear program is all too briefly sketched by Edouard Bustin, but in light of recent international efforts to restrain South African nuclear testing, his central conclusions are interesting. South Africa clearly possesses overwhelming conventional superiority relative to its political adversaries, and nuclear weapons would provide little benefit in that context. But as leverage for a degree of continued support by the United States and Great Britain, the threatened nuclear option is useful currency. In one of the book's most interesting papers, H. Jon Rosenbaum describes the forces stimulating Brazil's nuclear aspirations. Particularly useful is a description of the motivations of Brazil's various internal groups. National pride, developmental concerns, and rivalry with Argentina all have their part, with the latter being the most dynamic and subtle element.

Currently, U.S. policymakers are deeply involved in a complex effort to develop a comprehensive U.S. nonproliferation strategy. However, if this book leaves any one overall impression, it is to reemphasize the uniqueness of each near-nuclear situation. A comprehensive strategy is long overdue; its successful application will necessitate not only a long-term foreign policy commitment, but one which is sensitive to national and regional distinctions. This book is a good contribution to such an effort.

JOHN R. REDDICK
The Stanley Foundation

Nazionalizzazioni e diritto internazionale. By Giuseppe Tesaro. (Naples: Edizioni Scientifiche Italiane, 1976. Pp. 234.) This is a study of the legality of nationalization measures by states against foreign-owned property. The author concedes that international law, as interpreted by the major Western powers, grants any state the right to nationalize or expropriate foreign-owned assets within that state, but only if the following conditions are met: (1) the taking of property must be in the public interest; (2) it should not involve discrimination against foreigners; and (3) compensation must be paid adequately, effectively, and promptly.

The author tries to demolish these principles of classic international law. As to the requirement that a taking of property must be in the public interest, Tesaro contends that the nationalizing state is the exclusive arbiter in determining what is its national or public interest. It must be assumed that any expropriation of property is directly or indirectly in the public interest, otherwise the nationalizing state would not take such action in the first place. For example, the nationalization of the oil industry in Mexico in the 1930's and the postwar nationalization by Indonesia of

foreign oil companies were all in the public interest, even though economically this may not have been always profitable for Mexico or Indonesia. The author further states that the principle of nondiscrimination against foreigners is obsolete because discrimination is in many cases the necessary result of a policy which retaliates against foreign economic exploitation and interference in vital domestic affairs of the nationalizing state. As an example the author refers to the nationalization of property owned by U.S. enterprises in Cuba, which was, according to the author, the legitimate answer of Cuba to the American boycott of Cuban sugar imports to the United States. With respect to compensation practices, the author contends that the principle of adequate, effective, and prompt compensation has been abandoned by all states and replaced by the now generally accepted practice of long-term lump sum payments. Such lump sum payments were concluded between many Western countries and Eastern European states and in almost all cases compensation was neither adequate, nor effective, nor prompt, but payments were extended over many years and often covered not more than a fraction of the value of the expropriated property.

The conclusion of the author is that every state may claim to be judge of its own actions concerning the nationalization or expropriation of foreign-owned assets and that each state is entitled to regulate within its own jurisdiction the conditions under which compensation, if any, shall be paid to the foreign owners.

ZVONKO R. RODE

Of the District of Columbia Bar

Microstates in World Affairs: Policy Problems and Options. By Elmer Plischke. (Washington: American Enterprise Institute for Public Policy Research, 1977. Pp. xii, 153. \$3.) Since "analysis of microstate participation can be [and in this study is] viewed from the perspective of the community of nations, the international organizations, the smaller states, and other powers including the United States" (p. 129), one should be forewarned that Plischke's study is broader than its title may imply. As such, it is a welcomed attempt to examine the microstate phenomenon in a broader framework than most scholars previously have used. And although its analysis is somewhat prosaic and recommendations unoriginal, this study still constitutes a useful addition to the literature.

The author suggests a division of all the independent states in the world into ten categories. "Those states having less than 300,000 people are designated *microstates* and those with under 100,000 *submicrostates*" (preface); two categories of small states (under 5,000,000), two of medium states (under 50,000,000), and four of large states are also suggested.

A highly useful appendix then analyzes the ten categories in terms of their location, date of independence, area, population, diplomatic representational style, rates of treaty-making, attendance at international conferences, and membership in international organizations. Indeed, a sizeable portion of the study is a verbal analysis of this appendix. Unfortunately, one suspects that some of it would have been better left in tabular form. In addition, about 20 percent of the study consists of footnotes, far too many of which present data that will probably interest only devotees of minutiae. Despite all this detailed textual analysis, moreover, the author is able to conclude little more than that microstates are not as active in world affairs as other states. What is more, his final chapter on "Policy Problems and Options Analysis" is simply a restatement of material readily

available elsewhere. A second, less useful appendix lists some 200 potential new states. Included are such logical candidates as Belize, less logical ones such as the Falkland Islands, and completely illogical ones such as Manchuria, the Aleutian Islands, Canada's Northwest Territories and Newfoundland (but not Quebec), and Novaya Zemlya.

Closing his introductory survey of the relevant literature with a plea to check further microstate proliferation and thus help "undo the damage that has been perpetrated" (p. 10), Plischke here and elsewhere in his study fails to consider adequately some of the most salient reasons for the present situation, reasons which were so clearly brought out when the UN Security Council unsuccessfully grappled with the problem from 1969-1971.¹

MICHAEL M. GUNTER

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Die Menschenrechtsbeschwerde vor den Vereinten Nationen. By Friedrich Meissner. (Baden-Baden: Nomos Verlagsgesellschaft, 1976. Pp. 109.) This book on "The Human Rights Complaints before the United Nations" deals in its first section (A) with what its author calls "petitions proceedings," a term which is meant to cover activities not based on specific international instruments additional to the UN Charter, but procedures which developed out of the handling of "communications" concerning human rights. These are now regulated by resolutions of the Economic and Social Council 1235(XLII) of 1967 and 1503(XLVIII) of 1970, the latter laying down the procedure for dealing with communications that appear to reveal a consistent pattern of gross and reliably attested violations of human rights. The author submits that it is not the purpose of this "petitions procedure" to establish that a violation has been committed in a specific case.

Section B is devoted to the procedure applying in the UN system to individual complaints and deals mainly with the Optional Protocol to the International Covenant on Civil and Political Rights, which entered into force in March, 1976, and to which, as of September 1, 1977, there are 16 parties. The principal organ of implementation of the Optional Protocol and of the Covenant itself is the "Human Rights Committee" which consists of 18 members serving in their personal capacity.

Section C examines the difficult and very topical problem of competing international procedures and, in particular, the relationship between the European Convention on Human Rights and the Optional Protocol. It surveys measures which were proposed—and taken by a few states—in this regard.

In spite of its small size—of 109 pages only 68 contain the author's text while the rest consists of German translations of relevant treaties and UN documents—Meissner's book is more than a mere introduction to its subject. In many respects it presents detailed examinations of controversial questions, such as the question whether the petitions proceedings are legally binding. It is a valuable addition to the legal literature on the international protection of human rights.

EGON SCHWELB

New York, New York

¹ For an analysis, see the present reviewer's *What Happened to the United Nations Ministate Problem?* 71 AJIL 110-24 (1977).

L'Interdiction de la Discrimination dans le Droit International des Droits de l'Homme. By Marc Bossuyt. (Brussels: Etablissements Emile Bruylant, 1976. Pp. xi, 262. Index. Fr.625.) If a "preferred freedom" exists in the international law of human rights, it may be freedom from discrimination. In the language of the UN Charter respect for human rights and fundamental freedoms is called for "without distinction as to race, sex, language, or religion." (Arts. 1(3), 13, 55, 56). Specific international conventions have been adopted and are in force on Discrimination in Education (UNESCO, 1962), Discrimination in Employment and Occupation (ILO, 1958), and Elimination of Racial Discrimination (UN, 1965). The latter is the most widely adhered to human rights convention.

Reflecting this concern Bossuyt has addressed the international efforts to define and eliminate discrimination. His is the second recent book on this subject, the earlier being Vierdag's English language work, *The Concept of Discrimination in International Law* (1973). Of the two, Bossuyt's work is more comprehensive, as well as more up to date. Vierdag limits himself to an excellent analytical and theoretical discussion of the term "discrimination" and its meaning in international law. Bossuyt extends that discussion in the first part of his book, relying to a large extent on the earlier work, but more expansively addressing the difficult problem of reconciling terminological differences in the various international texts concerned with discrimination. In addition he makes extensive use of national materials, both constitutional provisions and case law, to add to an understanding of the definition and underlying concept of discrimination.

Although the first half of the book is well done, the discussions on implementation of the concept of nondiscrimination in the second half make an especially valuable contribution in presenting the case law arising from Article 14 of the European Convention of Human Rights, which prohibits discrimination "in the enjoyment of the rights and freedoms set forth in this Convention." Difficulties in application of this article by the European Commission and the Court are detailed through the cases, with particular emphasis on the *Belgian Linguistic* case. It is a thorough and excellent discussion.

DINAH SHELTON

University of Santa Clara

Discrimination on Grounds of Nationality. Free Movement of Workers and Freedom of Establishment under the EEC Treaty. By Brita Sundberg-Weitman. (Amsterdam, New York, Oxford: North-Holland Publishing Co., 1977. Pp. vii, 248. \$29.95; Dfl. 75.00!) This excellent, timely study originated as an address published in the March 1973 issue of *Svensk Juristtidning* (pp. 256-63) and was subsequently developed as a doctoral dissertation at the University of Stockholm under the title *Nondiskriminering i EEC* (October 1973). Both the article and the book were in Swedish. The 1977 publication, in English, is an enlarged and revised version of the author's major thesis, upholding full legal equality of the alien with citizens of the host country from the point of view of human rights.

According to Sundberg-Weitman, this idea first found its expression in the Convention of November 4, 1950, for the Protection of Human Rights and Fundamental Freedoms (Art. 14) and then in a most effective manner in the European Economic Community Treaty of March 25, 1957. The EEC program is based on the abolition of obstacles to freedom of movement of goods, persons, services, and capital among its member states.

Various measures directed to achieve this goal are based on the EEC nondiscrimination principle, which is clearly stated in Article 7 of the Treaty "... any discrimination on grounds of nationality shall be prohibited." The author devotes a great amount of space and effort to the analysis of this principle of nondiscrimination within the Common Market structure, especially in regard to freedom of movement for workers (Art. 48) and the right of establishment (Art. 52). The author also examines the exceptions to this principle: employment in the public administration activities which include the exercise of public authority as civil servants, as well as discrimination justified by reasons of public order, public safety, or public health. Thus, aliens still do not have the rights to participate in political elections or to be admitted to the civil service, but they are no longer restricted from engaging in economic activities, since this has nothing to do with sovereignty and democracy. In general no discrimination for economic reasons is allowed; any discrimination must be "justified," e.g., it must not be arbitrary.

The author demonstrates a thorough familiarity with the EEC Treaty, the supranational Common Market law, and the legal systems of the EEC countries. As a result of her intimate knowledge of the EEC, she has produced a competent and useful work at a time when human rights are a major issue within the community of nations.

IVAN SIPKOV
Library of Congress

Staatsangehörigkeitsrechtliche Bestimmungen in völkerrechtlichen Vereinbarungen Grossbritanniens. By Hannes Giese. (Frankfurt am Main: Alfred Metzner Verlag GmbH, 1976. Pp. x, 290.) The first 90 pages of this book contain a presentation of English nationality law in historical perspective which may be of interest to the German reader. There follows a description of nationality provisions in treaties to which Great Britain is a party, i.e., treaties relating to or consequential to cession or acquisition of territory. The treaties are grouped according to whether they provide for participation of the population in the transfer—by a right of option of nationality or a plebiscite. The British attitude toward the doctrine of automatic change of nationality in case of state succession is examined from the aspect of theory, jurisprudence, and practice. The last part of the work deals with treaty provisions for the elimination of conflicts of nationality laws, i.e., treaties concerning statelessness, plural nationality, and the nationality of married women.

The author correctly derives the doctrine of automatic change from the medieval concept of the legal identity of territory and population in continental law, ("*quidquid est in territorio etiam est de territorio*") and the Anglo-Saxon concept of allegiance. He propounds the view that the doctrine is not a rule of international law but a general principle of law which, however, constitutes *jus dispositivum*. Unfortunately, the author's research into British treaty practice in this field is bound to lead to meager results as to common features, since a great many of the treaties are plurilateral or multilateral treaties where Great Britain, though a party, was not involved in the territorial transfer itself. It is to be regretted that the author has not examined British practice concerning nationality in the process of decolonization. A considerable literature exists on the nationality laws of former French territories but this is not the case for former British territories. While the legislation of the ex-French territories is, in most cases, not based on agreements with France, the opposite is true for most of the ex-British territories. Independence requires legislation by the

Parliament of Westminster. The Independence Acts were followed by Independence Orders-in-Council to which, in most cases, the Constitution of the newly independent state is annexed and which, therefore, contain provisions relating to nationality.

The book, which is based on thorough research, shows the author's familiarity with Anglo-Saxon nationality concepts.

PAUL WEIS
Geneva, Switzerland

Comparative Human Rights. Edited by Richard P. Claude. (Baltimore and London: The Johns Hopkins University Press, 1976. Pp. xvi, 410. \$16.50.) Claude has edited an interdisciplinary volume intended to outline the scope and method of the sparsely cultivated field of comparative human rights and to provide a few stimulating studies of an exemplary character. The symposium is composed of eight political scientists, six legal scholars, one psychologist, and one sociologist. Ten authors teach in U.S. institutions; one is at a Canadian University, and five are otherwise active in the United States.

The editor summarizes four phases of a model of human rights development which is generalized from Western experience of the last four centuries (Table 3, pp. 392-93). This is supplemented by a "stimulus-response" model designed to assist specialists of all kinds to locate themselves in reference to the processes involved (Table 4, p. 401). The editor and James C. Strouse present a statistical synopsis of rights and sociopolitical and economic variables for 122 countries (Table 1, p. 56). Procedures are applied to the problem of interdetermination (subsequent tables).

The country studies use several modes of comparison. The situation in the United States is compared with one or more countries in order to analyze constitutional limitations on governments, freedom of expression, the right of privacy, equal justice and counsel rights, linguistic minorities, racial discrimination, and women's and children's rights. Lawrence W. Beer summarizes the interdependence of law and culture with particular skill in discussing freedom of expression in Japan and the United States. The right of privacy in the United States, Britain, and India is concisely handled by E. Jeremy Hutton, Krishna S. Nehra, and Durvasula S. Sastri. Other useful chapters are by Fletcher N. Baldwin, Jr., Otis H. Stephens, Jr., Manfred W. Werner, Ved P. Nanda, Anna P. Schreiber, and Linda Breeden. Jay Adrian Sigler provides a handy initial guide to "Research Sources on Comparative Rights Policies."

In Part III, "New Directions in Behavioral Research," Judith Gallatin contrasts the perspectives of adolescent Americans, British, and Germans and arrives at findings that will undoubtedly stimulate field investigation. William B. Devall outlines the present rather meager results of social science research on such questions as these: "What kinds of people express support for civil liberties and human rights and what kinds of people oppose them? Why do some people give verbal support to the abstract principle of civil liberties for everyone and, at the same time, advocate destroying the rights of their fellow citizens? What structural factors in a nation or community encourage and sustain civil liberties and human rights?" (p. 326). Carl Baar deals with legal and political studies by American political scientists and Richard P. Claude brings the enterprise to a suggestive conclusion.

The volume deserves to have an interdisciplinary impact at this timely moment.

HAROLD D. LASSWELL
Yale Law School

Das Selbstbestimmungsrecht der Völker Mit einem Exkurs zur Jurafrage. By Daniel Thürer. (Bern: Verlag Stämpfli & Cie, 1976. Pp. 256. Sw. Fr. 49.) Since World War I the "right" to self-determination of peoples has been hotly debated in the arena of international politics and, to a lesser extent, in the circles of international jurists. The push for autonomy by national minorities, particularly through the use of plebiscites, and the incorporation of the mandate system in the League of Nations all focused on "self-determination." This debate accelerated after World War II, particularly as a byproduct of decolonization. The advent of the United Nations created a new international forum for debates on territorial, ethnic, cultural, and economic self-determination.

Thürer examines the development of the "right," as a catchword whose meaning both historically and contemporaneously has been so ambiguous that Marxist, capitalist, and Third World nations might simultaneously brandish the phrase without a twinge of conscience. Has any right of self-determination reached the status of an international law norm? Although he rejects the notion that some general right exists, Thürer suggests that in specific instances, especially with respect to decolonization, there is near universal recognition of such a right.

Thürer concludes his general discussion of self-determination with an exploration of its possible future applications and of the role of the International Court of Justice in clarifying and expanding this principle. Thürer's analysis is thorough, well researched, and rich in example.

BRUCE M. BOTELHO
Juneau, Alaska

The United States and the Second Hague Peace Conference. American Diplomacy and International Organization 1899-1914. By Calvin DeArmond Davis. (Durham: Duke University Press, 1976. Pp. ix, 398. Index. \$16.75.) The author told the story of American participation in the First Hague Conference of 1899 in *The United States and the First Hague Peace Conference*,¹ published in 1962 by the Cornell University Press. The book under review is the successor, both in time and in logical development, to the earlier work, though it covers some of the same ground, and revises some of the author's earlier evaluation of the 1899 Conference.

In a sense, the title of the book is misleading, as its scope is considerably broader. Davis gives a detailed and authoritative account of the work of the Conference and of the role of the United States in initiating the Conference and in its achievements. Beyond that, however, he puts the Conference in historical perspective, indicating not only its relation to the 1899 Conference but also its place in the evolving world system for the handling of international relations. He sees the principal significance of the Conference as a step in the evolutionary development of a world organized for peace. To quote the author, "it was in connection with the project for a mondial arbitration convention and with recommendations for a Third World Conference that they came closest to agreeing on measures which could have established the Hague system in a formal sense as an organization of the world." (p. 278).

¹ Reviewed at 58 AJIL 224 (1964).

The outbreak of war in 1914 and President Wilson's lack of interest in using the Hague system as a point of departure in creating the League of Nations seemingly broke the chain of continuity in institutional development. The author believes that a stronger link with the Hague tradition might have softened Senate opposition to the Covenant of the League. In any case, the effort to break with the past in the establishment of the League was no more successful in severing the line of continuity in institutional development than were later efforts at San Francisco to conceal the League heritage of the United Nations.

This is a work of serious historical scholarship which should be invaluable to students of international organization who may be inclined to neglect the importance of the historical record of international institutional development not only in explaining what we have today but also in indicating the restraints under which we are forced to contend for a more peaceful world and the hope that lies in step-by-step progress, even with serious setbacks along the way.

LELAND M. GOODRICH
Columbia University

L'Inspection Internationale. Quinze Etudes de la Pratique des Etats et des Organisations Internationales. By Georges Fischer and Daniel Vignes. (Brussels: Etablissements Emile Bruylant, 1976. Pp. 518). This book contains fifteen studies on the practice of states and international organizations with respect to international inspection. The partial abandonment of state sovereignty through multilateral arrangements or through participation of states in international organizations has promoted a climate in which international inspection has developed in varying degrees. Ideally, international inspection is the detailed and active examination on the spot, by various means, carried out within the framework of a continuous and lasting process and pursuant to specific rules established by convention. It is important to note that the initiation of international inspection does not depend on the violation, or suspicion of violation, of an international undertaking or rule, or on the complaint of a state or the decision of an international organ.

The object of international inspection is to ascertain the conformity of a situation, operations, or acts with international rules. International inspection is carried out by a special category of international officials who should have the greatest freedom of access and movement as well as appropriate privileges and immunities. These officials are required to include their findings in reports addressed to an international body which alone is competent to draw conclusions from the report and to take follow-up measures.

The essays in the book consider international inspection in the following fields: (1) *Maintenance of international peace and security* contains contributions on international inspection within the framework of operations of the United Nations for the maintenance of peace, control of armaments, colonial territories, and Antarctica. (2) *Technical and economic matters* contains essays on international inspection in relation to ships, the power of control of the IMF, supervision carried out by the World Bank, and control over aid and development operations of the ECE to certain non-European states. (3) *Social and humanitarian measures* contains discussions of international inspection in the work of the ILO and WHO, international investigation in relation to drugs, the participation of the Inter-

national Committee of the Red Cross in visits to prisoner-of-war and civil-internee camps, and investigations in relation to human rights.

This innovative book merits reading by all interested in the subject of international organization. Since there is, as yet, no international government, inspection can help ensure, to some extent, compliance with international rules and obligations.

GERALD F. FITZGERALD
Department of Justice, Canada

The OAS and the UN: Relations in the Peace and Security Field. By Aida Luisa Levin. (New York: United Nations Institute for Training and Research, 1974. Pp. viii, 112. \$4.00.) The appearance of this monograph in the UNITAR Regional Studies series should have particular appeal to those interested in operational techniques of international organizations dealing with crises, both regional and universal. It should also have a great attraction for the cold war historian, for in essence it is a tale of the attempts by the Organization of American States to thwart the intrusion of Soviet communism into the Western Hemisphere.

Levin begins her excellent study by reviewing the long history of co-operation between the United States and the Latin American nations, which by World War II had developed a rudimentary form of regional organization. Nevertheless, at the end of that war, the idea of a world organization "did not arouse much enthusiasm . . ." in Latin America (p. 2). U.S. policymakers were more interested in universal organization than in strengthening the regional arrangement that had come into being, but at San Francisco it had to bow to pressures from Latin America, as well as from other nations interested in regional arrangements, to include in the UN Charter the articles permitting regional organizations to deal with regional peace and security problems, while attempting "to safeguard the authority of the world organization" (p. 6).

After a thorough analysis of the strengths and weaknesses of the inter-American system in its dealings with regional problems of peace and security, the author cogently points out that, as many of the regional conflicts were part of a global struggle (p. 39), it was inevitable that constitutional confrontations between the world and the regional organization would quickly occur. In tracing the debates, charter interpretations, and organizational activities of both bodies, Levin concludes that "while in theory United Nations organs are unquestionably competent to deal with any matter affecting the maintenance of international peace and security, in practice their ability to exercise such authority vis-a-vis the OAS is quite limited owing to the heterogeneity of the United Nations membership and the political divisions that pervade the political processes of the Organization" (p. 51).

The author recognizes that the outcome of many of the OAS-UN confrontations established a constitutional precedent which may well be the basis of extensive actions by other regional agencies in the future. "OAS claims have obscured the limits of permissible regional action, and consequently have opened the door to the assertion of broader claims" (p. 62). In the changing dynamics of today's world, Levin admits that it would be difficult to predict future developments between regional organizations and the United Nations in peace and security matters. But she clearly feels that some limits should be placed upon the right of the regional authorities to use force for the maintenance of peace and security.

Clearly written, fresh in its perspective, and informative throughout, this is a useful volume which will long be a standard reference work on the development of regionalism's impact on world organization.

ANN VAN WYNEN THOMAS
Southern Methodist University

La Suisse et la diplomatie multilaterale. Sous la direction de Jacques Freymond avec la collaboration de Nadine Galvani. (Geneva: Institut Universitaire de Hautes Etudes Internationales, 1976. Pp. 302. Sw.Fr. 45.) This book is about the participation of Switzerland in international organizations. Switzerland was not always the seat of international activity that it is today. Indeed, a study of international congresses organized during the 19th century and up to 1913 shows that between 1838 and 1913 Paris received 700 international congresses, Brussels 300, London 250, Vienna and Berlin 100, as compared with 60 in Geneva, 30 in Zurich, and 15 in Basel. This indicates that, prior to the First World War, the Swiss role in the convening of international gatherings was a marginal one. True, from an early date, Switzerland was host to a number of international organizations, e.g., the UPU. But it was only with the installation of the seat of the League of Nations in Geneva that Switzerland became a world center for international organizations. Today, even though the seat of the United Nations is in New York, and there is a move to spread the seats of international organizations around the world, Switzerland is still the center par excellence of international organizations.

The main preoccupation of Switzerland in international relations has been the preservation of its neutrality which is why it has not joined the United Nations and has had to accept the difficult role of observer in that organization. Moreover, the neutrality argument as a basis for not joining the United Nations has become considerably weakened as the specialized agencies and other intergovernmental organizations have become increasingly politicized.

The essays in the book cover such subjects as Switzerland in relation to the upset of world balance, the political problems of Switzerland's participation in international organizations, multilateralism as an instrument of international cooperation, the economic cooperation of Switzerland with industrialized countries (OECD), the logic and limits of European free exchange, the relations of Switzerland with centralized economy countries, the commercial and financial aspects of Switzerland's relations with developing countries, technical cooperation in a period of change, Switzerland and the IMF and GATT, Swiss external policy with respect to energy, world food security, and agricultural commercial policy, Swiss foreign policy with respect to science, Switzerland and the development of international law, and the arrangement on international trade in textiles.

This book affords interesting reading for those who have wondered about the evolution of Switzerland's policy on participation in international organizations in the face of the neutrality entrenched in its constitution.

GERALD F. FITZGERALD
Department of Justice, Canada

East-West Trade. A Sourcebook on the International Economic Relations of the Socialist Countries and Their Legal Aspects. Vol. I. Compiled and edited by Dietrich André Loeber. (Dobbs Ferry: Oceana Publications, Inc. 1976. Pp. xlix, 424. \$37.50 per volume.) Professor Loe-

ber has compiled and edited the first collection in English of reprinted agreements, resolutions, reports, and articles regarding the international economic relations of socialist countries. The materials are as recent as January 1, 1975, and emphasize the legal aspects of the international economic relations of the USSR, Yugoslavia, Hungary, and Romania. Information regarding the other socialist countries (or as Professor Loeber has defined them "states ruled by a communist party") is not so well documented due to the unavailability of relevant materials, translation difficulties, and research costs. This review is based on a reading of the first available volume of a projected five to seven volume set. The entire work will consist of ten chapters which will vary in subject matter from the general, Chapter 1: "Organization of International Economic Relations" to the specific, Chapter 8: "Transport." For readers interested in a more detailed description of what subjects will be contained in the projected volumes, Volume I includes a chapter-by-chapter list of headings.

After reading Volume I, certain characteristics of the work seem to manifest themselves. ("Seem" is used here because the forthcoming chapters regarding, e.g., foreign trade contracts, industrial cooperation, or intellectual property may have a different continuity.) The reprint format is sometimes burdensome and could have been improved upon by adding editorial comments to synthesize thoughts or refer to other sections for further information. For example, the section on "International Commodity Agreements" would have been more valuable with less extracts from the agreements cited and more editorial notation of the facts regarding the participation of socialist countries in such agreements. This section also would have been enhanced by some editorial references to other portions of the book such as the one entitled, "Participation of Socialist Countries in International Organizations." However, compensating for the lack of editorial comment is Loeber's keen ability to link documents to the myriad of issues encompassed by international trade. Moreover, his extensive background and familiarity with the topics is evidenced by the pertinent articles and excerpts he has chosen to supplement the primary resource materials contained in each chapter. Many of these secondary resource materials have lasting relevance. Consequently, students and practitioners interested in the international economic relations of socialist countries should look forward to the publication of the remaining volumes of this resource collection.

CHARLES R. JOHNSTON, JR.
U.S. International Trade Commission

The Political Economy of East-West Trade. By Connie M. Friesen. (New York, Washington, London: Praeger Publishers, 1976. Pp. x, 203, Index. \$18.50.) This book, part of the Praeger series on international business, finance, and trade, is primarily concerned with the economic and political aspects of East-West trade. Using an analytical and case study approach, the author traces the recent history of economic detente through 1975 and the Soviet rejection of the U.S.-USSR Trade Agreement. However, legal problems are not discussed, and legal scholars or practicing attorneys will not find a description of the legal framework of doing business in Eastern Europe. In fact, the book is an extension of Marshall Goldman's *Detente and Dollars*, although there is less emphasis here on practical considerations and more on policy decisions.

The author opens her study with a comparison of United States and Soviet perspectives on East-West trade. The discussion of the U.S. policymaking process is somewhat dated with the change in Administra-

tions in 1977, although with some foresight Friesen quotes from Messrs. Cooper, Mondale, and Brzezinski. Several interesting chapters follow dealing with the relationship between the Soviet Union and the other members of COMECON, and between COMECON and the West, including the EEC. From the point of view of a lawyer, the most useful part of the book is the last section where the author discusses the infrastructure of East-West trade—the banks, the various forms of doing business, and the role of international and national organizations—and where she presents a number of case studies relating to computers, petroleum and natural gas, chemicals, and the grain trade.

The author recognizes that East-West trade is a highly politicized area, but argues for separating business transactions and economic issues from political relationships. How this can be done in a government-controlled economy like the Soviet Union is not entirely clear. A related problem which the author mentions, but unfortunately does not examine at length, is the difficulty encountered by private American firms in transacting business in a centrally planned economy where business decisions can be influenced by political as well as economic factors. It should be noted that the book contains an excellent bibliography of recent materials as well as extensive footnotes to current sources. While this book will be of interest to economists and businessmen involved in Eastern Europe, for the lawyer *Business Transactions with the U.S.S.R.*,¹ edited by Robert Starr, is still the recommended work in this field.

ROBERT S. RENDELL
New York Bar

International Aid and National Decisions. Development Programs in Malawi, Tanzania, and Zambia. By Leon Gordenker. (Princeton: Princeton University Press, 1976. Pp. xx, 190. Index. \$13.) Gordenker studies a generally neglected aspect of international organization—the administration of such programs as the UN Development Decade, “so grandly acclaimed” (p. xi), carried out through field operations by global institutions. He is concerned with “the generalized flow of influence from international institutions to and from member governments” (p. 7). To counter the abstraction of general studies based on headquarters data (p. xiii), he employs field observation of aid programs in Malawi, Tanzania, and Zambia, which epitomized developments “of crucial importance to the whole world” (p. xi)—that is, international efforts to solve the problem of uneven economic development and to meet pressing demands for rapid change from developing areas. Ideally, the book should initiate a series of comparative studies.

Although the book does not provide “a broad enough basis for . . . a general [theoretical] construction” (p. xiv); the activities described “form an important basis for Functionalist and Neo-functionalist theories of international organization” (p. 176). From this perspective, Gordenker found the programs were neither “undertaken . . . with the intention of keeping them separate from some vague category labeled political, [nor] with the hope of producing integration. Rather, the national state may tend to grow in strength through [such] projects” (p. 177). The small programs did not supply any “crucial margin” essential to economic development in the three countries (p. 151) nor did the aims of concerned national and international officials “have much overtly to do with the construction of a particular world order or the fostering of a system of international organ-

¹ Reviewed at 69 AJIL 930-31. (1975).

ization . . . except insofar as the functioning of existing institutions automatically tended in that direction" (pp. 173, 175). The ability of national governments to manipulate international organizations, however, apparently grew faster than the level of international cooperation and decision-making—that "cherished 'spill-over' effect of Functionalist theorists" (p. 180).

RUTH B. RUSSELL
Berkeley, California

Internationales Privatrecht. Edited by Paolo Picone and Wilhelm Wengler. (Darmstadt: Wissenschaftliche Buchgesellschaft, 1974. Pp. xvii, 473.) This book collects "some of the expressions of views that have been of decisive importance for the development of general conflicts theory" (p. ix). Extracts from the writings of twenty-two authors, beginning with Savigny, are given. The editors have contributed three short discussions, one on the vested rights theory (pp. 51-56), another on "false conflicts" (pp. 63-64), and a third on the "homeward trend" (pp. 305-07). A bibliography of writings dealing with the topics covered in the volume (pp. 455-69) and short biographies of the authors whose works are represented (pp. 471-73) are also provided.

The book's apparatus and the editorial contribution are in German. Writings that appeared in English, French, or German are reproduced in the original language. Material that was published in Dutch or Italian is given in German translation. The extracts are presented under five headings: The Question of the Seat of a Legal Relationship in a Law's Territory (*Rechtsgebiet*) as the Point of Departure for Modern Doctrines (pp. 1-20); The Subject Matter (*Gegenstand*) and Function of Private International Law (pp. 21-71); Specific Goals in Regulating and Evaluating Situations with Foreign Elements (pp. 73-180); The Renvoi, Unilateral and Bilateral Choice-of-Law Rules, and Priority of Forum Law in the Light of Views Respecting the Function and Goals of Private International Law (pp. 181-343); Problems of Technical Development and Utilization of Conflicts Rules (Qualification, Adaptation, Recognition of Foreign Judgments, Foreign Public Law) (pp. 345-453).

The selection and arrangement of material for a volume of readings on general problems of private international law present difficult choices. Not every theme of interest and importance can be covered and, for the topics taken up, many discussions of great value and interest must be omitted for reasons of space. On the whole, the editors of the volume have found admirable solutions. One does regret, however, the lack of a discussion of the extent to which the theory and practice of private international law should build on comparative law investigations and analyses. Perhaps the explanation lies in the paucity of writing on the subject since the early years of this century.

The volume's selection and arrangement naturally reflect, in many ways, the civil law tradition. An American scholar preparing such a volume would have made a significantly different selection and used a very different arrangement. For example, the assignment of a separate heading to Savigny's work is presumably justified as a reflection of his central importance to Continental European scholarship in the field of private international law rather than on purely methodological or theoretical grounds. So far as selection is concerned, an American scholar is puzzled by the omission of material drawn from the *Restatement (Second) of Conflict of Laws*. The *Restatement*, though not strictly speaking scholarly

writing, certainly qualifies as an influential "expression of views" and at least its Section 6, Choice-of-Law Principles, cannot be ignored in any effort to canvass contemporary American conflicts thinking.

But these are minor defects in a work of high scholarly quality which should do much to make more generally available to students of private international law the basic ideas that have shaped contemporary conflicts thinking in different legal orders and traditions. Any scholar whose work in private international law has focused on his own legal tradition and on writing in his native language can derive much insight and stimulation from this fine anthology.

ARTHUR T. VON MEHREN
Harvard Law School

The Year Book of World Affairs, 1977. Vol. 31. Edited by George W. Keeton and Georg Schwarzenberger. (London: Stevens & Sons, 1977. Pp. vii, 364. Index. £8.75.) As has been true generally of this *Year Book* in recent years, the articles in the current volume vary widely in subject matter, approach, and level of interest. In that respect, the *Year Book* now is essentially like a rather wide-ranging quarterly. On topics of international law and organization, with which this note is concerned, two contributions this time are analytical studies of special problems, three others are introductory general surveys, and one is a critical essay.

Two of the articles continue the series on equality and discrimination in international economic law which has appeared intermittently since 1971. Alastair Sutton contributes an original analysis of a special sector of international trade, the textile trade, which since 1962 has operated under an international legal instrument legitimizing among the parties the discriminatory use of qualitative trade restrictions. He concludes that in this case selective agreed controls may benefit both the importing and the exporting countries involved and that the innovative features of the current arrangement may serve as a precedent for other fields. On the other hand, Carlton Stoiber, on multinational enterprises, enters a field already covered by a voluminous literature, on which he draws for an introductory overview that is focused on how multinationals have been utilizing the discriminatory laws of national governments.

Two articles deal with United Nations activities, and two with other international organizations. Reviewing recent developments in UN peace-keeping, Alan James singles out the novel aspects of the forces under the current Middle East disengagement agreements which suggest that peace-keeping operations will continue to be available as a flexible ad hoc mechanism even in greatly changed political conditions. On the technical functions of the United Nations, Charles W. Maynes starts with a critique of a much narrower UNITAR study¹ and goes on to argue that in this field the basic problem for the United Nations is how to maintain any relevance, even at the margin of policy, to effective multilateral diplomacy. On economic integration in Latin America, F. Parkinson provides a well-documented comprehensive survey of existing international institutions, achievements, and problems. A survey of the past and prospective role of gold by Peter M. Cohen includes references to pertinent policies of the International Monetary Fund.

KURT WILK
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¹ SIR PETER SMITHERS, GOVERNMENTAL CONTROL: A PREREQUISITE FOR EFFECTIVE RELATIONS BETWEEN THE UNITED NATIONS AND NON-UNITED NATIONS REGIONAL ORGANIZATIONS, UNITAR, 1973. Reviewed in 69 AJIL 232 (1975).

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OFFICIAL DOCUMENTS

PANAMA-UNITED STATES

PANAMA CANAL TREATY *

The United States of America and the Republic of Panama,

Acting in the spirit of the Joint Declaration of April 3, 1964, by the Representatives of the Governments of the United States of America and the Republic of Panama, and of the Joint Statement of Principles of February 7, 1974, initialed by the Secretary of State of the United States of America and the Foreign Minister of the Republic of Panama, and

Acknowledging the Republic of Panama's sovereignty over its territory,

Have decided to terminate the prior Treaties pertaining to the Panama Canal and to conclude a new Treaty to serve as the basis for a new relationship between them and, accordingly, have agreed upon the following:

ARTICLE I

ABROGATION OF PRIOR TREATIES AND ESTABLISHMENT OF A NEW RELATIONSHIP

1. Upon its entry into force, this Treaty terminates and supersedes:

(a) The Isthmian Canal Convention between the United States of America and the Republic of Panama, signed at Washington, November 18, 1903;

(b) The Treaty of Friendship and Cooperation signed at Washington, March 2, 1936, and the Treaty of Mutual Understanding and Cooperation and the related Memorandum of Understandings Reached, signed at Panama, January 25, 1955, between the United States of America and the Republic of Panama;

(c) All other treaties, conventions, agreements and exchanges of notes between the United States of America and the Republic of Panama concerning the Panama Canal which were in force prior to the entry into force of this Treaty¹; and

(d) Provisions concerning the Panama Canal which appear in other treaties, conventions, agreements and exchanges of notes between the United States of America and the Republic of Panama which were in force prior to the entry into force of this Treaty.

* Done at Washington, D.C., Sept. 7, 1977. 77 DEPT. STATE BULL. 483, S. EXEC. N, 95th Cong., 1st Sess., 16 ILM 1021 (1977). Not yet in force. For the Letter of Submittal by Secretary of State Vance to the President, Sept. 16, 1977, and the President's Letter of Transmittal to the Senate, Sept. 16, 1977, see 77 DEPT. STATE BULL. 484-85, 486 (1977). See also *Contemporary Practice* section, *supra* pp. 134-37. For other agreements, exchanges of notes, and documents associated with the Treaty, see 16 ILM 1043 (1977).

¹ The agreements affected by this provision and those *not* affected are listed in the "Agreed Minute to the Panama Canal Treaty." Not reprinted here, see 77 DEPT. STATE BULL. 494, 16 ILM 1034 (1977).

2. In accordance with the terms of this Treaty and related agreements, the Republic of Panama, as territorial sovereign, grants to the United States of America, for the duration of this Treaty, the rights necessary to regulate the transit of ships through the Panama Canal, and to manage, operate, maintain, improve, protect and defend the Canal. The Republic of Panama guarantees to the United States of America the peaceful use of the land and water areas which it has been granted the rights to use for such purposes pursuant to this Treaty and related agreements.

3. The Republic of Panama shall participate increasingly in the management and protection and defense of the Canal, as provided in this Treaty.

4. In view of the special relationship established by this Treaty, the United States of America and the Republic of Panama shall cooperate to assure the uninterrupted and efficient operation of the Panama Canal.

ARTICLE II

RATIFICATION, ENTRY INTO FORCE, AND TERMINATION

1. This Treaty shall be subject to ratification in accordance with the constitutional procedures of the two Parties. The instruments of ratification of this Treaty shall be exchanged at Panama at the same time as the instruments of ratification of the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal,² signed this date, are exchanged. This Treaty shall enter into force, simultaneously with the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, six calendar months from the date of the exchange of the instruments of ratification.

2. This Treaty shall terminate at noon, Panama time, December 31, 1999.

ARTICLE III³

CANAL OPERATION AND MANAGEMENT

1. The Republic of Panama, as territorial sovereign, grants to the United States of America the rights to manage, operate, and maintain the Panama Canal, its complementary works, installations and equipment and to provide for the orderly transit of vessels through the Panama Canal. The United States of America accepts the grant of such rights and undertakes to exercise them in accordance with this Treaty and related agreements.

2. In carrying out the foregoing responsibilities, the United States of America may:

(a) Use for the aforementioned purposes, without cost except as provided in this Treaty, the various installations and areas (including the Panama Canal) and waters, described in the Agreement in Implementation of this Article, signed this date, as well as such other areas and installations as are made available to the United States of America under this Treaty and related agreements, and take the measures necessary to ensure sanitation of such areas;

(b) Make such improvements and alterations to the aforesaid installations and areas as it deems appropriate, consistent with the terms of this Treaty;

(c) Make and enforce all rules pertaining to the passage of vessels through the Canal and other rules with respect to navigation and mari-

² See *infra* pp. 238-41.

³ For the "Agreement in Implementation of Article III of the Panama Canal Treaty," see 16 ILM 1043 (1977).

time matters, in accordance with this Treaty and related agreements. The Republic of Panama will lend its cooperation, when necessary, in the enforcement of such rules;

(d) Establish, modify, collect and retain tolls for the use of the Panama Canal, and other charges, and establish and modify methods of their assessment;

(e) Regulate relations with employees of the United States Government;

(f) Provide supporting services to facilitate the performance of its responsibilities under this Article;

(g) Issue and enforce regulations for the effective exercise of the rights and responsibilities of the United States of America under this Treaty and related agreements. The Republic of Panama will lend its cooperation, when necessary, in the enforcement of such rules; and

(h) Exercise any other right granted under this Treaty, or otherwise agreed upon between the two Parties.

3. Pursuant to the foregoing grant of rights, the United States of America shall, in accordance with the terms of this Treaty and the provisions of United States law, carry out its responsibilities by means of a United States Government agency called the Panama Canal Commission, which shall be constituted by and in conformity with the laws of the United States of America.

(a) The Panama Canal Commission shall be supervised by a Board composed of nine members, five of whom shall be nationals of the United States of America, and four of whom shall be Panamanian nationals proposed by the Republic of Panama for appointment to such positions by the United States of America in a timely manner.

(b) Should the Republic of Panama request the United States of America to remove a Panamanian national from membership on the Board, the United States of America shall agree to such request. In that event, the Republic of Panama shall propose another Panamanian national for appointment by the United States of America to such position in a timely manner. In case of removal of a Panamanian member of the Board at the initiative of the United States of America, both Parties will consult in advance in order to reach agreement concerning such removal, and the Republic of Panama shall propose another Panamanian national for appointment by the United States of America in his stead.

(c) The United States of America shall employ a national of the United States of America as Administrator of the Panama Canal Commission, and a Panamanian national as Deputy Administrator, through December 31, 1989. Beginning January 1, 1990, a Panamanian national shall be employed as the Administrator and a national of the United States of America shall occupy the position of Deputy Administrator. Such Panamanian nationals shall be proposed to the United States of America by the Republic of Panama for appointment to such positions by the United States of America.

(d) Should the United States of America remove the Panamanian national from his position as Deputy Administrator, or Administrator, the Republic of Panama shall propose another Panamanian national for appointment to such position by the United States of America.

4. An illustrative description of the activities the Panama Canal Commission will perform in carrying out the responsibilities and rights of the United States of America under this Article is set forth at the Annex. Also set forth in the Annex are procedures for the discontinuance or transfer of those activities performed prior to the entry into force of this

Treaty by the Panama Canal Company or the Canal Zone Government which are not to be carried out by the Panama Canal Commission.⁴

5. The Panama Canal Commission shall reimburse the Republic of Panama for the costs incurred by the Republic of Panama in providing the following public services in the Canal operating areas and in housing areas set forth in the Agreement in Implementation of Article III of this Treaty and occupied by both United States and Panamanian citizen employees of the Panama Canal Commission: police, fire protection, street maintenance, street lighting, street cleaning, traffic management and garbage collection. The Panama Canal Commission shall pay the Republic of Panama the sum of ten million United States dollars (\$10,000,000) per annum for the foregoing services. It is agreed that every three years from the date that this Treaty enters into force, the costs involved in furnishing said services shall be reexamined to determine whether adjustment of the annual payment should be made because of inflation and other relevant factors affecting the cost of such services.

6. The Republic of Panama shall be responsible for providing, in all areas comprising the former Canal Zone, services of a general jurisdictional nature such as customs and immigration, postal services, courts and licensing, in accordance with this Treaty and related agreements.

7. The United States of America and the Republic of Panama shall establish a Panama Canal Consultative Committee, composed of an equal number of high-level representatives of the United States of America and the Republic of Panama, and which may appoint such subcommittees as it may deem appropriate. This Committee shall advise the United States of America and the Republic of Panama on matters of policy affecting the Canal's operation. In view of both Parties' special interest in the continuity and efficiency of the Canal operation in the future, the Committee shall advise on matters such as general tolls policy, employment and training policies to increase the participation of Panamanian nationals in the operation of the Canal, and international policies on matters concerning the Canal. The Committee's recommendations shall be transmitted to the two Governments, which shall give such recommendations full consideration in the formulation of such policy decisions.

8. In addition to the participation of Panamanian nationals at high management levels of the Panama Canal Commission, as provided for in paragraph 3 of this Article, there shall be growing participation of Panamanian nationals at all other levels and areas of employment in the aforesaid commission, with the objective of preparing, in an orderly and efficient fashion, for the assumption by the Republic of Panama of full responsibility for the management, operation and maintenance of the Canal upon the termination of this Treaty.

9. The use of the areas, waters and installations with respect to which the United States of America is granted rights pursuant to this Article, and the rights and legal status of United States Government agencies and employees operating in the Republic of Panama pursuant to this Article, shall be governed by the Agreement in Implementation of this Article, signed this date.

10. Upon entry into force of this Treaty, the United States Government agencies known as the Panama Canal Company and the Canal Zone Government shall cease to operate within the territory of the Republic of Panama that formerly constituted the Canal Zone.

⁴ Annex, "Procedures for the Cessation or Transfer of Activities Carried Out by the Panama Canal Company and the Canal Zone Government and Illustrative List of the Functions That May Be Performed by the Panama Canal Commission." Not reprinted here, see 77 DEPT. STATE BULL. 493, 16 ILM 1032 (1977).

ARTICLE IV ⁵

PROTECTION AND DEFENSE

1. The United States of America and the Republic of Panama commit themselves to protect and defend the Panama Canal. Each Party shall act, in accordance with its constitutional processes, to meet the danger resulting from an armed attack or other actions which threaten the security of the Panama Canal or of ships transiting it.

2. For the duration of this Treaty, the United States of America shall have primary responsibility to protect and defend the Canal. The rights of the United States of America to station, train, and move military forces within the Republic of Panama are described in the Agreement in Implementation of this Article, signed this date. The use of areas and installations and the legal status of the armed forces of the United States of America in the Republic of Panama shall be governed by the aforesaid Agreement.

3. In order to facilitate the participation and cooperation of the armed forces of both Parties in the protection and defense of the Canal, the United States of America and the Republic of Panama shall establish a Combined Board comprised of an equal number of senior military representatives of each Party. These representatives shall be charged by their respective governments with consulting and cooperating on all matters pertaining to the protection and defense of the Canal, and with planning for actions to be taken in concert for that purpose. Such combined protection and defense arrangements shall not inhibit the identity or lines of authority of the armed forces of the United States of America or the Republic of Panama. The Combined Board shall provide for coordination and cooperation concerning such matters as:

(a) The preparation of contingency plans for the protection and defense of the Canal based upon the cooperative efforts of the armed forces of both Parties;

(b) The planning and conduct of combined military exercises; and

(c) The conduct of United States and Panamanian military operations with respect to the protection and defense of the Canal.

4. The Combined Board shall, at five-year intervals throughout the duration of this Treaty, review the resources being made available by the two Parties for the protection and defense of the Canal. Also, the Combined Board shall make appropriate recommendations to the two Governments respecting projected requirements, the efficient utilization of available resources of the two Parties, and other matters of mutual interest with respect to the protection and defense of the Canal.

5. To the extent possible consistent with its primary responsibility for the protection and defense of the Panama Canal, the United States of America will endeavor to maintain its armed forces in the Republic of Panama in normal times at a level not in excess of that of the armed forces of the United States of America in the territory of the former Canal Zone immediately prior to the entry into force of this Treaty.

ARTICLE V

PRINCIPLE OF NON-INTERVENTION

Employees of the Panama Canal Commission, their dependents and designated contractors of the Panama Canal Commission, who are nationals

⁵ For the "Agreement in Implementation of Article IV of the Panama Canal Treaty," see 16 ILM 1068 (1977).

of the United States of America, shall respect the laws of the Republic of Panama and shall abstain from any activity incompatible with the spirit of this Treaty. Accordingly, they shall abstain from any political activity in the Republic of Panama as well as from any intervention in the internal affairs of the Republic of Panama. The United States of America shall take all measures within its authority to ensure that the provisions of this Article are fulfilled.

ARTICLE VI

PROTECTION OF THE ENVIRONMENT⁶

1. The United States of America and the Republic of Panama commit themselves to implement this Treaty in a manner consistent with the protection of the natural environment of the Republic of Panama. To this end, they shall consult and cooperate with each other in all appropriate ways to ensure that they shall give due regard to the protection and conservation of the environment.

2. A Joint Commission on the Environment shall be established with equal representation from the United States of America and the Republic of Panama, which shall periodically review the implementation of this Treaty and shall recommend as appropriate to the two Governments ways to avoid or, should this not be possible, to mitigate the adverse environmental impact which might result from their respective actions pursuant to the Treaty.

3. The United States of America and the Republic of Panama shall furnish the Joint Commission on the Environment complete information on any action taken in accordance with this Treaty which, in the judgment of both, might have a significant effect on the environment. Such information shall be made available to the Commission as far in advance of the contemplated action as possible to facilitate the study by the Commission of any potential environmental problems and to allow for consideration of the recommendation of the Commission before the contemplated action is carried out.

ARTICLE VII

FLAGS

1. The entire territory of the Republic of Panama, including the areas the use of which the Republic of Panama makes available to the United States of America pursuant to this Treaty and related agreements, shall be under the flag of the Republic of Panama, and consequently such flag always shall occupy the position of honor.

2. The flag of the United States of America may be displayed, together with the flag of the Republic of Panama, at the headquarters of the Panama Canal Commission, at the site of the Combined Board, and as provided in the Agreement in Implementation of Article IV of this Treaty.

3. The flag of the United States of America also may be displayed at other places and on some occasions, as agreed by both Parties.

ARTICLE VIII

PRIVILEGES AND IMMUNITIES

1. The installations owned or used by the agencies or instrumentalities of the United States of America operating in the Republic of Panama pur-

⁶For the "Agreement Pursuant to Article VI of the Convention on Nature, Protection and Wildlife Preservation in the Western Hemisphere," see *id.* 1092.

suant to this Treaty and related agreements, and their official archives and documents, shall be inviolable. The two Parties shall agree on procedures to be followed in the conduct of any criminal investigation at such locations by the Republic of Panama.

2. Agencies and instrumentalities of the Government of the United States of America operating in the Republic of Panama pursuant to this Treaty and related agreements shall be immune from the jurisdiction of the Republic of Panama.

3. In addition to such other privileges and immunities as are afforded to employees of the United States Government and their dependents pursuant to this Treaty, the United States of America may designate up to twenty officials of the Panama Canal Commission who, along with their dependents, shall enjoy the privileges and immunities accorded to diplomatic agents and their dependents under international law and practice. The United States of America shall furnish to the Republic of Panama a list of the names of said officials and their dependents, identifying the positions they occupy in the Government of the United States of America, and shall keep such list current at all times.

ARTICLE IX

APPLICABLE LAWS AND LAW ENFORCEMENT

1. In accordance with the provisions of this Treaty and related agreements, the law of the Republic of Panama shall apply in the areas made available for the use of the United States of America pursuant to this Treaty. The law of the Republic of Panama shall be applied to matters or events which occurred in the former Canal Zone prior to the entry into force of this Treaty only to the extent specifically provided in prior treaties and agreements.

2. Natural or juridical persons who, on the date of entry into force of this Treaty, are engaged in business or non-profit activities at locations in the former Canal Zone may continue such business or activities at those locations under the same terms and conditions prevailing prior to the entry into force of this Treaty for a thirty-month transition period from its entry into force. The Republic of Panama shall maintain the same operating conditions as those applicable to the aforementioned enterprises prior to the entry into force of this Treaty in order that they may receive licenses to do business in the Republic of Panama subject to their compliance with the requirements of its law. Thereafter, such persons shall receive the same treatment under the law of the Republic of Panama as similar enterprises already established in the rest of the territory of the Republic of Panama without discrimination.

3. The rights of ownership, as recognized by the United States of America, enjoyed by natural or juridical private persons in buildings and other improvements to real property located in the former Canal Zone shall be recognized by the Republic of Panama in conformity with its laws.

4. With respect to buildings and other improvements to real property located in the Canal operating areas, housing areas or other areas subject to the licensing procedure established in Article IV of the Agreement in Implementation of Article III of this Treaty, the owners shall be authorized to continue using the land upon which their property is located in accordance with the procedures established in that Article.

5. With respect to buildings and other improvements to real property located in areas of the former Canal Zone to which the aforesaid licensing procedure is not applicable, or may cease to be applicable during the lifetime or upon termination of this Treaty, the owners may continue to use

ARTICLE II

The Contracting Parties agree to observe and respect the regime of permanent neutrality of the Canal in time of war as in time of peace, and to ensure that vessels of their registry strictly observe the applicable rules.

ARTICLE III

This Protocol shall be open to accession by all States of the world; and shall enter into force for each State at the time of deposit of its instrument of accession with the Secretary General of the Organization of American States.

INTERNATIONAL LEGAL MATERIALS *

CONTENTS

VOL. XVI, No. 5 (SEPTEMBER 1977)

	Page
TREATIES AND AGREEMENTS	
Japan-United States: Agreement on <i>Reprocessing Nuclear Material of U.S. Origin</i>	1017
Panama-United States: The <i>Panama Canal Treaties</i> and Related Documents	
Declaration of Washington	1021
Panama Canal Treaty of 1977	1022
Annex on Procedures for the Cessation or Transfer of Activities Carried out by the Panama Canal Company and the Canal Zone Government and Illustrative List of the Functions That May Be Performed by the Panama Canal Commission	1032
Agreed Minute on Certain Provisions of the Treaty	1034
Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal	1040
Annex on Definitions	1041
Protocol on Recognition of Neutrality by Other States	1042
Documents Implementing the Panama Canal Treaty	1043
United Nations Third Conference on the <i>Law of the Sea</i> :	
Explanatory Memorandum on the Informal Composite Negotiating Text	1099
Informal Composite Negotiating Text from the Sixth Session (May 23-July 15, 1977)	1108
REPORTS	
United Nations Economic and Social Council: Report of the <i>Ad Hoc</i> Intergovernmental Working Group on the <i>Problem of Corrupt Practices in International Commercial Transactions</i>	1236
United Nations International Law Commission: Report on Draft Articles Adopted at the Twenty-ninth Session (May 9-July 29, 1977)	
Draft Articles on <i>State Responsibility</i>	1251
Draft Articles on <i>Succession of States in Respect of Matters Other Than Treaties</i>	1255
Draft Articles on <i>Treaties Concluded between States and International Organizations or between International Organizations</i>	1260
JUDICIAL AND SIMILAR PROCEEDINGS	
United States: Court of Customs and Patent Appeals Decision in <i>United States v. Zenith Radio Corporation (Export Subsidies; Counterbailing Duties)</i>	1276

* The annual subscription for six numbers of ILM is \$55.00; there is a concessionary rate of \$20.00 for members of the American Society of International Law. Inquiries and orders should be directed to International Legal Materials, 2223 Massachusetts Ave. N.W., Washington, D.C. 20008.

RECENT ACTIONS REGARDING TREATIES TO WHICH THE UNITED STATES IS A PARTY	1324
RECENT ACTIONS REGARDING TREATIES TO WHICH THE UNITED STATES IS NOT A PARTY	1329
NOTICE OF OTHER RECENT DOCUMENTS (not reprinted)	1330

VOL. XVI, No. 6 (November 1977)

	Page
JUDICIAL AND SIMILAR PROCEEDINGS	
United States:	
Department of Justice <i>Instructions for Serving Foreign Judicial Documents in the U.S. and Processing Requests for Serving American Judicial Documents Abroad</i>	1331
District Court for the Eastern District of Virginia Order and Memorandum in United States v. Harold J. Richards (<i>Questions Submitted by Internal Revenue Service to Executives of International Corporations with regard to Illegal Payments</i>)	1358
Court of Appeals for the Second Circuit Decision on <i>Petition by Swiss Banque de Financement for Arrangement under the U.S. Bankruptcy Act</i>	1367
Supreme Court: Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari in Hunt v. Mobile Oil (<i>Clarification of the Scope of the Act of State Doctrine</i>)	1376
TREATIES AND AGREEMENTS	
Council of Europe: European Convention on the <i>Legal Status of Migrant Workers</i>	1381
Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict: Protocols I and II to the Geneva Conventions	
Protocol Relating to the <i>Protection of Victims of International Armed Conflicts</i>	1391
Protocol Relating to the <i>Protection of Victims of Non-International Armed Conflicts</i>	1442
Intergovernmental Conference on the Convention on <i>Civil Liability for Oil Pollution Damage from Offshore Operations</i> : Final Act and Text of Convention	1450
United Nations Commission on International Trade Law: Draft Convention on the <i>International Sale of Goods</i>	1456
LEGISLATION AND REGULATIONS	
Canada: <i>Foreign Investment Review Regulations</i>	1469
Egypt: <i>Foreign Investment Law, as Amended</i>	1476
United States:	
Presidential Statement on <i>Conventional Arms Transfer Policy</i> and Department of State Regulations on <i>International Traffic in Arms</i>	1489
Foreign Relations Authorization Act, Fiscal Year 1978 (Excerpts on <i>Belgrade Conference, U.N. Reform, International Food Reserve, Negotiations with Cuba, Foreign Gifts</i>)	1498
Act to Implement the Treaties for the <i>Transfer of Offenders to or from Foreign Countries</i>	1503
<i>International Development and Food Assistance Act of 1977</i>	1508
<i>International Security Assistance Act of 1977</i>	1518

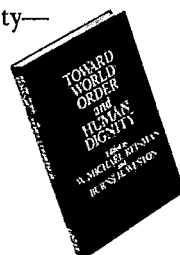
Appropriations Act for <i>Foreign Assistance and Related Programs</i>	1525
Venezuela: <i>Foreign Investment Decree</i>	1531
OTHER DOCUMENTS	
International Monetary Fund:	
Communiqué of the Interim Committee of the Board of Governors on the <i>Needs of the International Monetary System</i>	1534
Decision of the Executive Directors Establishing a <i>Supplementary Financing Facility</i>	1536
Decision of the Executive Directors on <i>Replenishment in Connection with the Supplementary Financing Facility</i>	1538
United Nations:	
General Assembly Resolutions	
On <i>Israeli Settlements</i>	1543
On <i>Safety of International Civil Aviation</i>	1545
Security Council Resolutions	
On <i>South Africa</i>	1547
On <i>Southern Rhodesia</i>	1550
World Food Council Communiqué on <i>Program of Action to Eradicate Hunger and Malnutrition</i>	1554
United States <i>Withdrawal from the International Labor Organization</i>	
Statement by the U.S. Secretary of Labor	1561
Statement by the Director-General of the International Labor Organization	1568
RECENT ACTIONS REGARDING TREATIES TO WHICH THE UNITED STATES IS A PARTY	1570
RECENT ACTIONS REGARDING TREATIES TO WHICH THE UNITED STATES IS NOT A PARTY	1585
NOTICE OF OTHER RECENT DOCUMENTS (not reprinted)	1586
INDEX TO VOLUME XVI	1587

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Volume II, Number I

January 1978

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Comparison of the Treasury and Commerce rules for conformity

...ale R. Johnson
...oward O. Weisman

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...er of A
...ne Internal
..."), said that a
...elines would be issued shortly, and
...ary would try to conform these new guidelines
...as possible with the regulations the Commerce
...ment must issue pursuant to the Export
...istration Act of 1969, as amended ("EAA"). At
...me hearing several taxpayer representatives also
...ly urged conformity in interpretations of the two
...es.

September 20, 1977, the Commerce Department
proposed regulations ("Regs.") under EAA.
memorandum analyzes how sections H through M
Rev. G., the substantive sections of the Rev. G.,

Also in this issue :

• The situation for foreign subsidiaries and affiliates under the new Export Administration Amendments is examined. By Kennan
... Page 3.

...gypt's initiative succeeds, what
...s to the boycott? By Samir Abiad.

...merce Department issues
...porting requirements to
...substantive regulations
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...and how
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...EAA sets forth detailed
...ions of that statute; the
...icipation in or cooperation
...al boycott ("PCIB"), set forth
... (b) (4) are much more limited.

Continued on following page

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* What's legal, illegal and reportable.

B. Jenkins Middleton, international trade attorney and partner in the Washington law firm of Nixon, Hargrave, Devans & Doyle, and former Vice President of the EximBank, provides a quick reference guide—with charts—to the many Commerce and Treasury regulations.

* The thorny problem of unilateral selection.

Stanley Marcuss, now Deputy Assistant Secretary of Commerce with responsibility for drafting new anti-boycott regulations, and the former counsel to the Senate Banking Committee where anti-boycott legislation was drafted, examines unilateral selection, host country law and intent under the U.S. law.

* Federal preemption; some states question it.

Nancy Turck, a Washington-based business consultant and an authority on anti-boycott measures, examines the varying state attitudes toward the preemption issue. Some states are uncertain about the question.

* Penalties: How serious is the threat?

Bert W. Rein, partner in the Washington law firm of Kirkland, Ellis & Rowe, and former Deputy Assistant Secretary of State, reports on the acceleration in anti-boycott enforcement activity by Commerce.

* Bechtel case: Open door for private treble-damage suits.

Lionel Kestenbaum, partner in the Washington law firm of Bergson, Borkland, Margolis & Adler and a specialist in antitrust and trade matters, explains the proposed consent decree and the possibility of private suits despite the general guidelines established in the case.

* Who gets blacklisted and how.

Norman Vander Clute, partner in the Washington law firm of Surrey, Karasik & Morse and a specialist of ten years' standing in the Middle East, details practical problems of dealing with a boycott investigation and with Arab ministries.

* How to cope with Tax Form 5713.

Carl Estes, partner and tax and anti-boycott specialist in the Houston law firm of Vinson & Elkins, reviews Treasury's International Boycott Report [Form 5713] and schedules.

Among other recent Bulletin authors:

Frederic W. Hickman, partner in the Chicago law firm of Hopkins, Sutter, Mulroy, Davis & Cromartie and former Assistant Secretary of the Treasury under Presidents Nixon and Ford; Paul McCarthy, partner in the Chicago office of Baker & McKenzie law firm. He represents clients doing business in the Middle East, and his specialty is avoiding boycott problems "at the source"; James P. Holden, partner in the Washington law firm of Steptoe & Johnson and a specialist in anti-boycott tax problems and Treasury regulations; Edward E. Dyson, partner in the Washington office of Baker & McKenzie and a specialist on anti-boycott regulations and Commerce policy; Richard E. May, of the Washington law firm of Steptoe & Johnson, an experienced federal tax practitioner and a specialist in anti-boycott problems and Treasury regulations; Jude Zwick, CPA and partner in Arthur Andersen & Co., responsible for tax matters relating to Middle East operations of client firms.

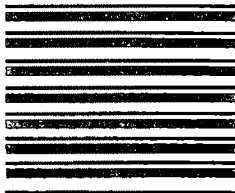
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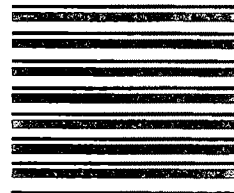
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in businesses, their banks, and their lawyers struggling for some time to grasp the statute to determine the range of application of the statute which has become effective after its author, Assemblyman John C. Berman, Col. Business & Finance, died on May 5. The Berman statute is a part of the statute.

Also in this issue:

●The Middleton charts for export managers facing various federal anti-boycott regulations are updated. By B. Jenkins Middleton. **Page 195.**

● Commerce's proposed regulations have come under attack in the House subcommittee on Commerce, Consumer and Monetary Affairs. By Lawrence Mosher. **Page 197.**

● The Treasury hears opposing calls for strengthening and repeal of the Ribicoff amendment and the Guidelines. By Judith

Bulletin

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to fulfill this broad mission and leaves unanswered questions. There is little doubt that the law and what actions are covered. But where such actions must take place and where California connections are necessary to supply a jurisdiction. The act on its face prohibits

Continued on following page

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David P. Forsythe

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Julius Stone

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VOL. 72

April, 1978

NO. 2

CONTENTS

	PAGE
The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices <i>Joel Davidow & Lisa Chiles</i>	247
Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflict <i>David P. Forsythe</i>	272
A Formula for Tax-Sparing Credits in the U.S. Tax Treaties with Developing Countries <i>Howard M. Liebman</i>	296
The People's Republic of China and the Charter-Based International Legal Order <i>Samuel S. Kim</i>	317
Editorial Comment	
Foreign Policy and the 1977 Soviet Construction <i>John N. Hazard</i>	350
Notes and Comments	
The Research and Study Activities of the American Society of International Law: Report of the Director of Studies, 1975-1977 <i>John Lawrence Hargrove</i>	356
Correspondence	373
Contemporary Practice of the United States Relating to International Law <i>John A. Boyd</i>	375
Judicial Decisions <i>Alona E. Evans</i>	410
Book Reviews and Notes <i>Edited by Leo Gross</i>	
Gross, Leo (ed.). <i>The Future of the International Court of Justice</i>	422
Venkata Raman, K. (ed.). <i>Dispute Settlement through the United Nations.</i>	425
Meron, Theodor. <i>The United Nations Secretariat. The Rules and the Practice.</i>	426
McDowell, Eleanor C. (ed.). <i>Digest of United States Practice in International Law 1975.</i>	427
Delessert, Christiane Shields. <i>Release and Repatriation of Prisoners of War at the End of Active Hostilities.</i>	429
Luard, Evan. <i>Types of International Society.</i>	430
Preisner, Wolfgang. <i>Frühe Völkerrechtliche Ordnungen der Aussereuropäischen Welt. Ein Beitrag zur Geschichte des Völkerrechts.</i>	432
Piradov, A. S. (ed.). <i>International Space Law.</i>	433
Doi, Teruo, and Warren L. Shattuck (eds.). <i>Patent and Know-how Licensing in Japan and the United States.</i>	434
Dölle, Hans (ed.). <i>Kommentar zum Einheitlichen Kaufrecht. Die Haager Kaufrechtsübereinkommen vom 1. Juli 1964.</i>	436

Briefer Notices; Uganda & Human Rights. *Reports to the UN Commission on Human Rights*, 438; *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*. Vol. III: *Committee of Experts, 2 February–10 March 1950*, 438; Lombardi, 439; Guilhaudis, 440; Castel, 440; Volken, 441; Berber, 442; Barile, 443; Matte, 443; Buergethal and Torney, 444; Gormley, 445; *Praesidium Libertatis*, 446; Wallace and Escobar, 446; Beyer 447; Orrego-Vicuña, 447; Anand, 448; Gelberg, 448; Zivier, 449; Gelberg, 450; Schulz, 450; Szabo and Peteri, 451; Kay, 452.

Books Received

453

OFFICIAL DOCUMENTS

Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts	457
Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I)	457
Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)	502
International Legal Materials. Contents, Vol. XVII, No. 1 (1978)	510

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THE UNITED STATES AND THE ISSUE OF THE BINDING OR VOLUNTARY NATURE OF INTERNATIONAL CODES OF CONDUCT REGARDING RESTRICTIVE BUSINESS PRACTICES

By Joel Davidow and Lisa Chiles *

The current administration has announced that one of the foreign policy objectives of the United States is to improve relations with developing countries by being more responsive to their concerns.¹ The former administration was also moving in the same direction, as demonstrated by the Kissinger proposals to the seventh special session of the United Nations in 1975² and by U.S. agreement to the extensive plan of action called for by a final omnibus resolution of the United Nations Conference for Trade and Development (UNCTAD) in Nairobi in May 1976.³

In the past few years, developing countries have crystallized many of their demands in the form of comprehensive proposals to adjust global economic relationships into a "new international economic order."⁴ In principle, the current administration supports changes in the international economic order.⁵ Although the United States has been unable to agree to

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¹ See Statement of Secretary of State Cyrus Vance of May 30, 1977 before the Conference on International Economic Cooperation and Development. 76 DEPT. STATE BULL. 645 (1977).

² Address written by Secretary of State Henry Kissinger and delivered by Ambassador Daniel P. Moynihan before the the seventh special session of the UN General Assembly, devoted to problems of development and economic cooperation, on September 1, 1975. 73 DEPT. STATE BULL. 425, 432 (1975).

³ The proposal, unanimously adopted by the delegates, called, *inter alia*, for continued work toward a Code of Conduct for the Transfer of Technology and formulation of principles and rules for the control of restrictive business practices. UNCTAD Res. 93(IV), May 31, 1977. N.Y. Times, May 31, 1976, at 1, col. 4.

⁴ On May 1, 1974, the UN General Assembly adopted without vote the Declaration and Programme of Action on the Establishment of a New International Economic Order. GA Res. 3201 & 3202, S-7 GAOR, Supp. (No. 1) 3, 5, UN Doc A/9559 (1974), 68 AJIL 798 (1974), 13 ILM 714 (1974). For the reservations of the United States, see 70 DEPT. STATE BULL. 569-72 (1974). This was followed by the Charter of Economic Rights and Duties of States, adopted on December 12, 1974, over the objections of the United States and five other developed nations; ten other nations abstained. GA Res. 3281, 29 GAOR, Supp. (No. 30) 50, UN Doc. 9631 (1974), 69 AJIL 484 (1975), 14 ILM 252 (1975).

⁵ Secretary of State Cyrus Vance emphasized, in the statement cited above, that the policy of the United States is that "[t]here should be a new international economic system. . . . We are prepared to help build that new system." *Supra* note 1, at 645. See also Statement by Andrew Young, U.S. Ambassador to the United Nations, made on July 8, 1977 before ECOSOC, "Framework for a Dynamic North-South dialogue," 77 DEPT. STATE BULL. 383 (1977).

many of the specific demands made by the developing countries to achieve the new economic order, certain of the proposals of the developing countries have been viewed as acceptable by the United States and other developed countries. Among these is the formulation of a code or codes of conduct covering various aspects of international commerce, particularly the activities of transnational enterprises ("TNE's").⁶

TNE conduct has been a continuing source of controversy in both the developing and developed countries. Developing countries have been faced with the paradox that they desire local control over their economic development but recognize the need for foreign investment to foster economic development. To resolve the dilemma, many continue to accept foreign investment but also want to strengthen their control of business conduct in their countries. Concerned that TNE's may not be contributing sufficiently to the development of the areas where they operate, developing countries have urged that a code should be formulated to mold corporate conduct into an effective instrument for local or regional development. They expect a code of conduct to redress the imbalance in bargaining power that they perceive between the multinational corporations and the governments or local enterprises with which such corporations deal and to promote trade and development goals regardless of whether such development could be expected from the operation of the free market.⁷

Developed countries generally regard the multinational enterprise and its activities as a beneficial force in world economic development. However, even developed countries like the United States that are the home governments of many transnational enterprises have agreed to negotiate codes of conduct as part of a "package" or "trade off" in which promises of good corporate behavior are provided in exchange for assurances that developing nations will provide broad latitude for freedom of contract and the operation of market forces, will encourage investment, and will treat foreign enterprises without discrimination.⁸ Furthermore, many countries, and even some corporations, have viewed codes as being useful for defining an acceptable standard of conduct for multinational enterprises which will be relatively uniform throughout the world.⁹

⁶ UN parlance has gradually shifted from the term "multinational corporations (MNC's)" to "multinational enterprises (MNE's)" to "transnational enterprises (TNE's)." The motives for the changes include a desire to encompass more types of business entities within a single term. In this article the terms (and abbreviations) will be used interchangeably.

⁷ See, e.g., UNCTAD, Report of the Second Ad Hoc Group of Experts on Restrictive Business Practices, UN Doc. TD/B/600 (1976); CTNC, Report of the Intergovernmental Working Group on the Code of Conduct, UN Doc. E/C.10/31, at 7 (1977); UNCTAD, Report of the Intergovernmental Group of Experts on a Code of Conduct on the Transfer of Technology, UN Doc. TD/B/C.6/1, at 26 (1975).

⁸ See, e.g., testimony that U.S. interests may be damaged by action of multinationals abroad in *Hearings on Multinational Corporations before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations*, 93d Cong., 1st & 2nd Sess. (1973-1974).

⁹ See, e.g., Rostow, Nye, & Ball, *The Need for International Arrangements*, in *GLOBAL COMPANIES: THE POLITICAL ECONOMY OF WORLD BUSINESS* 156 (G. Ball, ed. 1975);

Nevertheless, debate about whether codes of conduct are in fact desirable continues, further complicated by the issue whether such codes should be binding or of a voluntary nature. Of course, those who doubt the wisdom or value of the codes tend to support the position that they should be voluntary, if they are to exist at all. Many who do think codes are desirable also urge that they be voluntary rather than binding. An alternative position is that the legal nature of a code should be determined only after its substantive provisions are agreed to on the assumption that the more acceptable the substance, the more reason to agree that the code is binding. Throughout the negotiations on codes of conduct, developed countries have generally argued that the codes should establish general equitable principles, but should not be legally binding.¹⁰ Developing countries, on the other hand, have called for codes of conduct that would contain specific rules and be legally binding on all parties concerned.¹¹ Because of the intensity of the disagreement, the determination of the legal nature of the codes under negotiation within the United Nations may be postponed. The UNCTAD Intergovernmental Group on Transfer of Technology, for example, has been instructed to draft a code "without prejudice to its legal nature."¹² It may prove impossible, however, to draft code provisions without some resolution of the deadlock concerning the nature of the code. Even a provision that advocates conduct "in accordance with the provisions of this code of conduct" may be seen as prejudicial to the ultimate decision on the legal form of code. Furthermore, consensus on many of the code provisions may be unobtainable when they must both serve as general principles for the developed countries and yet also be sufficiently specific to meet the interests of the developing countries.

Statements of Gilbert Jones, Jacques Maisonrouge and Thomas Murphy before the Group of Eminent Persons. UN Doc. ST/ESA/15, at 65, 79 (1974).

¹⁰ The European Parliament, however, has called for legally binding codes covering the activities of TNE's, but Commission lawyers anticipate that the rules may be binding for intracommunity application but voluntary in relationships with other countries. [1977] COMM. MKT. REP., No. 433, pt. 1, at 1, 2.

Another important exception is the position taken by the United States to an international agreement dealing with corrupt practices. Senate Resolution 265 of November 12, 1975, urged the Executive Branch to negotiate for an international agreement with sanctions to eliminate distortions of trade resulting from unfair competition by bribery and other corrupt practices. S. Res. 265, 94th Cong., 1st Sess., 121 CONG. REC. S19812 (daily ed. 1975). During the ECOSOC meeting in Lima in February 1976, the United States proposed that such a treaty should be negotiated. The proposal led ECOSOC to establish an Ad Hoc Intergovernmental Working Group on Corrupt Practices to prepare an international agreement. ECOSOC Res. 2041, 61 ECSOR, Supp. (No. 2) 17, UN Doc. E/5908 (1976).

¹¹ This view is apparently not supported by the Socialist countries of Eastern Europe which have participated in the transfer of technology negotiations. The Outline of a Draft Code for the Transfer of Technology which they have proposed does not indicate what the legal nature of the code should be. UN Doc. TD/AC.1/7, Annex IV (1977). A leading delegate for the Group, however, has written that the code should provide "flexible guidelines." Soltysinski, *Patent and Know-How Licenses in Polish Law: The Domestic and International Perspective*, 8 INT. REV. OF INDUSTRIAL PROPERTY AND COPYRIGHT L. 228, 249 (1977).

¹² UN Doc. TD/AC.1/4, at 2 (1976).

Particularly in regard to codes of conduct for private enterprises, this debate is complicated by ambiguity and confusion concerning the consequences of accepting a "binding" or "voluntary" approach. Rational policy choice can also be hampered by the misperception that binding and voluntary enforcement are opposites and the only choices. In reality, there is a spectrum of enforcement alternatives permitting a variety of approaches, both initially and in the long run. It is also beginning to be recognized that the legal nature of an international code and the types of effectuating mechanisms employed to give effect to it may well vary according to the subject matter being covered and the degree of international consensus existing or obtainable in regard to that subject matter. For instance, a code of conduct dealing generally with the whole range of behavior of TNE's may be practicable only on a voluntary basis, while a code dealing with international bribery may well be appropriate for an agreement providing for some sort of enforcement in light of the high degree of international consensus condemning this practice.¹³ Codes dealing with restrictive business practices probably fall somewhere between the extremes since this is a technical subject in which there is some history of international consensus in condemning certain practices, but great variation in the extent and approach of national laws on the subject.

This article will address the background and current status of efforts to develop international codes of conduct for TNE's, analyze the debate on whether the codes should be binding or voluntary in an attempt to clarify the intended or possible meaning of those concepts, and review some of the intermediate enforcement alternatives developed in previous international efforts. In light of the authors' professional experience, particular stress will be placed on the nature of codes for the control of restrictive business practices.

CURRENT AND PROPOSED CODES OF CONDUCT

Development of codes of conduct is now centered in the United Nations, but earlier versions were prepared in other fora. In 1972, the International Chamber of Commerce issued a code of conduct¹⁴ which was very general and, of course, entirely voluntary and lacking in any international legal status, since it was adopted by a nongovernmental group.¹⁵ In June 1976,

¹³ The U.S. delegate to ECOSOC recently urged that the prohibiting of illicit practices should not be held up pending the completion of a general code of conduct for TNE's, but should go forward as soon as possible. [1977] INT. TRADE EXPORTER (BNA) C-2 (No. 168).

¹⁴ INTERNATIONAL CHAMBER OF COMMERCE, GUIDELINES FOR INTERNATIONAL INVESTMENT (1972).

¹⁵ There are other voluntary guidelines and rules by nongovernmental groups and organizations, such as the ICC Guidelines for International Investment; ICC Incoterms; International Rules for the Interpretation of Trade Terms; ICC Rules of Conciliation and Arbitration; and the York-Antwerp Rules adopted by the International Maritime Committee and the International Law Association. The International Confederation of Free Trade Unions also adopted at its Congress in Mexico in 1975 a Charter of Trade Union Demands for the Legislative Control of Multinational Companies. For

the Council of the Organisation for Economic Co-operation and Development (OECD)¹⁶ adopted a code of conduct,¹⁷ which was somewhat more specific than its predecessor from the International Chamber of Commerce. The first few of its twenty-nine provisions are quite general, but the rest relate to specific subjects, including competition. Enterprises, for example, are requested to cooperate with authorities of countries investigating restrictive business practices, including the provision of information to those authorities. Although observance of the code is voluntary, it is clearly intended that the code should have a meaningful effect on corporate conduct in controversial areas. The code was promulgated with the specific endorsement of all OECD governments and was recommended to TNE's by their governments. In addition, the OECD code provides for a consultation procedure, to be conducted by the OECD Committee on International Investment and Multinational Enterprises, for use by governments and enterprises in connection with issues that may arise under the code.

At the United Nations, an important early step was the study by a "Group of Eminent Persons"¹⁸ on the impact of the multinational corporation on development and on international relations. Their report, in 1974, discussed a series of problems concerning corporate conduct and called for work within the United Nations toward an international code of conduct.¹⁹ In accordance with the Group of Eminent Persons' recommendation,²⁰ the United Nations established a Commission on Transnational Corporations (CTNC) to deal with issues concerning multinational enterprises.²¹ An Information and Research Centre to collect information on TNE's and to assist developing countries in dealing with them was also established within the UN Secretariat and placed under the guidance of the Commission.²² At the conclusion of its March 1975 meeting, the Commission "decided that among the various tasks it would undertake in the next few years the

the interests of nongovernmental groups in the development of codes of conduct, *see* UN Doc. E/C.10/20 (1976).

¹⁶ The OECD is generally considered to be representative of most of the developed countries of the world.

¹⁷ OECD, "Guidelines for Multinational Enterprises," *DECLARATION ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES* (1976), *reprinted in* 15 ILM 297 (1976), 75 DEPT. STATE BULL. 83 (1976) [hereinafter, *OECD DECLARATION*]. Other regional organizations working to develop a code of conduct include the non-aligned countries; UN Doc. E/C.10/9/ Add. 1, at 12 (1976); the Organization of American States, Permanent Council Res. 154 (167/75), Corr. 1 (1975); and the parliamentarians of the United States and the European Economic Community (EEC), who are working on a draft code of principles to be observed by enterprises and governments in international economic activity. 435 EUROPEAN REP. 1 (July 16, 1977).

¹⁸ ECOSOC Res. 1721, 53 ESCOR, Supp. (No. 1), 3, UN Doc. E/5209 (1972) had requested the UN Secretary-General to establish the Group of Eminent Persons to study transnational enterprises.

¹⁹ UN Doc. E/5500/Rev.1, ST/ESA/6 (1974). *See generally* Coonrod, *The United Nations Code of Conduct for Transnational Corporations*, 18 HARV. INT. L. J. 273 (1977).

²⁰ *Supra* note 19, at 55.

²¹ ECOSOC Res. 1913, 57 ESCOR, Supp. (No. 1A) 31, UN Doc. E/5570/Add.1 (1975).

²² ECOSOC Res. 1908, 57 ESCOR, Supp. (No. 1) 13, UN Doc. E/5570 (1974).

priority would be assigned to the formulation of the code of conduct. . . ."²³ An Intergovernmental Working Group on a Code of Conduct, organized by the Commission at its second session,²⁴ is now in the process of preparing an annotated outline of a code of conduct which will address a broad range of corporate activity, including competition and restrictive business practices.²⁵ Discussion on the "legal nature" and implementation of the code has been postponed until the provisions of the code have been drafted.²⁶

UNCTAD²⁷ has also been active in the development of a code. It has an Ad Hoc Group of Experts on Restrictive Business Practices, within its Committee on Manufactures, which has recently been authorized to develop multilaterally agreed principles and rules for the control of restrictive business practices having adverse effects on international trade, particularly that of developing countries, and on the economic development of those countries.²⁸

At its second session, the UNCTAD Ad Hoc Group of Experts on Restrictive Business Practices drew up a broad list of types of behavior which may affect the trade and development of developing countries under the headings of international cartels, national external trade cartels, domestic restrictive practices, and acquisition or abuse of market power.²⁹ The list of practices did not deal with the question "as to how such practices should be controlled either under national or international regulation"³⁰ but provided a starting point for the formulation of specific principles and rules. Decisions on the "legal nature" and implementation of the code on restrictive business practices may be postponed until the provisions of the code have been drafted.³¹

Among the UN organizations working on a code of conduct, the greatest amount of work has been done so far by an UNCTAD Intergovernmental Group on the Transfer of Technology, which is attempting to draft a code of conduct by the end of 1978. The code will include a major chapter on restrictive licensing practices.³² Developing countries have long been

²³ 59 ESCOR, Supp. (No. 12), UN Docs. E/5655, E/C.10/6, at para. 9 (1975). See Rubin, *Reflections Concerning the United Nations Commission on Transnational Corporations*, 70 AJIL 73, 87 (1976).

²⁴ 61 ESCOR Supp. (No. 5) at paras. 10-17, UN Doc. E/C.10/16 (1977).

²⁵ UN Doc. E/C.10/31, at para. 16 (1977).

²⁶ *Id.*, at para. 13.

²⁷ UNCTAD was established in 1964 to deal primarily with the economic problems of the developing countries in their relations with the more developed parts of the world. GA Res. 1785, 17 GAOR, Supp. (No. 17) 14, UN Doc. A/5217 (1962); GA Res. 1995, 19 GAOR, Supp. (No. 15) 1, UN Doc. A/5815 (1964).

²⁸ UN Doc. TD/B/600, at para. 1 (1976).

²⁹ *Id.*, at para. 38.

³⁰ *Id.*, at para. 40.

³¹ UN Doc. TD/B/C.2/AC.6/2, at para. 15 (1976).

³² UN Doc. TD/B/C.6/14 (1976). Both the industrialized nations and the developing countries have offered drafts of the code. The draft originally proposed by the Group of 77 included a list of 40 restrictive business practices which they thought should be avoided or made unenforceable in international dealings, while the draft of the developed countries contained eight principles. So far a composite text of 14

pressing for a code that would regulate the terms and conditions for the international transfer of technology as an important element of the broader arrangements between developed and developing countries on a new international economic order,³³ and some delegates from developing countries have even rested the fate of the dialogue between developed and developing countries on the outcome of these negotiations on a code of conduct.³⁴ When agreement could not be reached on the "legal nature" of the code, it was decided to defer the issue until the code had been drafted. UNCTAD advised the Intergovernmental Group to proceed with the drafting of the code "without prejudice to its legal nature," which will be decided by UNCTAD when it receives the code for consideration.³⁵

It appears that some or all of the principles and rules developed by the UNCTAD committees will be used in the formulation of the broad code of conduct developed within the Commission on Transnational Corporations. The Chairman of the Working Group of the Commission has recommended that in drafting a code account should be taken of the work on restrictive business practices in UNCTAD and other international organizations.³⁶

THE APPLICABILITY OF THE CODES

Sovereigns are the primary subjects of international law and the normal parties to international agreements.³⁷ Most of the codes now being negotiated would impose obligations on commercial enterprises as well as states. However, the concepts of "binding" and "voluntary" international agreements have different implications in regard to the obligations of states and of enterprises.

Proposed codes of conduct on restrictive business practices have included provisions, *inter alia*, obliging states to give technical assistance, to consult, and to notify other states of antitrust proceedings. Similar provisions, as well as clauses providing for information sharing and training, have been included in codes on the transfer of technology. One would suppose that signatory states would consider themselves obliged to observe provisions such as those just mentioned, regardless of whether the agreement is called voluntary or binding. Other provisions directed to states, such as an obligation to enforce the code, might be treated differently.

As noted, since these codes of conduct deal primarily with the conduct of enterprises rather than states, it is crucial to determine precisely how the code would apply to the behavior of commercial enterprises. The classic distinction between "subjects" and "objects" of international law has

practices has been formulated, although much controversy still surrounds the proposed principles. See generally, Jeffries, *Regulation of Transfer of Technology, An Evaluation of the UNCTAD Code of Conduct*, 18 HARV. INT. L. J. 309 (1977).

³³ UN Doc. TD/AC.1/4, at para. 11 (1976).

³⁴ *Id.*, at para. 12.

³⁵ *Id.*, at para. 15.

³⁶ UN Doc. E/C.10/31, at 11 (1977).

³⁷ See the definition of "treaty" in Art. 2, para. 1(a) of the Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, UN Doc. A/CONF. 39/27 (1969), 63 AJIL 875 (1969).

been blurred by the imposition of international responsibility on individuals for war crimes and by the establishment of tribunals before which individuals could accuse states of violations of human rights.³⁸ Still, commercial enterprises are not considered to be the subjects of international law to the extent that they would be signatories to an international code of conduct or convention itself. In deciding, therefore, whether the code would create rights and obligations for enterprises, the issue would be whether their conduct would be regulated by international institutions created to enforce a code or by national legislation enacted pursuant to the international agreement; or whether, on the other hand, the international agreement would provide merely that the rules for enterprises would be promulgated as guidelines for their behavior.

POSITION OF THE DEVELOPED COUNTRIES

Developed countries, including the United States, have repeatedly claimed that the codes of conduct on restrictive business practices and transfer of technology should only be guidelines for enterprises and should not create any legal rights or obligations for states or enterprises. This position does not mean that the United States is opposed to codes of conduct in these areas.³⁹

Within the Commission on Transnational Corporations, which is preparing to draft an extensive code of conduct covering most activities of TNE's, developed countries have urged that a code be an "instrument of moral persuasion."⁴⁰ The U.S. delegate specifically stated that a binding code or treaty would prove impractical.⁴¹ The position of the United States and other developed countries has generally been the same in the two UNCTAD committees which are working to develop codes of narrower scope than that of the CTNC, one on restrictive business practices and another on transfer of technology. Before the Committee on Restrictive Business Practices, the developed countries argued that the code should be voluntary because of the "greatly varying states of development among members of the United Nations and the divergencies in approaches to restrictive business practices."⁴²

For the transfer of technology code, developed countries have proposed that it should set out "general and equitable principles which would encourage, facilitate and maximize the transfer of technology." The draft code of the developed countries on transfer of technology is entitled: "Outline of a Code of Conduct Consisting of Guidelines for the Inter-

³⁸ The European Convention for the Protection of Human Rights and Fundamental Freedoms established a procedure which permits an individual to complain to the European Commission even against his own government. 213 UNTS 221, ECHR, Docs. AND DECS. 1955, 1956, 1957, at 4 (1969).

³⁹ See statement by Secretary of State Kissinger, *supra* note 2, at 425, 433.

⁴⁰ UN Doc. E/C.10/6, at paras. 41-59 (1975).

⁴¹ UN Doc. E/C.10/SR.19, at 2 (1976).

⁴² UN Doc. TD/B/600, at para. 73(c) (1976); see also UN Doc. TD/B/C.6/14 (1976).

national Transfer of Technology,"⁴³ and further states that "[t]hese guidelines are voluntary and legally non-binding. The guidelines neither alter nor in any way supersede national or international law nor the responsibilities of States thereunder or as set forth in international treaties or agreements," and "[t]he failure of parties to a mutually agreed technology transfer agreement to observe one or more of the guidelines should not, in and of itself, invalidate such agreement."⁴⁴ The nature of the rules in the voluntary code proposed by the developed countries parallels the broadly stated prohibitions of antitrust laws of the United States and the European Economic Community (EEC), stating, for example, that an enterprise should not abuse a dominant position or impose unreasonable restraints on exports.

EFFECT OF A VOLUNTARY CODE

A significant difficulty in analyzing the voluntary approach to the enforcement of a code on transfer of technology or on restrictive business practices is that it may be impossible to keep the codes "voluntary." To begin with, the fact that nations would agree to a set of principles and rules tends to alter the purely "voluntary" nature of the agreement. Once a consensus is reached, the principles as agreed to can have considerable moral and practical force on the conduct of both states and enterprises.⁴⁵ The understanding and expectation in reaching such an agreement is that states will modify their practices to conform to the understandings of the agreement.⁴⁶ Departure from the agreement could subject a state and its enterprises to pressure or persuasion from affected parties, which could be a very effective "sanction."⁴⁷ Moreover, under certain conditions, it is possible that the code might pass into the general corpus of customary international law. This would occur if the norm-creating provisions of the code were regarded as binding by a large number of states. If this happened, the code would bind even those states that did not expressly consent to its provisions.⁴⁸ A state might act to avoid this result by clearly objecting during the formation of the code⁴⁹ and rejecting its application.⁵⁰ Developed countries which

⁴³ UN Doc. TD/AC.1/7, Annex III, at 1 (1977).

⁴⁴ *Id.*, at 18.

⁴⁵ See Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AJIL 296 (1977).

⁴⁶ *Id.*, at 303.

⁴⁷ The existence of a voluntary code such as the OECD code of conduct may eventually make it difficult for a noncomplying TNE to obtain diplomatic protection, insurance for its operations, and financing through international institutions. Plaine, *The OECD Guidelines for Multinational Enterprises*, 11 INT. LAWYER 339, 343-45 (1977).

⁴⁸ The most frequently cited support for this proposition is the *North Sea Continental Shelf* cases, Judgment of Feb. 20, 1969, [1969] ICJ REP. 3; *digested in* 63 AJIL 591 (1969). On this subject, see Baxter, *Treaties and Custom*, 129 REC. DES COURS 25, 57-64 (1970-I).

⁴⁹ I. BROWNLEE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 10 (2d. ed. 1973).

⁵⁰ See *Anglo-Norwegian Fisheries Case*, [1951] ICJ REP. 116.

encourage the use of antitrust laws, however, would be placed in an anomalous position if they were forced to raise strenuous objections to the development of a code on restrictive business practices in order to prevent it from becoming "binding."

It is possible that developing countries may attempt to have the codes adopted as UN General Assembly resolutions. Whether or not a General Assembly resolution may operate as a rule of law or have binding effect on states is disputed.⁵¹ Adoption by the General Assembly, however, could be construed by developing countries as giving the code principles considerable weight in the development of international law concerning restrictive business practices and the transfer of technology by creating an impression of broad international support for the code principles.⁵²

Lastly, it should be recognized that developed countries would probably be unable to prevent nations from enacting national laws embodying rules and principles contained in the codes of conduct. While such national law would not in itself create rights of obligations as to foreign states, the code's "voluntary" principles and rules would have become effectively "binding" for all enterprises wishing to do business in certain nations.

POSITION OF THE DEVELOPING COUNTRIES

Developing countries are convinced that mere guidelines would not satisfy their needs in supporting codes of conduct. They have often expressed concern that TNE's may have become too dominating and too diffuse to be governed effectively by any single nation,⁵³ and they are not likely to be persuaded that guidelines would appreciably alter the behavior of TNE's in the developing world.⁵⁴ Developing countries see themselves as relatively powerless against TNE's both in negotiation with them and in enforcement of their national laws and regulations. Obtaining information

⁵¹ Compare Haight, *The New International Economic Order and the Charter of Economic Rights and Duties of States*, 9 INT. LAWYER 591, 597 (1975) ("General Assembly Resolutions do not in any way have the force of law") with Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AJIL 782 (1966) (Professor Falk argues that certain General Assembly resolutions can be said to express a consensus of the world community, and as a result, may functionally operate as law, even though they are not formally binding). See also Sohn, *Voting Procedures in United Nations Conferences for the Codification of International Law*, 69 AJIL 310 (1975).

⁵² This point has been raised in connection with pressures by the developing countries for quick passage of a Charter of Economic Rights and Duties in the General Assembly, which was not a legally binding document, but which could be construed by those states rejecting traditional international law as a new standard of international law or as a device to pressure future international lawmaking. Brower & Tepe, *The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?* 9 INT. LAWYER 295, 302 (1975).

⁵³ The transnational enterprise has created a number of difficulties for the domestic legal systems of both developed and developing countries. See Vagts, *The Multinational Enterprises: A New Challenge for Transnational Law*, 83 HARV. L. REV. 639 (1970); UN Doc. TD/B/600, at para. 7 (1976).

⁵⁴ See generally, Vernon, *Storm Over the Multinationals*, 55 FOREIGN AFFAIRS 243 (1977).

about the practices of the TNE, for example, appears difficult for the developing countries when the headquarters and major offices of the company are elsewhere. Even when information concerning a restrictive practice is available, the developing country may fear that the TNE, with its greater resources, may simply abandon the country that attempts to regulate it and relocate in a country that takes a more benign view of its practices.⁵⁵ As perceived by the developing countries, these are situations that may not be appreciably changed by guidelines for the TNE to follow at will.

The developing countries have consistently supported "binding" or "legally enforceable" codes of conduct. They have argued that the extensive code of conduct being prepared by the Commission on Transnational Corporations should be "obligatory and contain penalties for non-observance."⁵⁶ Within UNCTAD, the proposal for a code on restrictive business practices submitted by the developing countries did not specify whether the code should be binding or voluntary, although the draft code presented refers to what nations and enterprises "shall" do.⁵⁷ The developing countries submitted a "Draft Outline of an International Code of Conduct on Transfer of Technology,"⁵⁸ which provides that certain transfer of technology transactions or practices would be "incompatible with the principles and objectives of the Code and shall be null and void," unless exceptional circumstances lead the receiving country to believe the practice is in its public interest and that the effect on its national economy would not be adverse.⁵⁹

POSSIBLE FORMS OF BINDING CODES

The proposed codes of conduct could be made formally "binding" upon the parties to the convention and upon enterprises in a number of ways. A treaty could create a supranational organization to enforce the code provisions, or the code could provide that home governments of TNE's ensure that their TNE's do not violate the codes in their transactions abroad. Finally, the code could aim for harmonization of business practices law by obliging nations to incorporate the provisions of the code into their national law.

The enforcement of treaties that concern business activities of private enterprise through the creation of administrative, quasi-judicial, or judicial organs with supranational competence has been rare. The best example is the Treaty of Rome which established the European Economic Com-

⁵⁵ But see Rubin, *The Multinational Enterprise at Bay*, 68 AJIL 475, 476-77 (1974).

⁵⁶ See UN Doc. E/C.10/6, at paras. 41-50 (1975).

⁵⁷ UN Doc. TD/B/C.2/181, Annex I (1977).

⁵⁸ UN Doc. TD/AC.1/7, Annex II, at 1 (1977).

⁵⁹ *Id.*, at 12. This exception clause suggests that developing countries may be seeking to increase their bargaining strength vis-à-vis TNE's not so much by strict rules in codes as by passing such codes and then gaining leverage based on their ability to grant exceptions.

munity.⁶⁰ The treaty provides for the enforcement of rights and duties of both persons and member states through the establishment of regional institutions, such as the European Court of Justice and the Commission of the European Economic Community, which are responsible, *inter alia*, for implementing treaty prohibitions against restrictive business practice affecting trade between member states. These treaty prohibitions are addressed to enterprises, and along with Court decisions and the Communities' rules and implementing regulations, are binding on persons and member states as a supplement to existing national legislation.⁶¹ Where there is conflict, community law takes precedence over national law,⁶² and national courts must apply community law in a proper case, which is, of course, a significant relinquishment of the sovereignty of each member state. To assure that national courts applying community competition laws do so uniformly, Article 177 of the treaty requires the national courts of last instance to request a preliminary ruling from the Court of Justice interpreting the treaty and rules and regulations of the Commission.

There are obvious advantages to having administration of the codes of conduct in a single administrative and judicial agency to ensure the harmonious application of the codes, particularly if the code contains the broad principles proposed by the developed countries which are similar to the U.S. and EEC antitrust laws. Neither the developed nor the developing countries, however, have proposed that such entities be created by the codes. For the developing countries, this position may stem from their glorification of nationalism⁶³ and their fear and rejection of laws or law enforcement lying outside of national control.⁶⁴ Possible exceptions are the Andean Pact countries which granted certain supervisory powers to a regional commission for matters involving trade and foreign investment.⁶⁵

⁶⁰ Treaty Establishing the European Economic Community, done Mar. 5, 1957, 298 UNTS 3, 51 AJIL 865 (1957). See E. STEIN, P. HAY, & M. WAELBROECK, *EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE* 17-29 (1976).

⁶¹ Each member state has incorporated the Treaty of Rome into its national legal order, but the European Court of Justice has removed from the states the power to determine the extent of their commitments under the treaty. See, e.g., *Costa v. ENEL*, [1964] COMM. MKT. L. R. 425.

⁶² See *Willem v. Bundeskartellamt*, [1969] COMM. MKT. L. R. 100; *Amsterdam Bulb B.V. v. Productschap Voor Siergewassen*, [1977] COMM. MKT. L. R. 218. See generally Markert, *Some Legal and Administrative Problems of the Co-existence of Community and National Competition Law in the E.E.C.*, 11 COMM. MKT. REV. 92 (1974).

⁶³ See Declaration on Principles of International Law Concerning Friendly Relations, GA Res. 2625, 25 GAOR, Supp. (No. 28) 121, UN Doc. A/8028 (1970), 65 AJIL 243 (1971); Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AJIL 713 (1971).

⁶⁴ The Group of 77 has maintained a certain cohesion at the global multilateral level for negotiation purposes although interests within the Group are diverse. Gosovic and Ruggie, *On the Creation of a New International Economic Order: Issue Linkage and the Seventh Special Session of the U.N. General Assembly*, 30 INT. ORGANIZATION 309, 312-13 (1976).

⁶⁵ Decision 24, Dec. 31, 1970. [1971] Registro Oficial No. 264, at 1 (Ecuador), translated and reprinted in 10 ILM 152 (1971). See Oliver, *The Andean Foreign In-*

Both the Treaty of Rome and the Cartagena Agreement⁶⁶ of the Andean Pact countries established competition rules for enterprises as a complement to the establishment of free trade zones among the member states, since the viability of a free trade zone may depend in part on the elimination of private restraints of trade as well as governmental restraints such as tariffs or quotas.

Since developing countries seek multilaterally acceptable codes involving developed as well as developing countries, they envisage some enforcement role for the home countries of TNE's operating within the developing host countries. This would probably involve providing information or support rather than actually using home country laws to stop "violations" of the code in developing countries. In the area of restrictive business practices, extraterritorial jurisdiction is already exercised by some home countries over their TNE's. The United States, for example, has not limited the reach of its antitrust laws to transactions that take place within the United States when U.S. domestic commerce has been affected by activities committed abroad. The U.S. antitrust laws are not applied, however, to foreign activities which have had no direct or intended effect on U.S. domestic commerce, generally because there is no legitimate U.S. interest to justify the intrusion upon the sovereignty of another state.⁶⁷ European Community law also does not apply to restraints on exports outside the Community.⁶⁸ Developing countries, however, have criticized this reserve on the part of home governments and have argued that developed countries should control the restrictive business practices of their TNE's abroad, even when such practices have no domestic effect.⁶⁹

Under existing international law, it is generally recognized that a state has the possibility of regulating conduct of its nationals wherever they may be or wherever they do business.⁷⁰ Theoretically, the home governments of TNE's could assume the obligation to regulate the practices of their TNE's whether or not such practices affect domestic commerce, but the difficulties that would attend the exercise of such jurisdiction, even for the United States, are numerous.

vestment Code: A New Phase in the Quest for Normative Order as to Direct Foreign Investment, 66 AJIL 763 (1972).

⁶⁶ Agreement of Subregional Integration, signed at Bogota, Colombia, May 26, 1969, translated and reprinted in 8 ILM 910 (1969).

⁶⁷ See, e.g., *United States v. Aluminum Co. of America*, 148 F.2d 416, 433 (2d Cir. 1945). Activities which have no direct or intended effect on U.S. consumers or export opportunities may not be within U.S. antitrust substantive jurisdiction. See U.S. Dept. of Justice, *Antitrust Guide for International Operations* 7, 53 (1977). But see *Timberlane Lbr. Co. v. Bank of America*, 549 F.2d 597, 615 (9th Cir. 1976) (Sherman Act is not limited to trade restraints which have both a direct and substantial effect on our foreign commerce); Rahl, *International Application of United States Antitrust Laws: Distribution Arrangements*, FORDHAM CORPORATE L. INSTITUTE 17, 18 (1975).

⁶⁸ Article 85(1) of the EEC Treaty, *supra* note 60, applies only to cartels which have the objective or effect of "preventing, restraining or distorting competition within the Common Market."

⁶⁹ UN Doc. TD/B/600, at para. 7 (1976).

⁷⁰ 2 D. P. O'CONNELL, *INTERNATIONAL LAW* 602 (2d ed. 1970).

The experience of the United States has been that the exercise of anti-trust jurisdiction over TNE's and their subsidiaries located abroad frequently engenders diplomatic protests from other countries, even when the conduct of a TNE abroad has had a substantial effect on U.S. commerce.⁷¹ Such action has often been regarded by other developed countries as an unwarranted intrusion into the territorial sovereignty of the host state and into the rights of the host state to govern the operations of business within its territory. For the developed countries, it would only exacerbate these tensions to encourage the exercise of home state jurisdiction for code violations taking place outside the home country of the TNE's and having no effect on the home country's economy.

It is possible that with a code objections to home country enforcement might be tempered or waived in particular cases, especially if conduct in developing countries were involved. Nevertheless, even if consent or outright encouragement of the host country were obtained before any actions were taken by a home country, unaffected itself by the practice of the TNE, substantial and possibly undesirable adjustments in the legal systems of the home countries would be required. The home country might be expected, for example, to persuade or apply indirect pressure to a TNE when the home country is notified that the activities of the TNE are in violation of a code of conduct. Governmental persuasion or indirect pressure as a method of dispute settlement and of enforcement of the law would run counter to the precepts of the American legal system and those of other developed countries which permit parties to defend themselves before an impartial tribunal. Furthermore, in the United States, an obligation to apply indirect pressure might be perceived as placing too much power in the Executive Branch. Each administration would be put in a bargaining position with TNE's over enforcement of the codes which could involve the interests of labor or other groups or agencies concerned with trade matters. The TNE subjected to indirect pressures from its home government might fight back indirectly by lobbying in Congress for protectionist measures or by bargaining with the host country. Both actions could seriously undermine enforcement efforts.

Special legislation would be needed to give U.S. federal courts jurisdiction pursuant to the codes regulating the conduct of transnational enterprises.⁷² As they are now being written, these codes of conduct are not

⁷¹ See, e.g., complaints raised by Great Britain in *United States v. Imperial Chemical Industries, Ltd.*, 100 F.Supp. 504 (S.D.N.Y. 1951), 105 F.Supp. 215 (S.D.N.Y. 1952) (supplemental opinion on remedies) and by Switzerland in *United States v. Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cas. para. 70, 600 (S.D.N.Y. 1962), *order modified*, 1965 Trade Cas. para. 71,352 (1965). These issues are likely to remain as the continuing enforcement policy if the Justice Department is to prosecute those foreign violations which substantially affect U.S. commerce. Address by Attorney General Griffin B. Bell before the American Bar Assn. (Aug. 8, 1977) ("We are obligated to do all that we reasonably can to prosecute foreign private cartels which have the purpose and effect of causing significant economic harm in the United States in violation of antitrust laws").

⁷² See 14 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 302-16 (1970); Schwartz, *Are the OECD and UNCTAD Codes Legally Binding?* 11 INT. LAWYER 529, 534 (1977).

addressed solely to executive action but are not sufficiently detailed to make them self-executing. Congress might reasonably object to granting such authority in these cases to the already overburdened federal courts. Some countries may have specific courts or administrative panels with special expertise in antitrust matters and conceivably such bodies could be created in the United States to hear claims made against TNE's concerning their conduct abroad.

The exercise of extraterritorial jurisdiction by tribunals in home countries against home enterprises at the request of a host country would probably be politically sensitive. For example, the choice whether to bring the case must first be made. If the responsibility lies with the home country, through its justice ministry or other agency which prosecutes antitrust cases, the decision whether to prosecute could turn on the adequacy of the evidence as presented by the host country. Such decisions could vary widely between countries according to their practice in dealing with the kind of violation alleged.

Obtaining further information from the host country may also be a sensitive matter. Will the host country be willing to give access to all the information surrounding an alleged violation? Will its information be reliable? Political pressures might hinder dispassionate interpretation of the evidence. Furthermore, host country officials may well be both complainants and witnesses. Would they permit vigorous cross-examination by the defendant TNE?

Home country enforcement of these codes against the conduct of TNE's in developing countries, however, may be ancillary to the main purpose of the developing countries in having a code of conduct with multilateral participation. By insisting that the codes should be "binding," developing countries may merely desire to emphasize that the code should be treated as obligatory by TNE's and their home governments. More likely, developing countries see the code as obliging each nation to incorporate its provisions into national law. Implementation of rights and duties pursuant to an international agreement affecting private persons or firms has frequently been left to national action.⁷³ In the area of restrictive business practices and transfer of technology, a notable example is Decision 24 of the Andean Pact which leaves implementation and enforcement of sub-regional rules to national institutions, although the subregional authority does maintain a supervisory function.⁷⁴ Implementation and enforcement of an international antitrust code submitted to ECOSOC in 1952-53 was also to be accomplished by national institutions, but the United States rejected the code on the grounds that too few nations had a history or a strong tradition of antitrust enforcement to ensure the passage of adequate legislation.⁷⁵

⁷³ See, e.g., Code of Conduct for Liner Conferences, UN Doc. TD/CODE/11/Rev. 1 and Corr. 1 (1974); the General Agreement on Tariffs and Trade, 61 Stat (5)(6), TIAS No. 1700, 55-61 UNTS (1948); and the Paris Convention on Protection of Industrial Property, March 20, 1883, *as revised* Oct. 31, 1958, TIAS No. 4931 (1962) and *as revised* July 14, 1967, TIAS No. 6923 (1970).

⁷⁴ See *supra* note 64.

⁷⁵ 16 ESCOR, Supp. (No. 11) (1953).

For the TNE, enforcement of the codes by national action could raise some of the same procedural difficulties which a complainant host country might face in home countries, such as difficult questions of procedural rights and burden of proof. To a certain extent, of course, TNE's are already subject to the vagaries of different legal systems. It could be expected that TNE's fearful of a biased interpretation of an international code by the developing countries would demand a system of appeals. Even though an international agreement would be involved, a TNE being challenged in a host country might not be permitted an appeal to a forum outside the host country because of considerations of sovereignty. For the host country bringing a complaint about a TNE before its home government, no international forum would exist to hear an appeal unless one was created by the codes themselves. The Statute of the International Court of Justice does not empower it to hear a case in which an individual or legal person is a party.⁷⁶ Even if the Court had the necessary jurisdiction, it would not be able to offer any special expertise in matters involving restrictive business practices or the transfer of technology.

If a decision in either the home country or host country were final, it would be essential to have some provision in the codes of conduct giving the decision the effect of *res judicata* or providing for collateral estoppel in the event that the host country attempts to raise the issue again in another forum. Host countries may be unwilling to accept this result if they do not obtain the relief they desire.

One may inquire how a code which obliges governments to adopt the codes in their national law would differ from a voluntary code which could then be enacted into national law. One answer is that developing countries may consider such a code to "legitimize" their own enforcement of the code against the TNE.⁷⁷ It is not entirely clear what practical effects such "legitimization" would have. If developing countries incorporate codes of conduct for TNE's into their national law, their enforcement of those laws would gain a considerable degree of "legitimacy" regardless of whether developed nations approved the code. Under the act of state doctrine, as understood in the United States,⁷⁸ the United Kingdom,⁷⁹ and

⁷⁶ Article 34, paragraph 1, of the Statute of the International Court of Justice provides that "only States may be parties in cases before the Court."

⁷⁷ See generally Claude, *Collective Legitimization as a Political Function of the United Nations*, 20 INT. ORGANIZATION 367 (1966).

⁷⁸ See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 404 (1964); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.); *cert. denied*, 409 U.S. 950 (1972); *Hunt v. Mobil Oil*, 550 F.2d 68 (2d. Cir. 1977). Act of state, sovereign immunity, foreign government compulsion, and considerations of comity may be defenses to any regulation of corporate conduct abroad by the Department of Justice based on antitrust statutes. *Hearings on Activities of Multinational Corporations Abroad before the Sub-Comm. on International Economic Policy of the House Comm. on International Relations*, 94th Cong., 1st Sess. 89 (1975) (testimony of Donald I. Baker, Deputy Assistant Attorney General, Antitrust Division).

⁷⁹ See 1 D. P. O'CONNELL, *INTERNATIONAL LAW* 378 (2d ed. 1970).

some other countries,⁸⁰ courts would not question the motive, fairness, or factual basis of a host country's ruling in respect to a violation of the code of conduct.

The interest of the developing countries in "legitimization" may be traceable to previous North-South disputes over the legality of expropriations under international law and to various countermeasures taken by the United States, such as the Hickenlooper Amendment⁸¹ and the anti-OPEC amendment to the 1974 Trade Act.⁸² These forms of response have been largely ineffective and harmful to foreign relations,⁸³ so that a lessening of the ability to employ them because of an agreement on a code would be a rather minor concession for the United States.

ALTERNATIVES

A MULTILATERAL CONVENTION

To resolve the deadlock over the nature of the code, a compromise suggested by the UNCTAD Secretariat for the code of conduct on the transfer of technology would put the code in the form of a multilateral convention.⁸⁴ The Secretariat believes this approach might accommodate the interests of both the developing and developed countries by making the code binding for those states that adhered to the convention, while leaving it voluntary for others that did not become parties to the convention.⁸⁵ It is unlikely, however, that developed countries would find this approach acceptable, since it would move a long way toward making the code binding and there would be no central agency to interpret the code or otherwise ensure its harmonious enforcement. Similarly, developing countries might object that it would place those developing countries that adhered to a code in a more vulnerable position in obtaining and securing foreign investment than those countries that refrained. A code that some could reject would not be "multilaterally acceptable."

⁸⁰ The Court in *Sabbatino* noted that courts in France, Germany, and the Netherlands had applied the doctrine as a matter of conflicts of law, but had not thought themselves compelled to do so by any rules of international law. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421 (1964). See also RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §41, Comments *a* (1965).

⁸¹ 22 U.S.C. §2370(e)(1) (1970). The amendment required the President to suspend foreign aid to any country taking the property of a U.S. citizen without taking steps to compensate him fully within six months. The Statute was modified to give the President discretion to waive application of the amendment when necessary in the national interest. Pub. L. No. 93-189, 87 Stat. 722 (1973). See Lillich, *Requiem for Hickenlooper*, 69 AJIL 97 (1975).

⁸² Trade Act of 1974, §502(b)(2), 19 U.S.C. §2464(b)(2) (Supp. V 1975). By the operation of the Section, the President cannot authorize duty-free treatment for any country which operates to withhold or raise prices of vital commodities.

⁸³ The Hickenlooper Amendment has been used only once, against Ceylon in 1963. 48 DEPT. STATE BULL. 328 (1963). See Amerasinghe, *The Ceylon Oil Expropriations*, 58 AJIL 445 (1964). See also, *U.S.-Latin American Relations Reeling Under Impact of Reaction to Trade Act*, BUSINESS LATIN AMERICA, Feb. 5, 1975, at 41, 43.

⁸⁴ UN Doc. TD/B/C.6/AC.1/2/Supp. 1/Rev. 1, at 48 (1975).

⁸⁵ *Id.*

It may be possible, however, to retain the essentially voluntary nature of the codes and yet to use the substantive provisions as more than a guideline for enterprises to follow at will. A variety of enforcement mechanisms are possible for the codes, as can be seen from the types of enforcement mechanisms created by existing international agreements. These agreements require different degrees of interdependence, cooperation, and goodwill between states, since they vary significantly in the nature and extent of the obligations that they impose upon the states parties to them and, in some cases, that they impose upon persons.

INTERNATIONAL ARBITRATION

Developed countries have long believed that international arbitration is a desirable method for the settlement of disputes related to foreign investment.⁸⁶ The United States, for example, has supported the creation and the use of the International Centre for the Settlement of Investment Disputes,⁸⁷ which operates as an arm of the World Bank. For developed countries, arbitration is often preferable to local proceedings which may involve procedures departing from Western concepts of the due process or decisionmakers thought to be prejudiced against foreign economic interests.

It is well accepted that parties to an international contract may voluntarily decide that certain disputes between them will be subject to arbitration.⁸⁸ Parties who choose arbitration may designate the body of law or principles to which the arbitrators will look for guidance in performing their function.⁸⁹ For instance, it is not uncommon in international commercial arbitration for the arbitrators to be directed to refer to Swiss com-

⁸⁶ UN Doc. E/C.10/9, at 21 (1976). The United States and most Western European countries are among the forty-two signatories to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 21 UST 2517, TIAS No. 6997, 330 UNTS 3, 53 AJIL 420 (1959). See generally Sohn, *The Function of International Arbitration Today*, 108 REC. DES COURS 11 (1963-I).

⁸⁷ Convention on the Settlement of Investment Disputes between States and Nationals of Other States. 17 UST 1270, TIAS No. 6090, 575 UNTS 159, 4 ILM 532 (1965). An arbitral award rendered pursuant to the Convention is binding and enforceable in United States courts, but no contracting state is required to submit a dispute to conciliation or arbitration. Convention on the Settlement of Investment Disputes Act of 1966, Pub. L. 89-532, Aug. 11, 1966 (implementing legislation). See Amerasinghe, *Dispute Settlement Machinery in Relations Between States and Multinational Enterprises—With Particular References to the International Centre for Investment Disputes*, 11 INT. LAWYER 45 (1977); Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 REC. DES COURS 332 (1972-II). The Kissinger-Moynihan proposals to the seventh special session of the United Nations advocated the use of the CSID and other third-party facilities to settle international investment disputes. *Supra* note 2, at 433.

⁸⁸ The United States is party to a number of multilateral and bilateral treaties requiring the arbitration of disputes arising under those treaties. See 12 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 1044-46 (1971).

⁸⁹ For a list of the developments in the international business community toward common principles for the conduct of international commercial arbitration, see Straus, *The Growing Consensus of International Commercial Arbitration*, 68 AJIL 709 (1974).

mercial law. On the other hand, parties may freely decide that the arbitrator will be guided by international law or even "natural justice."

Nations agreeing to an international code of conduct may thus also agree, or at least recognize, that the substantive principles of the code may be referred to as a primary or supplementary source of guidance for arbitration in a commercial matter involving issues covered by the code.

Such an approach would have the advantage of representing a compromise on both sides. Developing countries, particularly those in Latin America, would be compromising by favoring mutual arbitration rather than their usual position under the Calvo Doctrine⁹⁰ that all disputes should be settled under national law in national courts. The developed countries would be compromising by conceding that the code would have a force of law, *i.e.*, be binding, within the context of agreed binding arbitration. This approach would also create relatively expert and neutral fora, on a case-by-case basis, for the interpretation of provisions that have been written in vague or general terms.

Arbitration may, however, be inappropriate or inapplicable in many situations which can arise under an international code. Arbitration is used to settle disputes between parties who have had a contractual or other direct business relationship with each other. Such a relationship will not always exist between the complainant and the multinational enterprise in regard to all aspects of the conduct of the enterprise. For instance, in the area of restrictive business practices, a firm or person may have a grievance because of exclusion resulting from a boycott or exclusive dealing arrangement. Such an injured party is not seeking interpretation of a contract by relying on the agreed international principle itself. Similarly, Government *C* may complain that a contract in Country *B* between two firms has prevented exports to Country *C*. Government *C* would not be in privity with the parties who make the relevant agreement. Lastly, resort to arbitration may be inconsistent with the principle that arbitration agreements do not exclude action in the courts on matters involving the public interest, rather than merely the interests of the parties. In the United States, for example, it is well settled that parties may not avoid the application of U.S. anti-trust laws by an agreement to arbitrate disputes concerning their commercial relationships.⁹¹

INTERNATIONAL CONSULTATION AND CONCILIATION

Another method for giving content and limited effectiveness to an international code is to provide for consultation between states regarding issues

⁹⁰ Following the doctrine, Latin American governments have required aliens to agree not to seek the diplomatic protection of their own states in disputes arising under concession contracts. See STEINER & VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 522-30 (2d ed. 1976).

⁹¹ *American Safety Equipment Corp. v. J. P. Maquire & Co.* 391 F.2d 821 (2d Cir. 1968) (antitrust matter may not be arbitrated). Cf. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (in the area of international commercial transactions, an agreement of the parties to arbitrate any dispute will be respected and enforced by a federal court).

arising under the code.⁹² Use of the procedure of consultation may be voluntary, or there may be an obligation to consult when requested.⁹³ Administrative bodies may be used to determine whether the request is justified.⁹⁴ The extent to which enterprises or individuals may be represented also varies.

The OECD code of conduct⁹⁵ provides for consultation between member states before the OECD Committee on International Investment and Multinational Enterprises.⁹⁶ The agreement stipulates that the consultation may only concern general issues regarding the code and may not be for the purpose of ascertaining the culpability of a particular multinational firm or resolving the facts of a given incident.⁹⁷ The specific issues arising out of a particular complaint are seen as being useful only as examples that help nations to clarify the meaning of the code and its intended effect. TNE's may not initiate consultations, but they may express their views to the Committee on the application of the guidelines.⁹⁸ A recommendation adopted by the OECD in 1967 established a voluntary procedure for consultations regarding restrictive business practices, but this has been used only to consult about enforcement actions involving important interests of another member state, not about corporate conduct.⁹⁹

There have been other attempts to establish consultation procedures relating to antitrust issues, although these have not been associated with codes of conduct. Over the past twenty-five years, the United States has signed Treaties of Friendship, Commerce and Navigation with more than a dozen nations.¹⁰⁰ Each treaty has contained a clause providing that the parties are prepared to consult in regard to restrictive business practices affecting their trade and commerce.¹⁰¹ It does not appear that such a consultation has ever occurred.¹⁰²

⁹² Deputy Assistant Secretary of State for Economic and Business Affairs Paul H. Boeker recently stated that, although the position of the U.S. Government has been that broad codes of conduct should be voluntary in nature, "a broad range of consultative mechanisms may be possible even with a voluntary code." *Hearings on Codes of Conduct for Multinational Corporations before the Subcomm. on International Economic Policy of the House Comm. on International Relations*, 95th Cong., 1st Sess. (1977). See also UN Doc. TD/B/C.2/AC.5/3 (1975).

⁹³ *Id.*, at para. 22.

⁹⁴ *Id.*

⁹⁵ OECD, DECLARATION, *supra* note 17.

⁹⁶ *Id.*, at 21.

⁹⁷ Although the code is clear on this point, trade unions have recently attempted to use the OECD code to chastise TNE's by presenting the OECD with details of fifteen cases in which TNE's had "infringed" the code. One of the cases was brought directly by the Belgian Government. The general problems to which these cases give rise may be examined at the regular meeting of the Committee this year. *How to make business behave better*, THE ECONOMIST, Oct. 8-14, 1977, at 89.

⁹⁸ *Id.*

⁹⁹ Zisler, *The Work of the OECD Committee of Experts on Restrictive Business Practices*, 29 ANTITRUST BULL. 289, 290 (1974).

¹⁰⁰ See e.g., Treaty with Italy, Feb. 2, 1948, Art. XVIII, para. 3, 63 Stat. 2255, TIAS No. 1965, 79 UNTS 171 (effective July 26, 1949).

¹⁰¹ U.S. courts do not permit these treaties to insulate foreign defendants from the reach of U.S. antitrust laws. See *Calnetics Corp. v. Volkswagen of America, Inc.*, 353 F.Supp. 1219, 1222 (C.D. Cal. 1973), *rev'd on other grounds*, 1976-1 Trade Case, para. 60,757 (9th Cir. 1976). In *United States v. R. P. Oldham Co.*, 152 F.Supp. 818, 822-23, (N.D. Cal. 1957), the court overruled the defendant's contention that the

The abortive Havana Charter for an International Trade Organization of 1948¹⁰³ included procedures for consultations and investigations in the articles of Chapter 5 on restrictive business practices. All parties, including enterprises, could be represented.¹⁰⁴ This approach was followed by the Council of Europe when it drew up a draft convention for the control of international cartels in 1951.¹⁰⁵ The treaty establishing the European Free Trade Association (EFTA) includes provisions for bilateral consultation and, if no settlement is reached, for referral of the matter to the Council for a recommendation or decision.¹⁰⁶ Although the latter provision has not been used, bilateral consultations have produced settlements regarding exclusive dealing practices and refusal to supply.¹⁰⁷

Consultation is also provided as part of the dispute mechanism in the General Agreement on Tariffs and Trade (GATT).¹⁰⁸ Article XXII authorizes individual consultation between Contracting Parties and joint referral to the Contracting Parties if bilateral consultations have failed on "any matter affecting the operation of this Agreement." In 1960 the Contracting Parties passed a resolution recommending bilateral or multilateral consultations on restrictive business practices.¹⁰⁹ This procedure has never been used.¹¹⁰

Administrative agencies usually play an essential, though indirect role in consultations, by providing a forum, arranging for consultations, and re-

"restrictive business practices" clause of the Treaty of Friendship, Commerce and Navigation of April 2, 1953, between the United States and Japan provided the exclusive remedy to the United States. 4 UST 2063, TIAS No. 2863, 206 UNTS 143.

¹⁰² See Haight, *The Restrictive Business Practices Clause in United States Treaties: An Antitrust Tranquilizer for International Trade*, 70 YALE L.J. 240 (1960).

¹⁰³ Havana Charter for an International Trade Organization (1948), Dept. of State Pub. 3206, Commercial Policy Series 114 (1948). See Furnish, *A Transnational Approach to Restrictive Business Practices*, 4 INT. LAWYER 317 (1969-1970).

¹⁰⁴ The Charter has frequently been discussed in connection with the codes of conduct. See, e.g., UN Doc. TD/B/C.2/AC.5/3, at para. 12 (1975).

¹⁰⁵ *Id.*, at para. 15. See GATT Secretariat, *Restrictive Business Practices*, part 3, ch. III (1959).

¹⁰⁶ *Id.*, at para. 9.

¹⁰⁷ 11 EFTA BULL. Sept.-Oct. 1970, at 13.

¹⁰⁸ Art. 22, *supra* note 73.

¹⁰⁹ A minority of the group of experts which had prepared a report on restrictive business practices thought that, when a country was damaged by international cartels, the Contracting Parties should be authorized under Article XXIII to suspend the application of concessions or other obligations under the Agreement ("nullification and impairment"). The majority, however, thought that the necessary consensus did not exist for a multilateral agreement for the control of restrictive business practices. Contracting Parties to GATT, 9th Supp. BISD 28, 171 (1961); See also J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 511-27 (1969). The United States entered into informal antitrust notification and consultation arrangements with Canada in 1959 and in 1969. Each country is to notify and, if possible, consult the other when the interests of the other may be affected by an antitrust enforcement action. See Dept. of Justice Press Release (Nov. 3, 1969). A similar agreement between the U.S. and the Federal Republic of Germany was signed on June 23, 1976.

¹¹⁰ Consultations within GATT have occurred over the use of subsidies and, prior to action taken under Article XIX, the escape clause. JACKSON, *supra* note 109, at 379 n.15, 566.

ceiving reports or advice from member states on consultations.¹¹¹ An UNCTAD report has noted that the inclusion of such consultation procedures within UNCTAD's competence would be a "logical next step in the development and strengthening of UNCTAD's activities in the restrictive business practices field."¹¹² Such a role has also been suggested for the UN Centre on Transnational Corporations.¹¹³

A recommendation adopted by the OECD Council in 1973 established a voluntary procedure for conciliation with regard to restrictive business practices if consultation fails to resolve the matter.¹¹⁴ If the member states agree to bring the case before the OECD Committee of Experts on Restrictive Business Practices, the good offices of the OECD Committee could be used in order to reach a settlement.¹¹⁵ This procedure also has not been used in any formal sense.

Conciliation in an unusual form has been accepted recently by developing countries and a number of developed countries in the Convention on a Code of Conduct for Liner Conferences.¹¹⁶ The Code provides for "mandatory international conciliation"¹¹⁷ following unsuccessful consultations and authorizes the establishment of an International Panel of Conciliators.¹¹⁸ As is generally the case with conciliation, parties to the dispute need not accept the recommendation of the conciliators,¹¹⁹ but the Code does "supply a certain pressure to impel the parties toward agreement."¹²⁰

This history shows that most nations prefer to use nonpublic, bilateral diplomatic approaches rather than formalized international consultation and conciliation procedures, at least in regard to restrictive business practices. Agreement to consultation procedures seems to be largely a cosmetic formula for indicating goodwill and diplomatic accessibility and disguising unwillingness to surrender national discretion or to create powerful international institutions. On the other hand, agreement to consultation about adherence to rules inevitably implies—and may create—a greater dedication to obeying those rules than would be the case if there were no agreement to consult.

NORM REFINEMENT

Another possibility for the codes would be to create an international organization to formulate more detailed rules pursuant to general pro-

¹¹¹ UN Doc. TD/B/C.2/AC.5/3, at para. 20 (1975).

¹¹² *Id.*, at para. 26.

¹¹⁴ Zisler, *supra* note 98, at 291.

¹¹⁵ See W. L. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS*, 460-65 (1973).

¹¹⁶ UN Doc. TD/CODE/11/Rev. 1 and Corr. 1, reproduced in 13 ILM 912-51 (1974). Australia, Belgium, France, the Federal Republic of Germany, Japan, Spain, Turkey, the Socialist countries of Eastern Europe, China, and 58 developing countries voted for the Convention. The United States was among those that voted against adoption. Shah, *The Dispute Settlement Machinery in the Convention on a Code of Conduct for Liner Conferences*, 7 J. OF MARITIME LAW & COMMERCE 127, n.2 (1975).

¹¹⁷ Code of Conduct for Liner Conferences, *supra* note 116, Art. 23.

¹¹⁸ *Id.* Art. 46.

¹¹⁹ *Id.* Art. 30.

¹²⁰ UN Doc. E/C.10/9, at 21 (1976).

visions in the codes.¹²¹ When a treaty or convention is enforced by national institutions, an international body can be useful in collecting information about national enforcement for dissemination to other parties to the instrument and by making recommendations to the parties for the harmonization of national treatment. In regard to codes of conduct for TNE's, such information-gathering could encourage the use of the codes as well as harmonious interpretation of their provisions. This could be an important function for restrictive business practices codes which, as they are now being written, prohibit "abusive" or "unduly restrictive" business practices. Such provisions may be difficult for all states to interpret uniformly or difficult for those states with little or no history of antitrust enforcement to interpret at all.

Furthermore, an international organization with the responsibility of collecting information and advising states may also receive requests and proposals from governments to revise the code as they find it necessary. Studies by the organization could be sent to all parties for their recommendation and approval prior to a revision conference, in order to hasten the amendment process.

Organs of the ILO, EEC, OECD, and the Andean Pact have been created for such a rulemaking, advisory function.¹²² The international agreements establishing these organizations may require that the resulting rules and regulations be enacted in national law or that they are to serve as recommendations to the parties.¹²³

Within the United Nations there are organizations concerned with some aspects of TNE's which serve as advisory bodies to states. The Information and Research Centre on Transnational Corporations collects information about TNE's.¹²⁴ Although its current duties may prove formidable, it is possible that the Centre, or a similar organization, could provide important assistance to states in enforcing the codes harmoniously.

The United Nations Commission on International Trade Law (UNCITRAL) was specifically formed in 1966 under a General Assembly resolution to promote the unification and harmonization of international law.¹²⁵ UNCITRAL has recently referred to the Commission on Transnational Corporations questions concerning the activities of TNE's, but has agreed to offer UNCITRAL's services to the Commission to develop model rules that states could adopt "with a view to exercising a greater degree of control over the activities of multinational enterprises . . ." ¹²⁶

¹²¹ See UN Doc. TD/B/C.6/AC.1/2/Supp. 1, at paras. 236, 341-343 (1975).

¹²² See UN Doc. E/C.10/9, at 18 (1976).

¹²³ See, e.g., Art. 189 of the Treaty of Rome, *supra* note 60, which provides that Commission regulations are binding and directly applicable, but directives must be implemented by national authorities, and that Commission recommendations and opinions have no binding force.

¹²⁴ *Supra* note 21.

¹²⁵ GA Res. 2205. 21 GAOR, Supp. (No. 16) 99, UN Doc. A/6229 (1967).

¹²⁶ BROWN, *UN Commission on International Trade Law (UNCITRAL)*, 10 INT. LAWYER 366, 367 (1976).

FOLLOWUP AND SURVEILLANCE

The recent Helsinki accords¹²⁷ exemplify another method of implementing a code of conduct without altering its basically voluntary character.¹²⁸ This approach involves providing in an agreement that the nature of the code will be reexamined a few years afterwards. It may also be provided that nations will evaluate the effects of the code in eliminating the abuses against which it was aimed and report their conclusions at a reevaluation conference. A stronger form of agreement might create modes of followup or surveillance, ranging from a questionnaire to a survey group, or use the UN or UNCTAD Secretariats in followup activities. A premise of this, stated or implied, might be that, if a voluntary code produces no improvement over a three or four year period, tougher methods of enforcement will be considered.

CONCLUSION

The debate on whether the codes should be binding or voluntary has evoked strongly worded positions and dire predictions from advocates of rival points of view. Nevertheless, even after substantial analysis, it remains surprisingly difficult to determine just what is at stake in choosing between a relatively voluntary and a binding legal character for a code of conduct in regard to restrictive business practices or the transfer of technology. It is not at all certain that the issue has anything to do with the economic welfare of nations or firms. It is hazardous to attempt to predict whether the elimination of any particular type of restrictive business or licensing practice will transfer wealth in a given direction, since the practice may not have been successful and since its elimination could conceivably lead to less investment or less licensing.¹²⁹ Moreover, most countries accounting for a substantial share of world trade and investment already have national laws governing licensing practices and some other restrictive business practices. A code of conduct, whether binding or voluntary, would theoretically effect the greatest change for nations that either do not have laws in this area or lack the resources to enforce them. Such countries account for a miniscule proportion of international trade, investment, and licensing. Moreover, if one accepts the implicit premise that acceptance of even a voluntary code will in fact cause enterprises to adhere to the agreed rules, a voluntary code will result in

¹²⁷ Final Act of the Conference on Security and Cooperation in Europe, signed in Helsinki on Aug. 1, 1975, reproduced in 14 ILM 1292 (1975) and in 73 DEPT. STATE BULL. 323 (1975).

¹²⁸ See Russell, *The Helsinki Declaration: Brobdingnag or Lilliput?* 70 AJIL 242, 246-49 (1976).

¹²⁹ For instance, export restrictions in technology transfer licenses are frequently cited as an important and prevalent practice recipient countries would like to eliminate. However, so long as licensors maintain enforceable industrial property rights in home countries or other major export markets, removal of the license restrictions will probably not actually increase exports to a significant extent.

approximately the same wealth or resource transfer as would have stemmed from a binding document.

Arguably, the more important issue is whether a binding code would "legitimize" objectionably stringent national laws or rules. However, international codification of such rules in any form, binding or voluntary, would tend to have such an effect. On the other hand, if the rules of the code are more reasonable than those contained in the legislation of the more radical developing countries, it is arguable that agreement on the code would tend to moderate or undermine such local experiments, with a binding code perforce having a greater probability of "delegitimizing" local rules than a voluntary one.

Moreover, evaluating the importance of legitimizing national action is an extremely speculative task. The assumption appears to be that, if objectionable rules concerning licensing or other business practices were not given international approval, developing countries would not adopt them or would abandon those they already have. But such rules are being adopted now without any such international encouragement or approval. It appears that such regulatory experiments have often been adequately "legitimized" by political approval at the national level or by regional agreement, as in the Andean Pact.

What is most at stake in these codes is not their substance but the future role to be played by the United Nations. Until now, the United Nations has no enforcement and supervision powers with regard to TNE's. Successful completion of codes of conduct could give the United Nations an important new role. If the codes were binding, or even if they included any type of surveillance, consultation, or enforcement mechanism, the opportunities for development of the United Nations in the field of investment problems would be greatly enhanced. Certainly, it has been a consistent U.S. policy to favor the development of viable international institutions, including the United Nations. This policy has been eroded by the loss by the United States of a favorable UN majority and by the perception that the present majority is hostile to multinational corporations and to free market approaches. Still, it is good to remember that antitrust rules stem from free market assumptions and have a powerful tendency to liberalize trade and competition and to make free market converts out of those who are authorized to enforce them. The United States, for example, is unique among nations in having made decartelization and the dissemination of antitrust laws one of its war aims some time ago. It carried out that policy by opening up the industrial structure of Germany and Japan after World War II, by strongly encouraging the adoption of antitrust laws in those countries and in the European Common Market, and by sending experts to draft the international antitrust rules in the Havana Charter of 1948 and in the 1952 ECOSOC Ad Hoc Committee. It is, of course, vital to U.S. and other free market economy delegates to ensure that rules of competition in international codes are truly procompetitive, rather than *dirigiste*, biased, or confiscatory. If that goal is accomplished, there should be nothing to fear, and possibly much to gain, in the development of such codes and methods for their implementation.

LEGAL MANAGEMENT OF INTERNAL WAR: THE 1977 PROTOCOL ON NON-INTERNATIONAL ARMED CONFLICTS

*By David P. Forsythe **

At the Diplomatic Conference on Humanitarian Law held in Geneva from 1974 to 1977, it was pointed out that eighty percent of the victims of armed conflict since World War II have been created in noninternational armed conflict.¹ Whatever the precision of this estimate, as of the mid-1970's a number of important actors in world affairs were concerned about destruction of human values in internal war and sought restraints on that form of violence. This concern produced, as of June 10, 1977, a Protocol to the Geneva Conventions of August 12, 1949 relating to the protection of victims of noninternational armed conflict.²

This Protocol on human rights in internal war is the product of a long diplomatic struggle.³ Some of those who participated in this undertaking are optimistic about its future impact. Serious questions exist, however, as to the ameliorating effect this Protocol will have on internal war, if it is brought into force. Probably the Protocol will not bring to an end, or even diminish to any substantial extent, the inhumanity of noninternational armed conflict, but it may be another incomplete step of long-range and symbolic importance in the continuing search for a more humane world.

* The author was an observer at the first two sessions of the Geneva Diplomatic Conference on Humanitarian Law as a consultant to the International Red Cross and at the last two sessions under grants from the Ford Foundation. Comments on earlier drafts of this article were obtained from K. J. Keith of the New Zealand delegation and chairmen of several working groups on Protocol II, Georges Abi-Saab of the Egyptian delegation, and George Grandison of the American delegation. Responsibility for all statements rests with the author.

¹ See e.g., the statement by the delegate of the Federal Republic of Germany, quoting Red Cross sources, CDDH/I/SR.23, at 10. According to a Soviet delegate, the figure should be 90%. CDDH/I/SR.34, at 16.

² Final Act, June 10, 1977: UN Doc. A/32/144 (1977). Protocol II. The text of Protocol II and Protocol I relating to the protection of victims of international armed conflict is reprinted in *Official Documents* section, *infra* p. 457 and 16 ILM 1391 (1977).

³ Against the background of resolutions passed by the Red Cross Conference and greatly stimulated by state interest in humanitarian law at the UN Conference in Teheran and at the UN General Assembly, the International Committee of the Red Cross (ICRC) held a series of preparatory meetings with individual and governmental experts, then presented two draft Protocols—the first pertaining to international and the second to noninternational armed conflict—to a Diplomatic Conference convened by the Swiss Government in 1974.

BACKGROUND TO THE PROTOCOL

In the words of Rosalyn Higgins:

It has long been recognized that an internal war may have international repercussions, and international law has therefore sought to provide some guidance on what relations other nations may pursue with both the government and the rebels. Equally, international law has long had an interest in promoting minimum standards in the conduct of hostilities; and in recent years it has come to be acknowledged that at least some of the rules devised must apply to internal, as well as to international war.⁴

Notwithstanding this long and legitimate interest in the regulations of internal war, it is also clear that the law of internal war has become inadequate. There has never been much treaty law on the subject of relations among fighting parties, and the customary law has given rise to much confusion.⁵ A report of a main Committee of the Conference acknowledged that "the only general international law with respect to non-international armed conflicts is Article 3 common to the four Geneva Conventions of 1949. . . ."⁶ As for relations with third parties, the treaty and customary law, covering such subjects as nonintervention and permissible intervention, has proven equally confusing and perhaps even less effective.⁷ The relevance to internal war of other parts of international law, such as general human rights law, is not entirely clear.⁸

Moreover, Common Article 3—the most firmly established source of international law on internal war—has been termed more a statement of "affectionate generalities"⁹ than of precise guidelines. That article never attempted to regulate the relations of third parties with the belligerents. No one has been completely sure as to what factual situations the article applies, and no one has been totally sure exactly what is prohibited in whatever situation it is that is regulated. The text of that article, its drafting history, and subsequent interpretation do not make clear the exact scope and full content of Common Article 3.¹⁰

The vagueness of the 1949 article—the so-called "humanitarian conven-

⁴ Higgins, *International Law and Civil Conflict*, in *INTERNATIONAL REGULATION OF CIVIL WARS* 169 (Luard ed. 1972).

⁵ See especially *THE INTERNATIONAL LAW OF CIVIL WAR* (R. Falk ed. 1971).

⁶ CDDH/III/286, at 30. This is the 1975 Draft Report of Committee III of the Conference, written by R. R. Baxter and George Aldrich of the U.S. delegation and approved by that Committee.

⁷ In addition to Falk, see *LAW & CIVIL WAR IN THE MODERN WORLD* (J. N. Moore ed. 1974) [hereinafter *MOORE*].

⁸ The subject is not exactly clarified by the Protocol's Preamble which states, *inter alia*: "Recalling furthermore that international instruments relating to human rights offer a basic protection to the human person, . . . Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience. . . ."

⁹ Farer, *The Laws of War 25 Years After Nuremberg*, *INT. CONCILIATION*, No. 538, at 31 (1971).

¹⁰ See especially JAMES E. BOND, *THE RULES OF RIOT* 51 and *passim* (1974). Certain acts, such as murder and the taking of hostages, are clearly prohibited.

tion in miniature"—and the resulting confusion regarding its meaning have led to widespread belief that this law had gone largely unnoticed. According to a U.S. delegate at the 1975 session of the Geneva Conference, "the non-observation of article 3 common to the Geneva Conventions of 1949 . . . was an almost universal phenomenon."¹¹ To Iraq, that article "was not yet generally accepted or applied."¹² Similarly, one legal scholar concluded: "Despite the existence of Article 3 in each of the 1949 Conventions, internal war has lost little of its savagery in the observed conflicts in the post-1949 period."¹³ And a journalist, reporting on the violent situation in Lebanon in 1975, expressed a point of view shared no doubt by many: "Is this a civil war? It is an academic point, though an interesting one."¹⁴

It is premature, however, to dismiss the relevance of Common Article 3. That law, "warts and all," is more important and has received more attention than has been generally realized. First of all, it is treaty law, universally adhered to in the sense of being formally accepted.¹⁵ It establishes beyond doubt the legitimacy of the concern of modern international law with internal war. Moreover, Common Article 3 was in 1949, and remains, revolutionary in content, being the first piece of globally accepted international law requiring a state to treat its *own* nationals according to community standards. Were it not for the existence of this article, even with its deficiencies, international efforts in pursuit of a more effective law for internal war would be more difficult.

Secondly, considerably more attention has been paid to the "initial question" of the applicability of Common Article 3 than has been generally recognized. It is difficult, and perhaps impossible, to establish the precise conditions under which this article has been applied. Some things are known for sure. For example, during the French-Algerian conflict, the Algerian National Liberation Front explicitly admitted the relevance of Common Article 3 to that situation, and the French Government strongly implied that the article applied as of June 1956.¹⁶ Some evidence exists as to other cases. For example, according to an official of the International Committee of the Red Cross (ICRC), both the Cuban Government and the armed movement led by Fidel Castro admitted the relevance of the article in 1959; no official statement was ever published by either party.¹⁷ For example, officials in the U.S. Department of Defense claim that some attention was paid to Common Article 3 in Vietnam during 1964-1966,

¹¹ CDDH/III/SR.32, at 9.

¹² CDDH/I/SR.29, at 9.

¹³ Taubenfeld, *The Applicability of the Laws of War in Civil War*, in MOORE, *supra* note 7, at 516.

¹⁴ Markham, "Cry Lebanon," N. Y. Times, Nov. 9, 1975 (Magazine), at 21.

¹⁵ At the time of writing, 140 states have ratified or adhered to the 1949 Conventions with no reservations to Article 3. See C. PILLOUD, *RESERVATIONS TO THE GENEVA CONVENTIONS OF 1949*, at 12-13 (1976).

¹⁶ See Greenberg, *Law and the Conduct of the Algerian Revolution*, 11 HARV. INT. L.J. 37 (1970).

¹⁷ Veuthey, *Les conflits armés de caractère non-internationaux*, in CURRENT PROBLEMS OF INTERNATIONAL LAW (A. Cassese ed. 1975).

although this comes as a surprise to many people in various organizations and countries.¹⁸

The following chart is an effort to establish the initial relevance of Common Article 3 to situations of violence during the period from 1949 to 1975.

INITIAL RELEVANCE OF COMMON ARTICLE 3, 1949-75¹⁹

Category I. Ad hoc agreement by all belligerent groups to apply all four Geneva Conventions of 1949, or their basic principles, despite the existence of a situation initially termed by many observers as internal war.

1. The Congo, 1960-64
2. The Yemen, 1963-67
3. Nigeria, 1967-70

Category II. Explicit acceptance of the applicability of Common Article 3 by government officials. Explicit acceptance by a non-governmental party noted by asterisk.^a

1. Guatemala, 1954
- *2. France, 1956^b
- *3. Lebanon, 1958
- *4. Cuba, 1959
- *5. Yemen, 1962
6. United States in Vietnam, 1964^c
7. Dominican Republic, 1965
8. Uruguay, 1972
9. Chile, 1973

Category III. Possible situations for the application of Common Article 3, not so acknowledged by governments but in which the ICRC visited detainees.^d

¹⁸Letter to this author, dated April 14, 1975, from Major Gen. George S. Prugh, Judge Advocate General, USA.

It was my good fortune to serve as the staff judge advocate at Headquarters, Military Assistance Command, Vietnam, from November 1964 until July 1966 . . . My office, as Staff Judge Advocate, US MACV, was charged with serving as technical adviser to my counterpart in the Army of the Republic of Vietnam. I initially endeavored to persuade him that the standards of Article 3 GPW [Geneva Prisoners of War Convention of 1949], should be applied and I believe that he was able to achieve this in large measure, although this was admittedly a difficult task . . . I observed the actions of the RVN [Republic of Viet Nam] Director of Military Justice and his substantial efforts to comply with the applicable law, even though it was not clear nor had it been announced officially by the RVN officials that Article 3 was applicable during this period before August 1965. . . .

¹⁹The information in the chart is based on ICRC publications, as well as on academic, newspaper, and interview sources. The author believes that subjects such as the formal acceptance of law and ICRC visits to detainees are fully accurate. The author admits that the subject of "possible Common Article 3 situations" is one on which there may be differences of opinion, certainly with regard to encompassing dates. The author presents this chart as a tentative step in a new direction of research, not as the final word on the subject.

Notes to the Chart:

^a The author makes no attempt to assess the duration of applicability.

^b Explicit inference, see text, *supra*.

^c Explicit claim to action by individual officials, see text, *supra*.

^d The author has made no attempt to establish whether the ICRC stated its view on applicability to the government or to establish the relevance of the four Conven-

1. Algeria (France), 1955
2. Cyprus (U.K.), 1955-58
- *3. Hungary, 1956^e
4. Malaysia, 1956
5. Kenya (U.K.), 1956-59
6. South Vietnam, 1957-66
7. Rhodesia (U.K.), 1959-present
8. Laos, 1961-72
9. Indonesia, 1966-69^f
10. Aden (U.K.), 1966-67
11. Bolivia, 1971
12. Northern Ireland (U.K.), 1971-present
13. Guinea Bissau (Portugual), 1971-74^g
14. Mozambique (Portugual), 1971-74^g
15. Burundi, 1972^h
16. Philippines, 1972-present
17. Angola (Portugual), 1973-76^g
18. Thailand, 1973-75
- *19. Iraq, 1974-75ⁱ
- *20. Ethiopia, 1974-present^j
21. Lebanon, 1975-present

The above chart tends to confirm part of a summary statement by one authority on this subject:

Two conclusions emerge from a survey of state practice. First, states that quell riots, insurrections, or even revolts quickly do not feel bound to respect Article 3. In the absence of any widely held expectation that they should conform to Article 3, they act under emergency or martial law. The internal conflict is over before the international community can apprise itself of the facts and generate any pressure on the competing parties to comply with the provisions of Article 3 or humanitarian law in general. States do, second and nevertheless, accept some obligations to treat opposing forces humanely if the conflict drags on beyond several weeks or months. While this recognition seldom takes the form of an explicit acceptance of Article 3, it often manifests itself in acceptance of some Red Cross initiative. . . .²⁰

Thirdly, beyond the technical question of the applicability of Article 3 lies the question of the article's implementation in, or practical impact on, noninternational armed conflict. To recognize an obligation, legal or

tions of 1949 in colonial situations. In some cases ICRC visits may have preceded or continued after the dates given. Thus the visits were not always coterminous with a situation possibly governed by Common Article 3. The information on ICRC visits comes through the courtesy of that organization.

^e ICRC assistance, but no detention visits.

^f ICRC barred from visits 1967-69.

^g Portugal fully recognized the applicability of the Conventions after 1974.

^h ICRC visits interrupted during major violence.

ⁱ ICRC visits not permitted in Kurdistan.

^j ICRC visits not permitted in Asmara during certain periods. There is at least one possible situation falling under Common Article 3 in which the ICRC has not made any official visits, *viz.* the Sudan.

²⁰ BOND, *supra* note 10, at 60.

humanitarian, is not the same as abiding by it. It is well to remember that in the Spanish civil war both parties agreed at the outset to respect the principles of the Geneva Convention of 1929 on prisoners of war.²¹ Both parties proceeded to murder prisoners by the truckload.²² There seems little reason to challenge the generalization, noted above, that "internal war has lost little of its savagery" since 1949.

Yet, at the same time, there appears to have been some tendency to implement the spirit of Article 3 in several violent situations and not merely to pay lip-service to its applicability. If we return to the French-Algerian conflict as an example, we find much abuse of legal and humanitarian norms; the war was indeed one of terror and torture.²³ But we also find that the French did try to some extent to distinguish between combatant and civilian and did authorize ICRC visits to detainees. French courts did eventually recognize a separate legal status for Algerian detainees in order to mitigate the impact of French law. Also, the NLF permitted prisoners some communication with their families and repatriated some detainees prior to the end of the conflict. Space does not permit a detailed examination of the evidence from this and other armed conflicts, which has in any event been attempted elsewhere,²⁴ but it would not be totally incorrect to say in paraphrase of Telford Taylor: If it were not regarded as wrong to mistreat individuals in internal war, they would be mistreated all of the time instead of only some of the time.²⁵

That is not to say, of course, that Common Article 3 has been adequate. Indeed, its recognized inadequacy constitutes the underlying reason for the preparation of the new Protocol.

THE 1977 PROTOCOL

The Protocol is best understood if one considers, in addition to the final text, the negotiating process and currents of opinion manifested at the Diplomatic Conference.

Negotiating Process.

The ICRC, on the basis of pre-Conference consultations, had recommended an extensive draft Protocol that was in effect a miniature Convention. Its material scope of application was relatively broad, and the obligations imposed on the parties and the rights given to the ICRC and other third parties (such as relief societies) were broad.²⁶

²¹ Veuthey, *supra* note 17, at 233-34.

²² On this score the facts are not in doubt. See, *inter alia*, H. THOMAS, *THE SPANISH CIVIL WAR* (1961).

²³ See Greenberg, *supra* note 16 and FORSYTHE, *HUMANITARIAN POLITICS: THE INTERNATIONAL COMMITTEE OF THE RED CROSS* 147-52 (1977).

²⁴ See Taubenfeld, *supra* note 13; Veuthey, *supra* note 17; BOND, *supra* note 10; Falk, *supra* note 5; Luard, *supra* note 4; and Forsythe, *Law, Morality, and War After Vietnam*, 28 *WORLD POLITICS* 450 (1976).

²⁵ "If it were not regarded as wrong to bomb military hospitals, they would be bombed all of the time instead of only some of the time." NUREMBERG AND VIETNAM 40 (1970).

²⁶ ICRC, *DRAFT ADDITIONAL PROTOCOLS: COMMENTARY* (1973).

In the deliberations of the Conference over four years, the humanitarian safeguards in the ICRC's draft were broadened. While certain specific legal obligations were "watered down" or deleted, others were maintained, strengthened, or added. The result of debate in the committees of the Conference was a proposed instrument of 49 articles.²⁷ Many of these articles had been adopted in committee by consensus, including some of the more specific and restrictive rules. Others had been adopted by majority vote. But behind the facade of support lay profound reservations about the Protocol by a number of states, most of them in the Third World.

At the start of the 1977 session, the Pakistani delegation carried on discussions with numerous other delegations and "realized that there was considerable dissatisfaction with the length of the text as well as with the fact that it ventured into domains which they considered sacrosanct and inappropriate for inclusion in an international instrument."²⁸ The head of the Pakistani delegation was strongly committed to securing more law on internal war. After discussing the matter with the head of the Canadian delegation, who was likewise much in favor of the Protocol,²⁹ and with like-minded ICRC officials, Pakistan presented to the final plenary a series of amendments to the draft as reported out of committee which came close to constituting a new Protocol. One of the central rationales for the draft submitted by Pakistan was that the Protocol "should not appear to affect the sovereignty of any State Party or the responsibility of its Government to maintain law and order and defend national unity, nor be able to be invoked to justify any outside intervention. . . ."³⁰ The Egyptian delegation, influential in the Third World, immediately backed Pakistan and reminded the Conference, which had already adopted a Protocol on international armed conflict, that "charity should begin at home."³¹

Pakistan's proposal was based on a "gentlemen's agreement" among the caucusing groups at the Conference. Under this agreement Pakistan would submit amendments to the committee text which would greatly simplify that draft, in return for which those Third World states harboring reservations about the Protocol would not vote against its adoption. The two groups constituting the strongest backers for the committee draft, the Western and Socialist groups, rallied to the "gentlemen's agreement." Both believed the version adopted in committee could not survive the final plenary deliberations. Neither group had firm figures on opponents of the Protocol. But the United States, in addition to relying on information from Pakistan, had been told by a number of South American delegations that the existing version was unacceptable.

The "gentlemen's agreement" led to a major change in the form of Protocol II. In about two weeks, the work of the previous three years (seven years if one counts pre-Conference negotiations) was changed. The amendments submitted by Pakistan were accepted with a minimum of debate. Several articles not in that version were retained from the com-

²⁷ CDDH/402.

²⁸ CDDH/SR.49, at 4.

²⁹ Canada had submitted a simplified protocol in 1975, CDDH/212.

³⁰ CDDH/SR.49, at 5.

³¹ *Id.*

mittee draft, despite Third World statements that violation of the "gentlemen's agreement" jeopardized the entire Protocol. But the plenary meeting of the Conference finally adopted a Protocol of 28 articles on internal war. No state refused to sign the Final Act of the Conference because of the existence of that instrument. Blocking was avoided; "consensus" adoption was achieved.

Currents of Opinion.

Attitudes toward the second Protocol on internal war were greatly affected by what happened to the first Protocol on international armed conflict. Certain Third World states, with the support of the Socialists, succeeded in 1974 in defining international war to include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."³² Some supporters of this measure subsequently saw little reason to develop the law on internal war and some even challenged the existence of that law. An Indian spokesman said early in debates:

If national liberation movements were included under article 1 [of Protocol I pertaining to international armed conflict], the application of the draft Protocol [II, pertaining to noninternational armed conflict] to internal disturbances and other such situations would be tantamount to interference with the sovereign rights and duties of States. The definition of noninternational armed conflicts was still vague and no convincing arguments had been put forward to justify the need for draft Protocol II, the provisions of which would not be acceptable to his delegation.³³

The states opposed to further law on internal war were accused of engaging in "selective humanitarianism." Norway, which had voted with those in favor of defining international war to include anticolonial, anti-occupation, and anticolonial domination wars, chided the states formerly aligned with it. To Norway, the problem was not the nongovernmental character of at least one of the parties in an internal war but rather the attitude of many Third World states. These states were ready for broad humanitarian protection for national liberation movements, and the Norwegian spokesman "could see no objective element which would make the application of draft Protocol II more difficult . . . for dissident forces than the application of the whole of the 1949 Geneva Conventions and draft Protocol I by national liberation movements." He was "forced to the conclusion that the problem was not lack of material possibilities concerning the dissident armed forces concerned, but lack of political readiness on the part of certain delegations."³⁴ Even some Third World delegations were critical of their colleagues, as demonstrated by an Egyptian statement: "Selective humanitarianism could not exist. The principle

³² See Forsythe, *The 1974 Diplomatic Conference on Humanitarian Law*, 69 AJIL 77 (1975). Cf. Baxter, *Humanitarian Law or Humanitarian Politics*, 16 HARV. INT. L.J. 1 (1975).

³³ CDDH/I/SR.23, at 16.

³⁴ CDDH/I/SR.29, at 18.

underlying draft Protocol II was the same as that which had prompted the effort to extend protection in international armed conflicts."³⁵

Selective humanitarianism could exist and did exist, and almost to the point of destroying the Protocol on internal war altogether. The Indian and Norwegian statements defined the spectrum of opinion.

In the ensuing struggle to gain more law on internal war, an observer could identify four poles of opinion with regard to Protocol II around which attitudes tended to cluster. Identification of a state with one pole or another cannot be scientifically demonstrated; moreover a delegation could "move" from one pole to another depending upon the specific issue under consideration. Nevertheless, over four years, one could discern the maximalists, the moderates, the minimalists, and the monkey-wrenchers.

The maximalists were the pure humanitarians who desired extensive law on internal war at the expense of claims to national sovereignty. Their approach was explained by Norway, which had initially wanted one protocol to cover all armed conflicts and whose spokesman said in the final plenary that the Conference should adopt a demanding second Protocol and then let opponents take their position against it.³⁶ The maximalists were Norway, Sweden, and the Holy See, usually the ICRC, and sometimes Belgium, Italy, and others.

The moderates were the delegations which sought to resolve humanitarianism with national sovereignty. They consisted of states in the Western group, the USSR and the eight states in the Soviet bloc, plus others such as Pakistan and Egypt. While most Western delegations liked to think of themselves as more progressive than the Socialists, the USSR came out very strongly for a second Protocol, publically disagreeing with Third World states on a number of points. For example, in Committee I a Soviet representative said, in an obvious reference to the Third World:

Whatever opinion might be held of draft Protocol II, it must be remembered that armed conflicts always produced victims and that those victims required protection from the undesirable repercussions of the conflict. The question was not whether States were rich and well-equipped; it was that of the humane treatment of victims. . . .³⁷

Moreover, at the start of the final debate the USSR expressed concern that the Pakistani draft "was not well-balanced and evaded many issues," and a Soviet spokesman said "the Conference should not depart too far from the spirit of the draft adopted in the Committees."³⁸

³⁵ CDDH/I/SR.24, at 10.

³⁶ The Norwegian statement as heard by the author did not find its way into the official records of the meeting as found in CCDH/SR.49.

³⁷ CDDH/I/SR.34, at 16.

³⁸ CDDH/SR.49, at 7. There was a view among certain Western delegates, including American ones, that the Soviet Union only pretended to be a "friend" of Protocol II and was really interested in loading on to the Protocol so many obligations that it would be rejected. The author does not subscribe to this view in the light of these statements plus others. See *infra* notes 45 and 87. It is true that the Soviet Union wanted a high threshold and no strong means of supervision. But in the last analysis the Soviet Union went out of its way to engage in public debate with Third World opponents of the

The minimalists were those who gave priority to claims to national sovereignty and domestic jurisdiction at the expense of humanitarianism, without rejecting the latter as a basis for law. A number of Third World states, such as Ghana, made up this group, but many Third World states were inclined to silence in the debate.

The monkey-wrenchers were those prepared to "throw a monkey-wrench" into efforts to develop Protocol II. The monkey-wrenchers were few during the first three sessions of the Conference. India was the most easily identified, not only by its statement of opposition quoted earlier but by its comprehensive statement in the final plenary meeting. India not only had consistently opposed Protocol II but also challenged the continuing validity of Common Article 3. The Indian delegation said:

From the very beginning of this Conference, in all the Committees, the Indian delegation has expressed serious doubts about Protocol II . . . My delegation believes that the provisions of Protocol II will only militate against the sovereignty of States and will interfere in their domestic affairs. The internal law and order situations are the sole concern of sovereign States and these problems are to be dealt with according to the domestic laws of the country.

.....

It may be further mentioned that Article 3 of the Geneva Convention of 1949 was drafted in an entirely different context when the colonial and imperialist [p]owers ruled over half the world . . . The imperial and colonial powers had, however, a clever pretext that the colonies were overseas parts of their metropolitan empires and hence armed liberation struggles were internal armed conflicts. Fortunately, Article 1 of Protocol I would now cover the wars of national liberation. My delegation is therefore of the view that it is out of context to mention Article 3 common to the Geneva Conventions in connection with Protocol II.³⁹

In the Indian view, Common Article 3 was to cover only colonial and imperial "internal wars," despite the fact that this view found no support in the drafting history of that article and indeed the pattern of its application since 1949. Such was the depth of Indian opposition to Protocol II that it said that there was no prior basis in law for the Protocol.

Likewise through three sessions Iraq displayed open opposition to a protocol. The Iraqi delegate said early in debates that he "could not regard [the draft Protocol] as development of humanitarian law; it was rather a complication."⁴⁰

Many Third World states reserved their final position on the Protocol, while participating in the debates in committees. But the "closet monkey-wrenchers" showed themselves at the 1977 session, after the adoption of

Protocol, action indicating clear support for the Protocol especially when compared with the more general Soviet pattern of supporting the Third World on many issues related to Protocol I (e.g., Article 1 on material scope and Article 47 on mercenaries).

³⁹ CDDH/SR. 49, Annex, 6-7.

⁴⁰ CDDH/I/SR.29, at 9. Iraq endorsed the second Protocol at the 1977 session. CDDH/SR.56, at 10-11.

the Protocol by consensus. They explained why consensus adoption did not represent a consensus on the substantive desire to develop the law, but rather was only a consensus on the procedural desire not to block what *others* might accept.⁴¹ Some objected to a general infringement on national sovereignty, some to an anticipated manipulation of the Protocol by outside parties, and some to a failure to state that the established government was the only authority to activate the Protocol.⁴²

At the 1977 session, therefore, the moderates led by Pakistan moved to the minimalist position in substance, in return for which the monkey-wrenchers did likewise procedurally. The maximalists fought against this movement, generally unsuccessfully. This diplomatic movement was, to the Vatican, not based on a "gentlemen's agreement" but resulted from a "gentlemen's embarrassment."⁴³ Embarrassing to the maximalists or not, the shrunken protocol was adopted.

Analysis of Content.

The central question is what was lost in the process. In this observer's opinion, not much was lost because not much, and certainly nothing very revolutionary, was to be found in the draft adopted in committee to begin with. There was not much difference, in substance, between the moderates and the minimalists.

Only three rules of relative importance were found in the draft submitted to plenary which do not appear in some form in the text finally adopted. First, Article 10, paragraph 5, had contained a sentence reading: "In no such case [of penal prosecution for taking part in hostilities] shall the death penalty be carried out before the end of the armed conflict."⁴⁴ There is nothing similar in the adopted Protocol, despite efforts by several delegations in plenary.⁴⁵ Second, the committee version contained Article 8, paragraph 4: "The parties to the conflict shall endeavour to facilitate visits to persons [interned or restricted by reason of the conflict] by representatives of an impartial humanitarian organization."⁴⁶ This rule could have brought pressure to bear to allow visits by an organization such as the ICRC.⁴⁷ This rule was dropped without debate, and a number of

⁴¹ See CDDH/SR.56 and SR.58. Approximately twenty Third World states indicated they would have abstained had the adoption of Protocol II, even in the Pakistani version, been put to a vote.

⁴² Some final statements were extreme. The Philippine delegation said that it "adheres strongly to the principle that it is the sovereign right of every State to deal with rebel movements within its territory in any manner it deems fit. . . ." CDDH/SR.56, Annex, 11.

⁴³ CDDH/SR.52, at 17.

⁴⁴ CDDH/402.

⁴⁵ Switzerland, Italy, and Cyprus sought retention of draft Article 10(5), as did Norway and the Holy See. The Soviet coalition fought for the retention of Article 10(7) concerning amnesty at the end of hostilities for those participating in the conflict. CDDH/SR.50, at 9ff.

⁴⁶ CDDH/402. For background, see ICRC, DRAFT ADDITIONAL PROTOCOLS: COMMENTARY 140 (1973). And ICRC, CONFERENCE OF GOVERNMENT EXPERTS, I, BASIC TEXTS 41 (1972).

⁴⁷ There was considerable debate in committee as to whether the ICRC or National

delegations did not appear to recognize its importance. Third, the committee draft contained strong wording in support of the rights of relief societies. Article 33, paragraph 1, stated: "Relief societies established in the territory of the High Contracting Party, such as Red Cross . . . organizations, *shall be permitted to carry out relief activities . . . and no one shall be harassed, prosecuted, convicted or punished for such activities.*"⁴⁸ In the adopted Protocol this wording was changed to read: "may offer their services. . . ."

Aside from these three changes, it would appear that other revisions fell into three categories, none of which represented a serious loss of humanitarian values. Some changes were cosmetic or symbolic, such as removing the phrase "the parties to the conflict" in order not to suggest that rebels had equal status with governmental forces and also removing draft Article 3 on "Legal status of the parties to the conflict" for the same reason. Some changes of wording did not appear to affect the legal principle involved, such as changing five articles on civilian protection in the version adopted in committee to a short but broadly worded Article 7 in the adopted version.⁴⁹ And there were changes that removed a reaffirmation of the Conventions of 1949 and of customary law but did not undo the effect of that law, such as the dropping of draft Article 39 giving the ICRC the right to offer its services to the parties, a right already incorporated in Common Article 3.

Some words must now be said about the content of the Protocol as adopted.

(1) *Scope of the Protocol.* The most important provision in the Protocol is Article 1 pertaining to the material field of application of the treaty, that is, the factual situation to which the instrument applies. This subject, the "heart"⁵⁰ of the instrument, is crucial and complex.⁵¹

Red Cross Societies should be the visiting agency. This debate has relevance for the future, for it is possible some Eastern European or Third World governments in an internal war might utilize National Red Cross Societies to inspect places of detention. See CDDH/I/235, CDDH/I/323, CDDH/I/324, CDDH/I/SR.32, at 31ff. This would cause concern by others, who would view that Society as progovernmental, not impartial, and thus an impediment to ICRC visits. See the Mexican statement in CDDH/I/SR.32, at 32. The author shares the Mexican concern. See Forsythe, *The Red Cross as Transnational Actor*, 30 INT. ORG. 607 (1976).

⁴⁸ CDDH/402 (emphasis added).

⁴⁹ Several delegations believed that, on the subject of civilian protection and assistance, something important had been lost in the shrinking exercise; but the dominant view was that the important legal principles were contained in the broad language of the Pakistani draft. See the debates in CDDH/SR.51 and SR.52, reflecting the unhappiness of Norway and the Holy See, among others.

⁵⁰ CDDH/I/SR.23, at 13, statement by the Dutch delegation.

⁵¹ There is also a personal field of application for the Protocol, found in Article 2. The scope is thus defined in both material and personal terms. The significance of the personal field is two-fold. First, the protection of the Protocol is afforded to "all persons affected by an armed conflict" of an internal nature, without "adverse distinction." Second, persons "restricted for reasons relating to such conflict" retain the protection of the Protocol not just until the end of the violence but "until the end of such restriction."

The original intent of the ICRC in the drafting of this article was to give a broad scope to the Protocol. Despite certain governmental opinions to the contrary, the ICRC persistently tried to avoid writing into Article 1 phraseology relating to the degree of organization necessary for armed forces or other armed groups; the duration of the conflict; the amount of territory to be controlled by a nongovernmental party; and other factors that would reduce the scope of the Protocol by establishing conditions that had to be fulfilled before the instrument came into force.⁵² The ICRC desired a threshold of violence activating the Protocol which would be relatively low.

The ICRC, in the draft article submitted to the Conference, did suggest that "[t]he present Protocol shall not apply to situations of internal disturbances and tensions, *inter alia*, riots, isolated and sporadic acts of violence and other acts of a similar nature."⁵³ But this stipulation left a large area of conflict that would be regulated by the ICRC's version. Between this lower threshold and the upper threshold, consisting of international armed conflict defined by the four Geneva Conventions of 1949 and Protocol I of 1977, there would be a relatively wide range of internal conflict regulated by the ICRC draft, differing in no material respects from the scope of Common Article 3 in the 1949 Conventions.

The ICRC's wording on this score was favored not only by most Western states, but also by some Third World states like Egypt, whose delegate stated that:

He wished to underline that essential identity between article 3 [from 1949] and Protocol II . . . Other amendments would introduce the requirement that the rebels should control an appreciable proportion of the territory of the state concerned. That was too restrictive in view of the nature of modern, and particularly of guerilla [*sic.*] warfare. It was rarely possible to determine whether control of territory was exercised or not, so that such amendments would exclude the majority of non-international conflicts from the scope of the Protocol. He was therefore in favour of the ICRC text of article 1.⁵⁴

For the Egyptian delegate, as for the ICRC and many other states, the scope of the Protocol should be broad, as broad as their understanding of Common Article 3.

It became clear early in the second session of the Conference (1975), however, that this view would not be supported by consensus. Further specificity in the law of internal war would have to be bought, if the Protocol were to be adopted by consensus, at the price of materially reduced scope of application for the specific law. A large number of states sought to amend the ICRC's draft article in order to reduce its scope and to raise the threshold. They were successful. What emerged from the Conference was an article requiring dissidents, *inter alia*, to "exercise such control over a part of [the] territory [of a High Contracting Party] as to enable them to

⁵² ICRC, DRAFT ADDITIONAL PROTOCOLS: COMMENTARY 132-33 (1973); ICRC statement in CDDH/I/GT/33, at 3-4.

⁵³ ICRC, DRAFT ADDITIONAL PROTOCOLS 33 (1973).

⁵⁴ CDDH/I/SR.24, at 10, 12.

carry out sustained and concerted military operations and to implement the present Protocol" (Art. 1). Only in that event would the Protocol be applicable.

Even this version with a relatively high threshold met considerable opposition. A number of states led by Colombia and Brazil wanted the Protocol to apply only when, in addition to the other conditions specified in the above version, the established government expressed its acceptance of the application of the Protocol.⁵⁵ Article 1 was adopted by consensus, but beneath that consensus adoption there was not complete agreement.

As adopted, Article 1 was interpreted by some delegations to mean that the Protocol on internal war was applicable to classical civil war situations along the lines of the Spanish and Nigerian conflicts. Other delegates gave Article 1 a slightly wider scope. The Australian delegate had said during the debates:

The type of conflict to be covered by Protocol II would be major civil war conflict and armed conflict which amounted to insurgency rather than belligerency but which was still well above the level of internal disturbances such as riots which were rightly excluded from . . . draft Protocol II.⁵⁶

Moreover, some delegates thought a heavy obligation would fall on dissident parties to apply the law first as an inducement for the government's applying the Protocol, because of the wording "and to implement the present Protocol." A dissident party would have to demonstrate its organized character not only through effective fighting, but also by applying the Protocol. Only then would the Protocol be applicable by the government. States were worried about being held to a double standard; they might be expected to observe the Protocol, while the challengers in a civil war were not. Therefore some states put the first obligation on dissident parties.⁵⁷

At least three points are unclear about Article 1 as adopted and must await clarification in state practice. First, there is the question whether states will seek to make ad hoc governmental assent necessary, as a legal principle, for the application of the Protocol. As a practical matter, that ad hoc consent will be necessary, at least for application of the law by government forces, notwithstanding the formal legal argument that material conditions activate the law, once a state adheres to the instrument.⁵⁸ If material conditions do activate the law, then third parties can press a government to apply the law on the grounds that these conditions exist.⁵⁹

⁵⁵ For Brazil's position in Committee I and a record of those supporting Brazil, see CDDH/I/SR.29, at 4ff., and CDDH/I/238. In plenary, Colombia raised the same point and picked up support before deciding not to press for an amendment. CDDH/SR.49, at 11-ff.

⁵⁶ CDDH/I/SR.23, at 7-8.

⁵⁷ See the statement to this effect by Pakistan in CDDH/I/SR.23, at 20. While Pakistan did not press certain early amendments to a vote, the proposals and statements are indicative of reasoning and dispositions found in parts of the Third World.

⁵⁸ The formal legal argument is well presented by the ICRC spokesman in CDDH/SR.49, at 13-14. The argument persuaded the Colombian delegate to yield. *Id.* 14-15.

⁵⁹ According to Ecuador, "it is for the States not involved in the conflict to qualify such circumstances." CDDH/SR.49, Annex, 5.

Second, there is the question of exactly when the terms of Article I are objectively met. How much territory has to be controlled by dissident forces and for how long? What is the legal status of a conflict in which dissidents control a provincial town for two weeks and apply the Protocol? How will governments characterize a situation in which dissident forces are well organized and declare their intention to implement the Protocol, but in which violations of that instrument occur? As the delegate of Yugoslavia said:

Whatever wording were adopted, there would inevitably be problems in practice in deciding at what point a situation had developed into an armed conflict within the terms of draft Protocol II.⁶⁰

This will be true, of course, as long as states prevent compulsory adjudication of claims.

Third, there is the question of the relation between Common Article 3 and the Protocol. The ICRC, and a large number of states, believe that the scope of Common Article 3 is broader than that of the Protocol. From this perspective, there are two general types of internal war, legally speaking a Protocol II situation and a Common Article 3 situation, the scope of the latter being wider. Nevertheless, some delegates expressed the personal view that the two instruments would in the future be taken as coterminous. They thought state practice would effectively redefine Common Article 3 "upwards," giving that article the same material application as the Protocol.⁶¹

The practical significance of this issue rests in the question whether international law in the future will in practice regulate a type of armed conflict below the threshold of the Protocol. If the violence like that in Lebanon during the mid-1970's and prior to the Syrian armed involvement were not regarded as a conflict governed by Protocol II, could it be seen nevertheless as falling within Common Article 3?⁶² The drafting history of Protocol II clearly suggests the existence of two types of internal war; but there was, nevertheless, some confusion on this point.⁶³

(2) *Third Party Rights and Duties.* The Protocol provides for no authoritative resolution by third parties of competing claims arising under the instrument. This lacuna, long characteristic of the law of armed conflict in general, affects all parts of the Protocol. Most governments were unwilling to confront this issue, except on the key question of when the Protocol applied. Even on the issue of initial application (Art. 1), the debated choice was between vagueness and resolution of the matter by the established government. There was no discussion of an authoritative decision by a third party.

The question was raised, but not answered, in committee. The delegate

⁶⁰ CDDH/I/SR.23, at 17.

⁶¹ This view was expressed only in private, not officially at the Conference. Interview data.

⁶² Views differ on the answer to this question. Interview data. A relevant document is CCDH/GT/33, at 1-2.

⁶³ On confused comments, see the statements in CDDH/I/SR.23, at 2-9.

of Mongolia brought the problem into the open, specifically with regard to a Brazilian proposal: "It was not clear who would decide whether or not the forces hostile to the Government exerted continuous and effective control over a non-negligible part of the territory."⁶⁴ Likewise, a Hungarian spokesman asked in general: "Who should determine the day or week that should be regarded as the beginning of an internal armed conflict?"⁶⁵ Since these and other governments did not propose determination of the issue by a third party, the answer was that there would probably be competing claims which would go unresolved.

The question of supervising the implementation of the Protocol provoked extended and intense debate. There was not even a proposed draft with regard to supervision in general which would have carried the law beyond the terms of the 1949 Conventions. Under Common Article 3, "[a]n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict." Under the ICRC's proposed draft Article 39, "[t]he parties to the conflict may call upon a body offering all guarantees of impartiality and efficacy, such as the International Committee of the Red Cross, to co-operate in the observance of the provisions of the present Protocol. Such a body may also offer its services to the parties to the conflict." The increase in verbiage over the 1949 phraseology was not matched by an increase in legal obligation.

Even this bland proposal encountered major difficulty. A number of states, including India, Iraq, Mexico, and South Korea, found the ICRC's proposal either an infringement on national sovereignty⁶⁶ or a principle subject to political manipulation by dissident forces who would ask the ICRC to become involved without the permission of the established government.⁶⁷ Given these attitudes, the Socialist group declined to support the ICRC draft.⁶⁸ The Western group, initially content with the ICRC proposal precisely because it was devoid of significant legal obligation,⁶⁹ escalated the importance of the ICRC's proposal in the face of attacks on it. Reference to the ICRC or a reaffirmation of Common Article 3 was said by the British spokesman to be "essential."⁷⁰

This largely symbolic argument over whether to include the right of the parties to the conflict to seek the cooperation of the ICRC in the implementation of the Protocol was nicely summarized by the Tunisian spokesman:

...[H]e had the impression that people were trying to make the article say something that it was not meant to say. Some saw it as entirely useless, others as violating national sovereignty. Taking the

⁶⁴ CDDH/I/SR.23, at 17.

⁶⁵ CDDH/II/SR.40, at 25.

⁶⁶ See CDDH/I/SR.59, especially at 15-17.

⁶⁷ *Id.*, at 20.

⁶⁸ *Id.*, at 17-18.

⁶⁹ A spokesman for the Dutch delegation, one of the more progressive, said "his delegation welcomed the fact that [the Protocol] did not provide for any implementation machinery." CDDH/I/SR.23, at 14.

⁷⁰ CDDH/I/SR.59, at 18. It had been the Western group that was most strongly in favor of a strong Protecting Power system to help supervise the law of international armed conflict at the second session. See Forsythe, *Who Guards the Guardians*, 70 AJIL 41 (1976).

article as drafted, his delegation thought it could be very useful. It was concerned with non-international armed conflicts, which were far more difficult to resolve than international ones. It was surely not pointless to provide for every possible means of securing observance of the Protocol. The article was simply giving the Parties to a conflict the possibility of calling on the good offices of impartial bodies to that end. As long as it imposed no obligation, there was nothing in it that was prejudicial to the sovereignty of a State.⁷¹

This debate on an article that "imposed no obligation" led to much parliamentary maneuvering and then to a vote in committee in favor of retention of the right of the ICRC to offer its services.⁷² But even this draft article did not find its way into the version submitted by Pakistan and was not accepted by the final plenary. In the last analysis, all parties would in any event be guided by Common Article 3; the ICRC claims a right of initiative apart from any requirement of public international law;⁷³ and nothing in the Geneva Conventions of 1949 or the proposals submitted to the Conference debates would have required a party to *accept* that ICRC initiative—except draft Article 8, paragraph 4, regarding detention visits, which was also thrown out in 1977.

Indirect supervision did not fare any better. A provision calling for the operation of a tracing agency or "information bureaux," which is important in protecting individuals, did not impose a strict obligation, but was also discarded.⁷⁴ And provisions requiring the parties to the conflict to disseminate the terms of the Protocol contain no new or controversial obligations.⁷⁵

Despite much recent interest in the rights and duties of third parties vis-à-vis the parties to internal conflict,⁷⁶ the 1977 Protocol contains little that touches on this subject. The law of Geneva has always been primarily concerned with regulating the violence between the contending parties. The new Protocol, consistent with this tradition, is silent on such questions as when and whether a foreign state can provide military aid or fighting forces to a party to an internal war or can intervene for some other purpose.

The Protocol does contain in Article 3 a reaffirmation of the general principle of nonintervention in the internal affairs of states. This article reinforces the abstract notion of national sovereignty more than it answers specific questions arising from internal conflict. The wording may conflict with the traditional idea of the legitimacy of humanitarian intervention in an internal war, because of the presence of the words "for any reason whatever."⁷⁷ But the overriding problem is one of differentiating intervention from other forms of involvement.

⁷¹ CCDH/I/SR.59, at 19.

⁷² See CDDH/I/SR.62. The vote in committee was 34-17-2. See also CDDH/I/323, at 3-4.

⁷³ See FORSYTHE, *supra* note 23, at 8, 29, 57-108.

⁷⁴ Committee draft Art. 34, CDDH/402.

⁷⁵ Adopted Art. 19; Conference Resolution 21 (IV). Dynamic checking on dissemination by the ICRC could be an effective form of indirect supervision of the law's application.

⁷⁶ See especially MOORE, *supra* note 7.

⁷⁷ See further, HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (R. Lillich ed. 1973).

Article 3 would seem to reinforce proscription of the type of support given by the United States and Iran to the Kurdish violent struggle in Iraq in the mid-1970's.⁷⁸ Providing weapons and sanctuaries would seem to constitute "dictatorial interference" in Iraqi domestic affairs, unless such a conflict were viewed as a war of national liberation and thus not covered by Protocol II.

The long-standing confusion over what constitutes intervention, exacerbated by the contemporary interdependence of nations and the increasingly complex question of what constitutes a noninternational armed conflict, is not resolved by Article 3 or by the new Protocol in general.

While Article 3 does not resolve certain persistent legal difficulties, at least it does not add important new ones. It could have been otherwise. India argued doggedly for the right of a government in an internal war to suspend the Protocol when foreign interference (not even intervention) occurred or when the established government said it occurred.⁷⁹ This view failed to gain significant support even in the Third World. Few were willing to relegate humanitarian concerns to such a low position in relation to governmental freedom of action, and especially on such subjective conditions.⁸⁰

In sum, the Protocol provides third parties few rights in internal war. Rules pertaining to direct supervision of the implementation of the law are nonexistent.

(3) *Conflict of Laws.* One of the central problems in establishing an acceptable law for internal war is that of meshing international with municipal law.⁸¹ Governments facing violent disorder in their territory are primarily interested in restoring order as permitted by municipal law.⁸² The Protocol, on the other hand, is primarily directed to insuring humane treatment for individuals. The two values are not easily reconciled.

The Protocol was not intended to interfere with the restoration of order but only to call for certain humane standards to be applied in that process. This basic principle is formulated in Article 3, paragraph 1. More specifically, the Protocol establishes penal provisions that do not interfere with the workings of national standards of criminal justice so long as certain standards of the international community are met (Art. 6).

Certain problems can be expected to arise under these penal provisions. One can well question the degree to which belligerent parties, especially authoritarian ones, will implement Article 6, paragraph 2:

No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. . . .

⁷⁸ N.Y. Times, Nov. 2, 1975, at 14.

⁷⁹ See CDDH/I/SR.29, at 23-24 and CDDH/I/SR.30, at 2-3, 11.

⁸⁰ Both Poland and Mexico, supportive of India on other subjects, spoke out against the Indian view on suspending the Protocol as a sanction for interference. CDDH/I/SR.30, at 8, 9.

⁸¹ The subject is concisely reviewed in Baxter, *Jus in Bello Interno*, in MOORE, *supra* note 7, at 526-27. It is a subject that pertains to Article 1, as well as to the norms discussed here.

⁸² See BOND, *supra* note 10, at 60.

Six detailed rules follow which specify the meaning of independence and impartiality.⁸³ Could any of the three fighting parties in Angola have met these standards? Would civil war in Yugoslavia be characterized by the operation of independent and impartial courts?

One provision and the debate on it reveal the clash of attitudes on this subject of conflict between international and local standards, with the East and West switching their usual positions. Draft Article 16, paragraph 3, dealt with whether medical personnel can be required to divulge security information obtained through their professional activities. The ICRC draft read:

No person engaged in medical activities may be compelled to give to any authority information concerning the sick and wounded under his care should such information be likely to prove harmful to the persons concerned or to their families.⁸⁴

This draft met considerable opposition, not only from the Third World but also from the West. The U.S. delegate wanted the paragraph deleted because "the ICRC text represented a direct challenge to the sovereignty of a State."⁸⁵ Canada wanted the entire article deleted "on the grounds that it entailed unreasonable interference in national sovereignty."⁸⁶

But the idea of protecting medical personnel from involvement in the conflict, and especially from being forced to divulge information about a violation of municipal law, had its supporters too, including an outspoken Soviet delegate.

The representative of the United Kingdom had spoken of his qualms of conscience if the authorities came knocking on his door asking for information. Civil wars were apt to be brutal, more brutal even than international wars; often, the police or military did not knock on the door—they shot it down if they believed that enemies, even sick and wounded enemies, were or had been harboured within. They were apt to shoot the wounded and sick too, even women with newborn babies; and they might also shoot the doctor, however neutral he might be, if he refused to give them the information they were looking for. The protocol must most certainly include a paragraph prohibiting such actions and giving some protection to doctors and to other medical personnel so that they should not be afraid to treat all those who had need of their services on either side . . . Doctors should not be subjected to compulsion, but should be left free to take decisions as humane persons. . . .⁸⁷

The resolution of the debate was in keeping with past efforts to reconcile humanitarianism with what governments saw as military necessity. The vague provision adopted reflected both viewpoints and therefore imposed no precise obligation. Article 11, paragraph 4, reads in part "*Subject to national law, no persons engaged in medical activities may be penalized in any way for refusing or failing to give information concerning the wounded and sick who are, or have been, under his care*" (emphasis added).

⁸³ For background, see CDDH/I/317/Rev.2, at 2-3.

⁸⁴ ICRC, DRAFT ADDITIONAL PROTOCOLS 38 (1973).

⁸⁵ CDDH/II/SR.41, at 3.

⁸⁶ CDDH/II/SR.40, at 27.

⁸⁷ CDDH/II/SR.41, at 16-17.

The prospects for implementation of parts of the Protocol are not good because of the strong defense by many states of the primacy of municipal law at the expense of international humanitarian principles. India unsuccessfully tried to formalize national legal supremacy as a general rule and, in the process, to destroy the meaning of much of the Protocol.⁸⁸

At least the idea of protecting and assisting one's enemies in an internal war was accepted at a certain level of generality by perhaps half the states at the conference. It remains to be seen to what extent this standard is given effect in competition with more parochial values.

(4) *Dissident Groups*. If established governments were concerned about enforcing their own laws, some participants in the conference were concerned about how to insure respect for the Protocol by de facto authorities or nongovernmental parties. The problem has two fundamental dimensions.

First, there is the matter of legal obligation. As is widely known, modern international law has difficulty in regulating certain nonstate actors. Under traditional law, only states are the subjects of international law, and all other actors are regulated indirectly through states. Only states are directly obligated under the law. The general difficulty with this theory is exacerbated in internal war, where one of the belligerents is not generally recognized as a state or government. Moreover, the matter becomes even more complicated in the articulation of law for the protection of human rights in armed conflict, for there is competition over what should be priority values in that law—human rights or the rights of the authorities in power. The competition of values even becomes three-cornered—rights and duties of the established authority, of the dissident forces, and of individuals qua individuals. Who in addition to states is directly obligated under the law? Other public authorities? Individuals?⁸⁹

The most pressing part of this problem under the Protocol is how to insure respect for the law from de facto public authorities. The Protocol is laconic about legal obligations for dissident groups. The ICRC takes the traditional approach that a treaty binds all persons subject to the jurisdiction of the state.

. . . the purpose of [draft] Article 5 was to make it clear that the provisions of Protocol II were applicable to all the Parties to a conflict, whether Governments or rebels. The rights and duties laid down in it were valid for all. It was based on the same principle as Article 3 common to the Conventions, namely, that all parties were bound by its provisions, i.e., not merely established Governments but also all authorities and private individuals on the territory of the High Contract-

⁸⁸ CDDH/I/SR.34, at 6. Regarding draft Article 10 and penal provisions, India proposed that: "The application of the present article shall not prejudice the right of a State to apply its national laws."

⁸⁹ The general subject has been well treated by William D. Coplin, *International Law and Assumptions About the State System*, 17 *WORLD POLITICS* 615 (1965). Relevant is the comment at the Conference by a West German delegate: "[T]he legal position of the individual had also changed . . . it was only now becoming clear that the individual had a part to play as a subject of the new legal order." CDDH/I/SR.23, at 10. But according to an Iraqi spokesman: "It must be left to municipal law to organize the relationship between citizen and State." CDDH/II/SR.32, at 17.

ing Party concerned. In the case of [draft] Article 5, that meant that States undertook to apply the provisions of the Protocol in the case of insurgents. The fact that the latter were not under the control of the Government could not weaken or extinguish that obligation.⁹⁰

This view was strongly supported by the USSR.⁹¹ But in general the problem was not extensively debated. The practical problem remains: How can a government, as spokesman for a state, impose effective legal restraints on persons resisting its authority?

In the past, certain dissident groups such as the National Liberation Movement of South Vietnam explicitly rejected this traditional view of legal obligation, asserting that they were not bound by the actions of a government whose authority they did not respect.⁹² Other dissident groups have tried to adhere to the Geneva Conventions of 1949 as if they spoke for a state, but they have been challenged not only by their opponents but also by Switzerland, the depositary of the Conventions.⁹³

The Geneva Conference on International Humanitarian Law did provide one new element in this debate. Certain "national liberation movements," approved by the appropriate regional organization, were invited to participate in the Conference without vote and to sign the Final Act.⁹⁴

A second dimension to the subject of securing dissident support for the Protocol is not the purely legal question of obligation but the legal-political question of securing implementation of the norms. Even if the leader of one rebel group has been quoted as saying that revolution observes no rules, most such groups perceive a need to maintain an image of humanity.⁹⁵ The NLF of South Vietnam, while rejecting the traditional view of how the Geneva Conventions of 1949 created obligations for it, nevertheless asserted that it treated its detainees humanely. And dissident groups like the Algerian NLF and Castro's forces paid some attention to humanitarian norms, for whatever underlying reason. There is some prospect, therefore, that rebel groups will not automatically reject the terms of the Protocol even if they challenge the concept of obligation on which it rests. As a party claiming to be a public authority, a dissident group will feel some *de facto* obligation to comply with international law, especially if it wishes its opponent to apply to the Protocol.

It has been observed above that parts of the Protocol impose high standards, for example with regard to court proceedings; on governments and rebels alike. Some believe that the Protocol has been overloaded with standards that dissident groups in the Third World cannot reach.

⁹⁰ CDDH/I/SR.24, at 17, for example.

⁹¹ CDDH/III/SR.32, at 12.

⁹² See FORSYTHE, *supra* note 23, at 156.

⁹³ Both France and Switzerland challenged efforts by the Provisional Revolutionary Government of Algeria to adhere to the Conventions. See Greenberg, *supra* note 16, at 64-66. Switzerland also challenged the attempted adherence by the Smith government in Rhodesia.

⁹⁴ For a list of these "approved" organizations, see Final Act 6. Israel refused to sign the Final Act, apparently because the PLO could also sign.

⁹⁵ George Habash, leader of the Popular Front for the Liberation of Palestine, was so quoted in N.Y. Times, Sept. 11, 1970, at 15. But more generally, see J. FREYMOND & T. HENTSCH, *LIMITES A LA VIOLENCE* (1973).

On the other hand, various sections of the Protocol seek to take into account the material conditions of rebel groups in order to make the instrument capable of being applied by them. This is an important point, for if rebels cannot apply the Protocol, at least to some unspecified degree, the government may not see itself as obligated to apply it either. Thus, a central problem in drafting the Protocol was to match the level of duties involved with the capabilities of rebel groups.

The approach adopted in many places was to use relative or vague standards. Detainees were to be provided with food, water, and other things "to the same extent as the local civilian population" (Art. 5 (1)(b)). Legal precision was sacrificed in order to promote compliance, with the result that governments as well as rebel groups were not always put under precise rules. For example, detaining authorities were required to carry out certain duties "within the limits of their capabilities" (Art. 5(2)).

Among the fundamental guarantees (Art. 4), which in general require humane treatment for "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities," there is a categorical prohibition of "acts of terrorism" "at any time and in any place whatsoever" (Art. 4 (2) (d)). This prohibition, along with that in the same article against "taking of hostages," imposes severe limitations on the way in which some rebel groups have conducted violence. Because established governments have had superior resources at their disposal, rebels have resorted to terror and kidnapping. It may be argued that terror and kidnapping are more prevalent at lower levels of violence and that in situations regulated by the Protocol such acts will be less frequent. Still, the prospect of compliance with such parts of the fundamental guarantees of the Protocol is open to question.

However, a humanitarian treaty could hardly pass over such acts in silence. A balance was struck between prohibition of terror and kidnapping on the one hand and torture on the other (Art. 4(2)(a)). If wars like that in Algeria were characterized by terror and torture, one could hardly prohibit one without the other. It can be argued that terror by rebels is no more or no less likely than torture by established governments in order to extract security information.⁹⁸ The problem then becomes one not simply of securing rebel support for the Protocol but of assuring compliance by all parties.

CONCLUSION

Those who prepared Protocol II of 1977 on noninternational armed conflicts sought, at least initially, a solution for most of the humanitarian problems encountered in internal war. The present analysis may be criticized by some for finding a problem for every solution. It may turn out to be the case that governments will not give a narrow interpretation to the scope of the Protocol. Standards may not be set too high or too vaguely. And it must be admitted that some clearly humane principles are enshrined in the

⁹⁸ See further AMNESTY INTERNATIONAL, REPORT ON TORTURE (1975).

A FORMULA FOR TAX-SPARING CREDITS IN U.S. TAX TREATIES WITH DEVELOPING COUNTRIES

By Howard M. Liebman *

On July 1, 1957, the United States and Pakistan signed a Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income.¹ Although, at that time, it was one of the few double taxation treaties that the United States had entered into with a developing country, it followed, for the most part, the template established by earlier tax treaties negotiated with the more developed nations. A major distinguishing factor, however, was the inclusion of a tax-sparing credit provision, by means of which the coverage of the foreign tax credit accorded U.S. taxpayers for certain foreign taxes paid or deemed to have been paid was extended to certain taxes that were ordinarily levied by Pakistan but which had been "spared" as part of the latter's incentive program for the stimulation of economic development. Three other treaties—with India, Israel, and the United Arab Republic—presented to the Senate for ratification at approximately the same time also contained tax-sparing provisions. However, none of these tax-sparing provisions was ever put into effect. The Convention with Pakistan was approved with a reservation excluding the sparing provisions, on the basis that the Pakistani tax concession which was to be credited for "phantom" taxes deemed paid had expired. The other three treaties never received the assent of the Senate and were subsequently withdrawn from the Senate Committee on Foreign Relations in 1964. No other tax-sparing provisions have been negotiated by the United States, although other tax incentive schemes have been presented to the Senate. These, too, have failed to be approved. The failure to agree to any such provision utilizing tax incentives as a form of development assistance is often deemed to be the major reason for the notable dearth of tax conventions between the United States and the developing states, as the latter are particularly interested in the inclusion of tax-sparing credit provisions in the double taxation treaties that they agree to sign.² This failure is, in turn, rooted in the severe and

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¹ 10 UST 984, TIAS No. 4232 [hereinafter Convention]. Ratification of the Convention was advised by the Senate with a reservation on July 9, 1958, and the President ratified the Convention subject to the same reservation on November 6, 1958. Pakistan ratified the agreement on May 2, 1959. The instruments of ratification were exchanged at Karachi on May 21, 1959, and the treaty entered into force as of May 21, 1959.

² The interest of developing countries in negotiating tax-sparing agreements stems from their widespread reliance on tax incentives to spur private investment in and the concomitant development of their economies. See, e.g., Macdonald, *Recent Legislation*

at times persuasive criticism levied against the principle of granting tax-sparing credits—especially in the form in which they were to be granted in the four aforementioned treaties—and in the consequent hostility of the Senate Committee on Foreign Relations, as perceived by those responsible for negotiating U.S. tax treaties, toward provisions of this sort.

It is the aim of this article to suggest an alternative form in which future tax-sparing provisions may be drafted—a formula that will, at one and the same time, eliminate those features of prior versions that provoked the heaviest criticism and yet will nevertheless contribute to the economic development of the developing countries in an effective and efficient manner. It is hoped that the proffered suggestions, albeit far from universal in applicability, will at least spur positive action in this area, for the United States is the last major holdout among those countries participating in the growing number of tax-sparing treaties between developed and developing countries. Thus it is of some importance to the foreign policy of the United States that a solution be found which is agreeable to all parties. It is also of considerable importance to the developing countries that this tool of economic development be fashioned in the most effective form. Finally, it is of interest to potential investors—primarily the multinational corporations which it is hoped will be attracted by tax-sparing incentives—that the tax-sparing principle be integrated into the tax systems of as many countries as possible in order to minimize conflicts and to promote that level of tax harmonization necessary for rational decisionmaking.

THE TAXATION OF FOREIGN-SOURCE INCOME UNDER THE U.S. INTERNAL REVENUE CODE

Under present U.S. law, several principles of taxation interact to affect the manner in which foreign-source income is taxed by the United States. First, the separate entity principle insures that a corporation and its shareholders are treated as separate persons for tax purposes, regardless of whether the shareholders are natural persons or are themselves corporate bodies.³

in Nigeria and Ghana Affecting Foreign Private Direct Investment, 6 INT. LAWYER 548, 563-65 (1971); Salacuse, *Egypt's New Law on Foreign Investment: The Framework for Economic Openness*, 9 INT. LAWYER 647, 655 (1975). See generally J. HELLER & K. KAUFMAN, *TAX INCENTIVES FOR INDUSTRY IN LESS DEVELOPED COUNTRIES* (1963); Landau, *Direct Foreign Investments in Developing Countries?*, 4 J. L. & ECON. DEV. 182 (1969); Lent, *Tax Incentives in Developing Countries*, in R. BIRD & O. OLDMAN, *READINGS ON TAXATION IN DEVELOPING COUNTRIES*, 362 (3d ed. 1975); General Secretariat of the Organization of American States, *Tax Incentives for Industrial Development in Latin America*, Doc. CIES/1138 (English)/Add. 3 (1967). Such incentives may be nullified, however, without provision being made for tax sparing. See text accompanying notes 31 & 32 *infra*.

³ There are exceptions to this principle as in the case of sham corporations whose "corporate veil" may be "pierced" to prevent the abusive use of such "shells" for the avoidance of taxes. See *Gregory v. Helvering*, 293 U.S. 465 (1935); *Lloyd F. Noonan*, 52 T.C. 907 (1969), *aff'd per curiam*, 451 F.2d 992 (9th Cir. 1971); *Shaw Constr. Co.*, 35 T.C. 1102 (1961), *aff'd*, 323 F.2d 316 (9th Cir. 1963); Alan S. Davis, T.C. Memo

Second, the principle of deferral embodied in Section 881(a) of the Internal Revenue Code (I.R.C.) dictates that no tax is levied on the foreign-source income of foreign corporations.⁴ Due to the separate entity rule, deferral is accorded to this foreign-source income even if the foreign corporation is wholly owned by U.S. taxpayers.⁵ Thus, by operating abroad in the form of one or more separately incorporated subsidiaries rather than

1970-170, CCH Dec. 30,200(M), 29 T.C.M. 749. Cf. *James Realty Co. v. United States*, 280 F.2d 394 (8th Cir. 1960). In *Johansson v. United States*, 336 F.2d 809 (5th Cir. 1964), a nonresident alien taxpayer was not permitted to shield his U.S.-source personal income from taxation under Section 871 of the U.S. Internal Revenue Code by means of a wholly owned Swiss corporation which was found to have "no legitimate business purpose" but for qualifying the income for the tax benefits accorded by the existing U.S.-Swiss income tax treaty. Such disregard of a corporate entity deemed to be a sham is most often based on the business activity test of *Moline Properties, Inc. v. Comm'r*, 319 U.S. 463 (1943). See, e.g., *Estate of Miller v. Comm'r*, 239 F.2d 729, 734 (9th Cir. 1956) ("it is of importance to inquire whether the arrangements adopted have no purpose germane to the conduct by the business of the parties other than tax minimization"); *Aldon Homes, Inc.*, 33 T.C. 582 (1959). Exceptions also exist to recognize the economic unity of an affiliated group of corporations, permitting such a group to file consolidated tax returns in specified circumstances. See Internal Revenue Code of 1954, §1510 [hereinafter I.R.C.; section numbers without further attribution refer to the Internal Revenue Code of 1954]. Most foreign related corporations, however, are excluded from participating in the filing of consolidated returns. For a summary of the most significant exceptions to the separate entity principle, see the Treasury Department's April 1976 report entitled "U.S. Taxation of the Undistributed Income of Controlled Foreign Corporations," prepared by the Office of International Tax Affairs for consideration by the House Ways and Means Committee Task force on the Taxation of Foreign Income.

⁴ U.S.-source income of foreign corporations which is unconnected with the conduct of a trade or business in the United States and is of a "passive" character (e.g., dividends, interest, gains from the sale or exchange of certain property) is taxed at a flat rate of 30 percent. I.R.C. §881(a). Nonresident alien individuals are taxed in a like manner under Section 871(a).

A foreign corporation which is engaged in a "trade or business within the United States" (as defined in Section 864(b)) is taxed as if it were a domestic corporation to the extent its income is "effectively connected" with the conduct of that trade or business. I.R.C. §882(a)(1). If a nonresident alien individual is in such a position, he, too, is taxed as if he were a resident, specifically at the applicable graduated tax rate provided for under Sections 1 and 1201(b). I.R.C. §871(b).

⁵ I.R.C. Section 7701(a)(4) and (5) determines whether a corporation is foreign or domestic, the test being one based upon place of incorporation rather than the "seat of management" standards utilized by many other nations such as Great Britain, France, and Germany. See Jones, *Anti-Avoidance Measures in the United Kingdom*, in J. JONES, *TAX HAVENS AND MEASURES AGAINST TAX EVASION AND AVOIDANCE IN THE EEC* 52, 63 (1974) ("In effect, the central management and control of a company is where the board of directors meet . . . [t]he place of incorporation has little relevance. . . . If in fact the directors of the subsidiary control the company it will be resident where they meet"); HARVARD LAW SCHOOL, *TAXATION IN THE UNITED KINGDOM* Sec. 5/2.2 (1964); HARVARD LAW SCHOOL, *TAXATION IN FRANCE* Sec. 11/2.2 (1966), (concept of *siège social*); Landwehrmann, *Legislative Development of International Corporate Taxation in Germany: Lessons for and from the United States*, 15 HARV. INT. L.J. 238, 240 n.10 (1974) (place of management test used if no statutory seat described in its certificate of incorporation). According to Section 7701(a)(30), only a "domestic corporation" is considered a "United States person."

in the form of branches, a U.S. taxpayer can defer all U.S. tax on the overseas income so long as it is not "effectively connected with the conduct of a trade or business within the United States."⁶ The tax deferral is effective until such time as the income is repatriated to the United States, which most often occurs in the form of a distribution of dividends to the U.S. shareholder(s). It should be noted that, during periods characterized by high interest rates and high rates of inflation, a sufficiently lengthy tax deferral may become, in effect, a tax exemption.⁷ Of course, the foreign income is still subject to the applicable foreign taxes. When these taxes approach or exceed the U.S. tax which would have been imposed had the income been currently taxable by the United States, the advantage of deferral is diminished, if not altogether eliminated. But when the foreign corporation is located in a tax haven, the advantages of deferral are compounded and, concomitantly, the opportunities for abuse are multiplied.⁸

⁶ I.R.C. §882(a)(1). See note 4 *supra*.

⁷ There are those who argue that deferral provides an undesirable impetus for multinational corporations (MNC's) to invest more sums abroad than would be warranted in a tax neutral system and that such investment occurs at the expense of domestic investment and the level of domestic unemployment. See, e.g., S. SURREY, P. McDANIEL, & J. PECHMAN, *FEDERAL TAX REFORM FOR 1976*, at 77-92 (1976). But see Stobaugh, *How Investment Abroad Creates Jobs at Home*, 50 HARV. BUS. REV. 118 (Sept.-Oct. 1972), for the contrary position. Numerous unsuccessful efforts have been made to completely eliminate deferral based primarily on its perceived perversity. See, e.g., the Burke-Hartke Bill, S. 151/H.R. 62, 93d Cong., 1st Sess. (1973); and the Hartke and Hollings amendments to the Tax Reform Bill of 1976, H.R. 10612, 94th Cong., 2d Sess. (1976), reprinted at 122 CONG. REC. 10,988 (daily ed. June 29, 1976), 122 CONG. REC. 13,776 (daily ed. Aug. 6, 1976).

⁸ The abusive use of tax-haven subsidiaries stems from the ability of MNC's to manipulate their money flows and funnel funds from affiliated enterprises through a tax haven, thereby avoiding large portions of the U.S. and foreign taxes otherwise due. See, e.g., Note, *The Swiss Base Company: Tax Avoidance Device for Multinationals*, 50 NOTRE DAME LAWYER 645 (1975). The United States utilizes several tools to curb such tax avoidance. I.R.C. Section 482, for example, provides the Secretary of the Treasury with the necessary authority to reallocate gross income, deductions, credits, and allowances among two or more businesses (whether or not affiliated and regardless of their place of incorporation) "in order to prevent evasion of taxes or clearly to reflect the income of any such organizations, trades, or businesses." See, e.g., *Lufkin Foundry & Mach. Co. v. Comm'r*, 468 F.2d 805, rehearing denied, 468 F.2d 808 (5th Cir. 1972). Subpart F (Sections 951-964) also provides a mechanism for stemming tax avoidance by eliminating the deferral privilege for certain U.S. shareholders of "controlled foreign corporations" engaged in those tax-haven operations described in Section 954. Such shareholders are thus taxed currently on their allocable portions of the foreign corporation's foreign-source income regardless of whether or not they have actually received that income. See, e.g., *Estate of Leonard E. Whitlock*, 59 T.C. 490, 507 (1972), *aff'd*, 494 F.2d 1297 (10th Cir. 1974), noted in 63 GEO. L.J. 815 (1975), 5 DENVER J. INT. L. & POLICY 135 (1975). See generally Liebman, *The Tax Treatment of Joint Venture Income under Subpart F: Some Issues and Alternatives*, 32 BUS. LAWYER 341 (1977); Liebman, *Note on the Tax Treatment of Joint Venture Income under Subpart F: An Addendum*, *id.* at 1819. Foreign personal holding company income is treated in a like manner under Sections 551-558, which impute a ratable distribution of "undistributed foreign personal holding company income" to the U.S. shareholders of certain foreign corporations meeting defined conditions. See *Marsman v. Comm'r*, 205 F.2d 335 (4th Cir. 1953).

The third major principle that plays a significant role in U.S. taxation of foreign-source income is an antipathy toward the double taxation of income. The statutory relief provided for the avoidance of double taxation is merely one manifestation of the notion of tax equity that is implicit in the entire Internal Revenue Code. The policy norm of capital-export neutrality also dictates that the United States unilaterally take steps to minimize the double taxation of its citizens and residents engaged in overseas transactions.⁹ The two norms of equity and neutrality are not immutable and in numerous instances they are not adhered to. However, the general principle of neither encouraging nor discouraging foreign investment relative to domestic investment has played a significant role in the present statutory scheme, particularly in the area of relief from double taxation.

The relief itself takes the form of the foreign tax credit provisions of Sections 901-907 of the I.R.C. In brief, these provisions recognize a priority for the territorial system of taxation by giving a U.S. taxpayer a credit for "the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country."¹⁰ Thus, if a foreign country (usually the source of the income) levies an income tax, it is deductible from the tax due to the U.S. Treasury. In addition, a credit is granted for the foreign taxes deemed paid by corporations which are, in turn, shareholders of foreign corporations if the former own at least ten percent of the voting stock of the latter.¹¹ The deemed-paid credit is allocated in direct proportion to the shareholdings of the U.S. corporate taxpayers and is deductible from the tax due on the dividends received from the foreign corporation when foreign taxes have been paid or deemed paid¹² on the profits from which the dividends are declared.¹³ The credit is also extended to the payment of foreign taxes levied "in lieu of a tax on income, war profits, or excess profits."¹⁴ However, the amount of the credit is limited to preclude it from being taken against the U.S. tax due on U.S.-source income.¹⁵ The credit cannot exceed the proportion of the U.S. tax

⁹ Capital-export neutrality requires that foreign and domestic profits be taxed at identical rates in the aggregate. Capital-import neutrality, on the other hand, would dictate that all taxpayers in any one country pay the same ultimate tax rate on the profits earned from activities in that country. Finally, "national" neutrality implies that the return on capital shared between the national government and the taxpayer be identical regardless of whether the capital is invested at home or abroad. See Patrick, *U.S. Tax Policy and Foreign Investments—Legislative and Treaty Issues*, 5 DENVER J. INT. L. & POLICY 1, 2 n.2 (1975).

¹⁰ I.R.C. §901(b) (1). Nonresident aliens and foreign corporations are also allowed a foreign tax credit for foreign taxes paid on income effectively connected with the conduct of a U.S. trade or business. I.R.C. §906. See generally E. OWENS, *THE FOREIGN TAX CREDIT* (1961).

¹¹ I.R.C. §902(a).

¹² The deemed-paid credit is also granted for the taxes paid by "second" and "third tier" subsidiaries of a U.S. parent (foreign subsidiaries of the foreign corporation whose shares are held by the U.S. taxpayers) as long as certain conditions are met, primarily that the U.S. parent own five percent or more of the second and third tier corporations' voting stock. I.R.C. §902(b) (3).

¹³ See generally E. OWENS & G. BALL, *THE INDIRECT CREDIT* (1975).

¹⁴ I.R.C. §903.

¹⁵ See Hellawell, *United States Income Taxation and Less Developed Countries: A*

due which is equal to a limiting fraction, the numerator of which is the total of the taxpayer's taxable foreign income and the denominator of which is the taxpayer's total taxable income for the same tax year.¹⁶ Excess credits may be carried back to preceding years and carried forward to succeeding tax years under Section 904(d).

The net result of the tax credit provision is that a U.S. taxpayer need only pay one tax on his foreign-source income, at a rate which is the higher of the applicable U.S. and foreign rates. If the foreign rate is lower than the U.S. tax, the foreign tax is paid in full and the difference between the U.S. and foreign tax is payable to the United States. In the reverse situation, the total foreign tax is paid to the foreign country and the credit is set off against the U.S. tax bill in full.

II.

THE ROLE OF TAX TREATIES

Despite the unilateral relief provided U.S. taxpayers in the form of the foreign tax credit, double taxation problems nevertheless plague international transactions because of the differences that inevitably exist between the tax systems of any two nations. Variations in the definition of "taxable income," for example, may thwart the smooth application of a unilateral tax credit provision by raising the issue of what is a creditable "income tax."¹⁷ Differing concepts of "source" may also lead to the failure of the tax credit to prevent double taxation since the United States accords the credit only for non-U.S.-source income.¹⁸ Hence, tax treaties are often necessary to mediate between conflicting tax systems.¹⁹

Critical Appraisal, 66 COLUM. L. REV. 1393 (1966). Cf. *United States v. Woodmansee*, 388 F.Supp. 36 (N.D.Cal. 1975) (holding that the foreign tax credit "cannot arise out of foreign taxes paid or accrued on income which is exempt from the United States income tax").

¹⁶ I.R.C. §904(a). This so-called overall limitation allows the averaging of taxes paid to high and low tax foreign countries. Prior to 1977, an alternative per country limitation was also used in which the numerator of the limiting fraction was based on the taxpayer's taxable income in each foreign country for which credits were claimed, each calculation being performed separately on a country-by-country basis. The per country limitation was eliminated by Section 1031(a) of the Tax Reform Act of 1976. Pub. L. No. 94-455, 90 Stat. 1520.

¹⁷ Compare, e.g., Rev. Rul. 76-215, 1976 INT. REV. BULL., No. 23, at 6 (disallowing a foreign tax credit for the share of oil production retained by the Indonesian Government under a production-sharing contract, deemed in substance to be a noncreditable royalty since Indonesia collects its share regardless of the profitability or performance of the venture) with Rev. Rul. 75-377, 1975-2 CUM. BULL. 294 (holding, *inter alia*, the Venezuelan Branch Profits Tax to be "an income tax by United States standards"). See generally *Biddle v. Comm'r*, 302 U.S. 573, 578-79 (1938) (the definition of a creditable foreign income tax is to be derived by a comparison with the U.S. income tax statutes).

¹⁸ See Surrey, *International Tax Conventions: How they Operate and What they Accomplish*, 23 J. TAX. 364 (1965).

¹⁹ Tax treaties have the particular advantage of enabling the resulting tax treatment to be individually tailored to the trade and investment flows between the two signatories. On the other hand, they are often difficult to alter once the time-consuming negotiations have concluded.

Besides serving to define terms and delimit taxing jurisdictions,²⁰ tax treaties often include provisions to assure nondiscrimination and institute consultative machinery and information exchanges to promote more efficient enforcement of the tax laws of the parties.²¹ Of great significance to the taxing authorities is the fact that such treaties often go further than merely recognizing which country will have the primary or sole right to tax transnational income. By limiting withholding rates on agreed-upon categories of income such as dividends, interest, and royalties, the priority given to the country of source is limited and the gross tax revenues are shared between the country of source and the country of the taxpayer's residence or citizenship.²² Thus, the U.S. Treasury stands to gain by such an arrangement, for it concedes less tax (via the tax credit) to the treasury of the source country when withholding rates are lowered by treaty. In turn, the United States agrees to lower its taxes on foreign investors receiving income from the United States in order to share the tax revenue on such income with the countries asserting tax jurisdiction over such persons.

This arrangement is most readily amenable to agreements between countries with reciprocal income flows that are of approximately equal magnitude with the result that no one signatory stands to lose an inordinate amount of tax revenue. For this reason, most tax treaties were, and to a large extent still are, concluded between developed countries. Because the income flows are generally unidirectional between developed and developing nations,²³ the developing countries are unwilling to enter into

²⁰ For example, "permanent establishment" provisions describe the type of activities which constitute a taxable establishment in a foreign country. Other provisions might define deductions from earned income allowable in computing the tax base or provide reciprocal exemptions for the residents of each signatory who visit the territory of the other signatory for limited periods of time. See Articles 1-5 of the Organisation for Economic Co-operation and Development Fiscal Committee, Draft Double Taxation Convention (1963), reprinted in *TAX TREATIES* (P-H) ¶ 1007, [hereinafter OECD Draft Convention], which are the prototype for many of the tax treaties among developed countries, and Articles 1-5 of the U.S. Treasury Department's Model Income Tax Treaty of May 17, 1977, reprinted in *TAX TREATIES* (P-H) ¶ 1019 [hereinafter U.S. Model Tax Treaty], the supposed template for many future U.S. tax treaties. The U.S. Model Tax Treaty of May 18, 1976, is reprinted in A. KROLL, *PLI SEVENTH ANNUAL INSTITUTE ON INTERNATIONAL TAXATION* 291 (1976). See generally Bischel, *Understanding United States Income Tax Treaties*, in *U.S. TAXATION OF INTERNATIONAL OPERATIONS* (P-H) ¶ 5008 et seq. (1972). For a discussion of the problems which arise when two jurisdictions characterize or tax partnerships differently, see Leongard, *Tax Treaties, Partnerships and Partners: Exploration of a Relationship*, 29 *TAX LAWYER* 31 (1975).

²¹ See, e.g., Articles 24-28 of the OECD Draft Convention, *supra* note 20, and Articles 24-26 of the U.S. Model Tax Treaty, *supra* note 20.

²² See Surrey, *The Pakistan Tax Treaty and "Tax Sparing"*, 11 *NAT. TAX J.* 156 (1958).

²³ Investment income flows from the developing to the developed countries without much set-off in the opposite direction due to the dearth of investors from the developing states deriving income in the developed nations. See Irish, *International Double Taxation Agreements and Income Taxation at Source*, 23 *INT. & COMP. L.Q.* 292, 296 (1974); Smith, *The Functions of Tax Treaties*, 12 *NAT. TAX J.* 317, 321 (1959); Comment, *The United States Tax Treaty Program with Developing Countries*, 2 *J. INT. L. & ECON.* 230 (1968).

tax treaties with developed countries, since such treaties would entail an inherent loss of much-needed tax revenues²⁴ unless they receive compensating benefits of a more substantial nature than the standard antidiscrimination and information exchange clauses. Thus, "[t]reaties with less developed countries . . . require somewhat different solutions from [U.S.] treaties with industrialized countries."²⁵ As the developing countries are usually more concerned with encouraging foreign investment (albeit under controlled conditions) in order to develop their domestic economies, they are often willing to forego some augmentation of their tax base in order to attract private investment funds.²⁶ Thus, to compensate for relinquishing their insistence on full taxation at source and entering into arrangements to allocate income and share tax revenues with the developed countries, the developing states usually require some concession on the part of the developed state which will provide a stimulus to capital inflow.²⁷ The United

A State Department spokesman has explained the problem in the following fashion:

The reason that our tax treaties have so far contributed little to this goal [of encouraging maximum private participation in the development of underdeveloped areas] is that many of their standard provisions assume a mutual flow of trade, capital, and investment income which normally exists only between countries on a comparable level of economic development.

Statement by Thorsten V. Kalijarvi, Assistant Secretary of State for Economic Affairs, in 2 JOINT COMM. ON INTERNAL REVENUE, LEGISLATIVE HISTORY OF UNITED STATES TAX CONVENTIONS 2278 (1962) [hereinafter LEGISLATIVE HISTORY]. See also Statement on the U.S.-Brazil Tax Treaty by Stanley S. Surrey, Assistant Secretary of the Treasury, before the Senate Committee on Foreign Relations, October 5, 1967, in TAX TREATIES (P-H) ¶ 19,133, at p. 19,127.

²⁴ "[T]he sacrifice made by the treasury of the developing country in not being recognized by the developed country from which the investment comes merely means that there is a transfer of tax revenue from the former to the latter." Atchabahian, *Some Aspects of International Double Taxation Between Developed and Developing Countries*, 25 BULL. INT. FISC. DOC. 451, 463 (1971).

²⁵ Surrey, *supra* note 18, at 366. See also Proposed Income Tax Convention Between the United States and Brazil, Memorandum prepared by the Staff of the Joint Comm. on Internal Revenue Taxation, in SENATE COMM. ON FOREIGN RELATIONS, TAX CONVENTIONS WITH BRAZIL, FRANCE, AND THE PHILIPPINES, S. EXEC. REP. No. 5, 90th Cong., 2d Sess. 12 (1968) [hereinafter S. EXEC. REP. No. 5].

²⁶ This is usually a necessary tradeoff in the light of the profit-maximization impetus behind most private investment. Cf. Imam, *A New Solution for Solving the Problem of Double Taxation of Dividends*, 29 BULL. INT. FISC. DOC. 327, 328 (1975).

²⁷ As noted in a report (dated November 17, 1967) prepared at the request of the UNCTAD Secretariat, the "failure to take adequate steps to avoid frustrating the fiscal policies of the [developing countries] has in some cases adversely affected relationships between governments and individual foreign enterprises." Stikker, *The Role of Private Enterprise in Investment and Promotion of Exports in Developing Countries: Taxation Aspects*, 22 BULL. INT. FISC. DOC. 383, 391 (1968). ECOSOC Resolution 1273 of August 4, 1967, mandated that tax treaties with developing countries provide "for favourable tax treatment" for investments by, *inter alia*, "measures which would assure to them [i.e., the investments] the full benefit of any tax incentives allowed by the country of investment." 43 ESCOR, Supp. (No. 1) 5, UN Doc. E/4429 (1967), reprinted in Annex I of United Nations Department of Economic and Social Affairs, Tax Treaties between Developed and Developing Countries, UN Doc. E/4614, ST/ECA/110, at 26 (1969) [hereinafter 1st UN Report].

States has very few treaties with developing states because it has been generally unwilling, to date, to accord sufficient concessions of this sort.²⁸ Basically, the only concession currently granted by the United States is deferral, a concession which has proven inadequate in the eyes of the developing countries.²⁹ Instead, one of the most sought after concessions

²⁸ The United States has two tax treaties presently in force with developing countries, specifically those with Pakistan and Trinidad and Tobago. Several developing countries have accepted the terms of treaties currently extant between the United States and their former "mother countries," the United Kingdom and Belgium (*viz.*, Barbados, Burundi, Gambia, Jamaica, Malawi, Nigeria, Rwanda, Sierra Leone, Zaire, and Zambia). See Kelley, *Tax Treaties between the United States and Developing Countries: The Need for a New U.S. Incentive*, 65 AJIL 159 (1971); TAX TREATIES (P-H) ¶ 1011 (status of each signed tax treaty as of July 29, 1977). Cyprus had assumed the terms of the U.S. income tax treaty with the United Kingdom but terminated the arrangement as of December 31, 1967, T.D. Release F-1068, Oct. 31, 1967. See TAX TREATIES (P-H) ¶ 89,156 n.3. A new treaty was signed on April 19, 1974, but it has yet to be released or submitted to the Senate. See TAX TREATIES (P-H) ¶ 1011.

In contrast, the developed countries of Western Europe have negotiated many tax agreements with developing states. See Statement by Surrey in LEGISLATIVE HISTORY, *supra* note 23; Comment, *supra* note 23, at 234; and the references in note 33 *infra*.

²⁹ As has been mentioned, four treaties were negotiated with developing countries (Pakistan, India, Israel, and the United Arab Republic) containing tax-sparing provisions, but none of these provisions ever came into effect. The Treasury Department subsequently negotiated treaties that extended the domestic investment tax credit (equal to seven percent at the time) to investments in developing countries with whom the United States had included the requisite treaty clause. Treaties with such a provision were concluded with Brazil, Israel, and Thailand between 1965 and 1967, but the Senate would not approve these particular clauses because of a domestic recession militating against incentives for foreign investment, and the treaties never entered into force. See S. EXEC. REP. No. 5, *supra* note 25, at 2, 13; Hellawell, *supra* note 15, at 1419 n. 81; Kelley, *supra* note 28, at 160. At the same time, an attempt was made to allow taxpayers to take charitable deductions under I.R.C. Section 170 for contributions to otherwise qualified developing country charities in Brazil, Thailand, and the Philippines. These, too, were rejected by the Senate on the grounds that charitable deductions had fostered such excessive abuse domestically that an extension of the privilege was unwarranted and might only serve to exacerbate the abuses. Article XIII(1) of the March 4, 1942 U.S. income tax treaty with Canada, 56 Stat. 1399, T.S. No. 983, as modified by Article I(e) of the Supplementary Convention of Aug. 6, 1956, 8 UST 1619, 1622-23, TIAS No. 3916, however, does include such a clause. See Pearson, *The OECD Draft Double Taxation Convention and Recent United States Treaties*, 48 TAXES 426, 431-35 (1970). See also S. EXEC. REP. No. 5, *supra* note 25, at 3; Hellawell, *supra* note 15, at 1419 n. 81.

The most recent tax treaties include altogether different concessions. In Article 11 of the Income Tax Convention, October 28, 1975, United States-Egypt (TAX TREATIES (P-H) ¶34,100, at ¶34,111), tax exemptions are only granted by Egypt to U.S. corporations so long as the profits are not taxable by the United States. Thus, Egypt retains the primary right to tax income earned within its jurisdiction, and it will not relinquish tax revenues to the U.S. by reason of its tax exemptions. In the Income Tax Convention, November 20, 1975, United States-Israel (TAX TREATIES (P-H) ¶52,100, at ¶¶52,110, 52,126), certain cash grants bestowed upon U.S. taxpayers by the Israeli Government (a program reportedly no longer in effect) are not to be included in gross income for U.S. tax purposes (Art. 10) and compulsory loans are treated as taxes on income for purposes of the foreign tax credit (Art. 26(2)). The Senate has yet to pass on these provisions.

is an agreement which would require the United States to accord tax-sparing credits to its taxpayers who invest abroad.³⁰

The income tax treaty with the Republic of Korea (TAX TREATIES (P-H) ¶56,100, signed June 4, 1976) is also awaiting Senate approval. In an exchange of notes on June 4, 1976 (*id.*, at ¶56,133), the U.S. Ambassador to Korea recognized the importance Korea places on negotiating special investment incentives to promote the flow of U.S. capital and technology and assured the Korean Minister of Foreign Affairs that "when circumstances permit," the United States will be prepared to

resume discussions with a view to incorporating provisions into this Convention that will minimize the interference of the United States tax system with incentives offered by the Government of the Republic of Korea and that will be consistent with the income tax policies of the United States Government regarding other developing countries.

Similar exchanges took place between the United States and Trinidad and Tobago in connection with the tax treaty presently in force with that country. See Statement on Proposed Income Tax Treaty with Trinidad and Tobago by Edwin S. Cohen, Assistant Secretary of the Treasury for Tax Policy, before the Senate Committee on Foreign Relations, Oct. 6, 1970, in TAX TREATIES (P-H) ¶85,061, at pp. 85,030-31. See also the exchange between the United States and Morocco in connection with a tax treaty signed on August 1, 1977. Letter from Abdel Kader Benslimane, Minister of Finance, Kingdom of Morocco, to the Honorable Robert Anderson, U.S. Ambassador to Morocco (Aug. 1, 1977) (seeking a confirmation of the U.S. Government's commitment to resume discussions on granting a tax-sparing credit against the U.S. tax on U.S. citizens and residents investing in Morocco should the Senate reconsider its position on such credits), in TAX TREATIES (P-H) ¶64,130, at p. 64,117.

It is significant to note that the Trinidad and Tobago treaty, as assigned, contains a special provision for the deferral of taxes on exchanges of technical assistance in the event such technology transfers are rendered in exchange for stock in the recipient corporation. See Art. 7 of the Income Tax Convention, Jan. 12, 1970, TIAS No. 7047, TAX TREATIES (P-H) ¶85,030, at ¶85,037 (effective Jan. 1, 1970). Although the Senate ratified the treaty, it reserved its acceptance of Article 7 because it deemed the encouragement of overseas private investment by U.S. taxpayers to be inappropriate in view of the prevailing economic considerations such as the current balance of payments deficit. See TAX TREATIES (P-H) ¶¶85,001; 85,063, at p. 85,052.

The United States has also entered into several exchanges of notes agreements with developing countries for the limited purpose of providing relief from the double taxation of aircraft and shipping earnings. See, e.g., Agreement on Taxation of Aircraft Earnings, Dec. 29-31, 1975, United States-Chile, TIAS No. 8252 (effective Jan. 1, 1975); Agreement on Taxation of Aircraft Earnings, Nov. 26-Dec. 29, 1976, United States-India, TIAS No. 8569 (effective Jan. 1, 1976). For a list of such agreements in effect as of July 24, 1976, see TAX TREATIES (P-H) ¶1014.

³⁰ See Hausman, *The Andean Pact Model Convention as Viewed by the Capital Exporting Nations*, 29 BULL. INT. FISC. DOC. 99, 100 (1975).

Admittedly, a treaty has been signed with the Philippines on October 1, 1976, without reference to any investment incentive provisions. See TAX TREATIES (P-H) ¶74,100. There has also been a spate of recent negotiations with Bangladesh, Botswana, Costa Rica, India, Iran, Jamaica, Malta, Singapore, Sri Lanka, Tunisia, and Zambia. See 9 TAX TREATIES (P-H), Rep. Bull. No. 16, at ¶16.1 (April 29, 1977); 8 TAX TREATIES (P-H), Rep. Bull. No. 17, at ¶17.1 (Nov. 21, 1975). In addition, negotiations with Indonesia, Kenya, and the Republic of China are reportedly near completion. See 9 TAX TREATIES (P-H), Rep. Bull. No. 16, at ¶16.1 (April 29, 1977). This upsurge in developing country negotiations may signal a willingness on the part of such countries to forego tax-sparing credits. However, the aforementioned exchanges of notes between the United States and Korea, Trinidad and Tobago, and Morocco (see note 29 *supra*) as well as the attempts at finding an acceptable treaty incentive

provisions as they were originally drafted did contain several major flaws.³⁷ First, they encouraged investors to seek quick profits and disinvest soon thereafter by reason of the facts that extension of the tax concession was uncertain and there was no positive incentive for continued reinvestment of

by the foreign country. See Surrey, *supra* note 22, at 157-58; Hollman, *The Pros and Cons of Tax Sparing for Waived Foreign Taxes*, 9 J. TAX. 152, 154 (1958). However, the Senate must consent to the treaty in order for it to be ratified and the scope of the spared tax credit can be delimited sufficiently to prevent giving the foreign country legislative power over U.S. tax rates. Furthermore, sparing is best enacted through a treaty rather than by statute because of the flexibility and selectivity of the treaty device. See Statement of Mitchell B. Carroll, Counsel to the Tax Committee of the National Foreign Trade Council of New York, in LEGISLATIVE HISTORY, *supra* note 23, at 2254. See also Valdés Costa, *Latin American Position on the Problems of Tax Agreements between Developed and Developing Countries*, 25 BULL. INT. FISC. DOC. 283, 291 n. 12 (1971).

(c.) Congress has traditionally manifested an antipathy towards preferential corporate tax rates on foreign income. See Surrey, *supra* note 22, at 158. At the time this criticism was levied, there was no DISC legislation (I.R.C. §991 *et seq.*, enacted as Title V of the Revenue Act of 1971, Pub. L. No. 92-178, 85 Stat. 497), and the lack of other such preferences is not immutable. The same response is appropriate for Professor Surrey's comment that, merely because the United States recognizes the primary jurisdiction of source countries, it is not necessary that it also accommodate foreign tax waivers. *Id.* at 161. This is true but does not advance the discussion of whether or not it is a good policy to agree to accommodations of this sort.

(d.) There are numerous administrative difficulties in ascertaining what taxes were not paid. Surrey, *supra* note 22, at 162. However, as long as the tax to be spared is properly defined, such difficulties should prove manageable. The experience of those developed countries which are engaged in crediting spared taxes may be helpful in this regard.

(e.) Tax-sparing may result in pressures on developing countries to compete among themselves to the detriment of positive tax reform. *Id.*; P. MUSGRAVE, UNITED STATES TAXATION OF FOREIGN INVESTMENT INCOME: ISSUES AND ARGUMENTS 161 (1969). The solution to this problem, however, probably lies in regional agreements between developing countries to limit the "wasteful competition" in tax incentives which may presently exist in spite of the reluctance of the United States to grant sparing credits. See 6th UN Report, *supra* note 31, at 57.

(f.) It is not clear that tax policies should be used to encourage foreign investment and, in any event, the test of which countries the United States desires to "aid" should not depend upon which countries offer tax concessions. See Surrey, *supra* note 22, at 163-64. However, where appropriate, and in carefully selected circumstances, there is no reason why tax policies may not be utilized as one effective tool for promoting "self-help" forms of foreign aid. In the final analysis, whether or not sparing will have much of an effect on investment decisions, it is conclusive that the increase in revenue to the United States, as long as it refuses to implement tax-sparing credits, comes at the expense of a concomitant loss of potential revenue for developing countries. See Atchabahian, *supra* note 24, at 465.

(g.) The symbolic value and "emotional appeal" of tax sparing are insufficient reasons for the creation of major loopholes and a significant precedent with unforeseen consequences. See Surrey, *supra* note 22, at 165-66. Tax sparing, however, has additional benefits which outweigh the perceived risks (particularly if sparing is first undertaken on a trial basis). It may assist in promoting the foreign economic policy of the United States by improving our relations with developing countries, see Statement

the profits.³⁸ Rapid disinvestment is of limited benefit to the developing country, and the disequilibrium it may cause may, on balance, prove disadvantageous. Secondly, it resulted in windfalls to those U.S. corporations that had already invested in the developing country and thus did not require tax-sparing credits in order to induce them to operate there.³⁹ Finally, there was a significant loophole by means of which the benefit could be abused, specifically by liquidating the foreign operation and reorganizing,⁴⁰ unless the tax administrators of the developing country were diligent and had the requisite administrative capacity to monitor attempted manipulations by the corporate investors.

At the time tax sparing was first presented to the U.S. Senate, economic conditions were not deemed suitable for a treaty that would benefit foreign investment at the expense of investment in domestic industry. Of the four treaties containing sparing provisions, the tax-sparing credit in the U.S.—

by Kalijarvi, in *LEGISLATIVE HISTORY*, *supra* note 23, at 2279, and it may also be utilized as a *quid pro quo* or "bargaining chip" to obtain more tax treaties with developing countries, a goal which is for the benefit of the United States as well as for those countries with whom it signs treaties. See Hollman, *supra*, at 153. See also Peterson, *Canada's New Tax Treaties*, 23 *CAN. TAX J.* 315 (1975) (changes in Canadian tax laws may serve to induce more developing countries to enter into treaties with Canada).

(h.) Finally, Professor Surrey argues that the present tax credit system does not nullify foreign tax concessions because most U.S. overseas investment is made via foreign subsidiaries and the income derived therefrom is shielded by the deferral principle. See Surrey, *supra* note 22, at 160. See also Hausman, *supra* note 30, at 100. However, in some areas and industries (e.g., in Latin America and in mineral extraction enterprises), branch operations prevail. It is thus important to at least provide sparing credits for branch income, see 3d UN Report, *supra*, at 99, at which point tax equity dictates treating repatriated income from foreign subsidiaries in a like manner. Hence, the rationale for permitting tax concessions to be fully operative on both branch and subsidiary income. See P. MUSGRAVE, *supra*, at 161.

³⁷ The tax-sparing clause in Article XV(1) of the 1957 U.S.-Pakistan treaty, *supra* note 1, reads as follows:

For the purposes of this credit there shall be deemed to have been paid by a United States domestic corporation the amount by which such Pakistan taxes (other than the business profits tax) have been reduced under the provisions of section 15B of the Income Tax Act, 1922 (XI of 1922) as in effect on the date of the signature of the present Convention: Provided, That any extension made by law of the period within which an industrial undertaking may be set up or commenced in order to obtain the reduction provided in section 15B shall be deemed to be in effect on the date of the signature of the present Convention.

³⁸ See Surrey, *supra* note 22, at 159-60; P. MUSGRAVE, *supra* note 36, at 159. Although the incentive to disinvest may be ameliorated by the operation of the deferral principle in the case of foreign subsidiaries (see Singhal, *Taxation for Development: Incentives Affecting Foreign Investment in India*, 14 *HARV. INT. L.J.* 50, 83 (1973)), disinvestment only results in a U.S. tax liability if it is allowed by repatriation. Thus, without a positive incentive to reinvest, funds may be withdrawn for investment elsewhere without the imposition of U.S. tax as long as no dividend (actual or constructive) is distributed.

³⁹ See Surrey, *supra* note 22, at 159; Statement of Stanley Surrey, Harvard University Law School, in *LEGISLATIVE HISTORY*, *supra* note 23, at 2230.

⁴⁰ See *LEGISLATIVE HISTORY*, *supra* note 23, at 2207 (Comment by Senator John F. Kennedy).

Pakistan treaty came closest to being approved. But as the Pakistani concessions to be spared had expired, a *raison d'être* for the sparing provision no longer existed, and the treaty was approved without it.⁴¹ The Senate Committee on Foreign Relations reserved the question of sparing for a future date and expressly noted that it had not passed a negative judgment on the concept of sparing itself,⁴² for it recognized that without sparing the U.S. tax law had effectively nullified Pakistan's tax concessions.⁴³ However, although Pakistan subsequently reinstated its tax concessions,⁴⁴ the tax-sparing clause was never reinserted nor was any other tax incentive device included in the treaty since, to date, none has received congressional approval.⁴⁵ At the same time, tax sparing has become more widespread, in part due to the demands of the developing countries and in part to its general acceptance by developed countries (other than the United States) as a relatively effective means of rendering development assistance in a form that allows the developing nations to maximize the efforts undertaken on their own behalf.⁴⁶ The developing countries are adamant in their demand for tax-sparing provisions in any treaties they negotiate⁴⁷ and tax

⁴¹ See note 1 *supra*.

⁴²

In recommending a reservation to article XV(1), the committee wants to make it perfectly clear that this is without prejudice to future consideration of the matter in the event the Pakistani tax waiver law is reenacted and the question again comes before the committee. There is no occasion for the Senate at this time to decide the question. The committee reserves complete freedom of decision for the future.

S. EXEC. REP. NO. 1, *supra* note 32, at 6217. See also LEGISLATIVE HISTORY, *supra* note 23, at 2287.

⁴³ See note 32 *supra*.

⁴⁴ Income Tax Act, 1922 (XI of 1922), Sec. 15B (1974).

⁴⁵ See note 29 *supra*.

⁴⁶ As of 1972, over 70 tax-sparing treaties had already been signed by Japan and the countries of Western Europe alone. See *Tax Sparing by European Countries*, *supra* note 33. The OECD Draft Convention, *supra* note 20, provides two alternatives, an exemption and a credit method, for the elimination of double taxation (Arts. 23A and 23B). However, Comment 48 to the draft recognizes that tax concessions granted by the developing countries to encourage industrialization may be nullified under the credit system. Thus, Comment 49 allows for a deviation from the stated alternatives. One suggested deviation is for the state of the taxpayer's residence to grant a tax-sparing ("matching") credit for the taxes which would have been paid had there been no concession (Comment 50). Under Comment 51, the members of the OECD are left free to settle upon those deviations from the ordinary credit method which they find most appropriate.

⁴⁷ See Kelley, *supra* note 28, at 161-62. Cf. Christiaanse, *Tax Treaties Between Developed and Developing Countries*, 54 CAHIERS DE DROIT FISCAL INTERNATIONAL 31, 38, 40 (1969). Greece, for example, will not grant concessions to enterprises incorporated or organized in countries which use a tax credit system unless the consequent nullification of such concessions is eliminated concurrently. See Atchabadian, *supra* note 24, at 463 n.8, citing Tsingris, *Grèce*, 44 CAHIERS DE DROIT FISCAL INTERNATIONAL 112 (1961). See also the U.S.-Egypt Tax Convention, *supra* note 29, at Art. 11. The fate of the June 25, 1956 United States tax treaty with Honduras (8 UST 219, TIAS No. 3766, 279 UNTS 178 (effective Jan. 1, 1957)) is a further example of this adamancy. The treaty was terminated as of December 31, 1966 (see *Tax Treaties* (P-H) ¶45,001) apparently because Honduras desired that it be amended to include some form of tax sparing. Honduras refused the U.S. counteroffer to

sparing could therefore serve as the *quid pro quo* for the concessions that the United States traditionally seeks in its tax treaties but which the developing countries are otherwise reluctant to concede.

In the light of the recent elimination of all the remaining unilateral tax concessions for investment in developing countries,⁴⁸ it is probably an appropriate time to reconsider the inclusion of tax-sparing provisions in present and future U.S. tax treaties with developing states. Any such provisions must, of course, resolve those anomalies that caused the major objections to tax sparing when it was first proposed to the Senate.⁴⁹ Political realities probably still dictate the need for a revised format. But, in addition, the economic efficacy of tax sparing—its ability to accomplish efficiently the ostensible goal of abetting existing incentives for investment in developing countries—also dictates that these anomalies be eliminated. Most tax-sparing clauses, including those that were presented to the Senate, restrict tax-sparing credits to certain agreed-upon incentives legislated by the developing countries,⁵⁰ thereby avoiding an unlimited grant of discretion to the developing country's finance minister. However, the windfall and pitfalls of disinvestment often remain.

In the following section, a formula is offered which attempts to eliminate these problems as well. As the U.S.-Pakistan treaty is the oldest tax treaty the United States presently has in force with a developing country and as the tax-sparing principle came closest to being approved when included in this treaty, the proposed draft will be framed in the context of the Pakistani tax concession and the U.S.-Pakistan tax treaty. Naturally, other treaties would require their own special language to tailor them to the particular circumstances of the signatory developing country. Nevertheless, the basic suggestions should prove of wide applicability and, to the extent that those developed countries that already accept sparing in practice have yet to avoid one or more of the pitfalls mentioned above, the proposed solutions should prove of even wider applicability.

A SUGGESTED FORMULA

There are four major tasks to be performed in drafting a tax-sparing provision. The first is to define the tax concessions for which credits are to be accorded by the capital-exporting country.⁵¹ It is important that this

extend the seven percent investment credit to the export of capital to Honduras. See Comment, *supra* note 23, at 238. Talks were subsequently renewed for a new treaty but have recently terminated. See 8 TAX TREATIES (P-H), Rep. Bull. No. 9, at ¶9.1 (March 26, 1975).

⁴⁸ See the Tax Reform Act of 1976, *supra* note 16, at Sec. 1022(a), amending I.R.C. Sec. 1248(d), which repeals the special treatment accorded the sale or exchange of stock in Less Developed Country Corporations (LDCC's), and Sec. 1033(a), amending I.R.C. Sec. 902, which eliminates the concession for dividends from LDCC's in the calculation of the foreign tax credit limitation.

⁴⁹ See text accompanying notes 38-40 *supra*.

⁵⁰ See 3d UN Report, *supra* note 36, at 90; note 37 *supra*.

⁵¹ It is assumed that tax credits are to be allowed for taxes actually paid according to language akin to that in Article 23B of the OECD Draft Convention, *supra* note 20, or Article 23 of the U.S. Model Tax Treaty, *supra* note 20.

be done after careful consideration of the scope and effect of the various concessions offered by the host country. In the case of the U.S.-Pakistan treaty, the credit was to be accorded for taxes spared under Section 15B of the Pakistani Income Tax Act of 1922 (XI of 1922) as it was then in effect.⁵² Section 15B provided a concession for the profits from investments in new industries (in manufacturing, shipbuilding, the production of power, mining, oil extraction, or other "industrial undertakings") which employed at least ten persons and utilized mechanical energy.⁵³ The concession itself was a full or partial exemption from the income tax and supertax normally levied by Pakistan and limited to five percent of the capital invested in Pakistan.⁵⁴ The fact that an upper limit was placed on the concession itself served to insure that the potential for abuse was minimized.⁵⁵ However, it has been pointed out that, despite the precise drafting, an anomaly in the Pakistani income tax laws may have rendered the concessions of Section 15B illusory, specifically by reason of the fact that, in most circumstances, liberal depreciation allowances,⁵⁶ which were not recognized for tax-sparing purposes, would completely wash out the profits which Section 15B was to exempt from taxation. In such cases, the tax-sparing provision in the treaty was rendered ineffective.⁵⁷ The problem was not insoluble, for it was only necessary to recognize accelerated depreciation allowances as concessions also deserving of tax-sparing credits⁵⁸ in order to preclude the nullification of the credit for Section 15B concessions. But it does serve to emphasize the need for a complete investigation of the concessions to be credited, particularly in the light of the fact that not all tax concessions warrant tax-sparing credits from the point of view of U.S. foreign economic policy, nor are they all in the best interests of the developing country itself.⁵⁹

The second major task is to establish the procedures to be followed in response to changes in the incentive statute or in other tax legislation that might significantly affect the treaty provision. On the one hand, it is

⁵² See note 37 *supra*.

⁵³ See GOVERNMENT OF PAKISTAN, CENTRAL BOARD OF REVENUE, INCOME TAX MANUAL: PART 1, at Sec. 15B (9th ed. 1974).

⁵⁴ The income tax rate is presently a flat 30 percent and the supertax is 30 percent of the resulting net income. See PRICE WATERHOUSE & Co. U.S.A., INFORMATION GUIDE: CORPORATE TAXES IN 80 COUNTRIES 212 (July 1976); GOVERNMENT OF PAKISTAN, FINANCE DIVISION, TAXATION STRUCTURE OF PAKISTAN 1974-75, at 43 (1974). For a general explanation of Pakistani tax law, see K. SAEED, INCOME TAX LAW WITH PRACTICAL PROBLEMS (1970). Compare Crockett, "Tax Sparing": A Legend Finally Reaches Print, 11 NAT. TAX J. 146, 149-50 (1958), for a description of the Pakistani tax exemptions when the treaty was negotiated in 1957.

⁵⁵ Not all tax-sparing clauses are as precise as that in the U.S.-Pakistan treaty. Some describe the incentives to be credited in quite general and perhaps overly broad terms. See 3d UN Report, *supra* note 36, at 89-90.

⁵⁶ Income Tax Act, 1922 (XI of 1922), §10(2)(va) & (vi). See K. SAEED, *supra* note 54, at 118-26. Note that the unused portion of the accelerated depreciation allowance may be carried over indefinitely.

⁵⁷ See Kust, *Tax Sparing in Principle; and as Vitiated by the Pakistan Laws*, 9 J. TAX. 150 (1958).

⁵⁸ An idea propounded on its own merits in Smith, *supra* note 23, at 327.

⁵⁹ See Singhal, *supra* note 38, at 61.

undesirable that every minor change necessitate renegotiation. On the other hand, some mechanism for consultation and agreement is mandatory to insure the smooth functioning of the treaty and yet not bar legislation necessitated by exogenous considerations. Many United Kingdom tax treaties contain the following formula for determining which future legislation is to be covered by the treaty:

Any other provision which may subsequently be made, granting an exemption which is agreed by the taxation authorities of the Contracting Parties to be of a substantially similar character, if it has not been modified thereafter or has been modified only in minor respects so as not to affect its general character.⁶⁰

This formula fails, however, to provide for legislation which affects the tax-sparing credit indirectly, without itself granting an exemption. Thus, the following language (in terms of the U.S.-Pakistan treaty) is suggested as an alternative or as an appendage to the British formula:

In the event of amendments to the Internal Revenue Code or the Income Tax Act, 1922 (XI of 1922) subsequent to the date of the signature of the present Convention, which affect or nullify the provisions of this Article [granting tax-sparing credits], the contracting States shall seek an agreement with regard to the application of this Article under the terms of the amended statutes. If such an agreement is not signed within six months of the effective date of the relevant statutory amendments, the provisions of this Article shall terminate automatically, unless a further six month extension is mutually agreed upon.

Such a provision not only adds the flexibility necessary for the relevant income tax statutes of the two signatory states to be amended in such a way as to affect the tax-sparing mechanism, but it also provides protection against arbitrary changes in the tax concession to be credited, particularly those that increase its scope or alter the extent of the credit that must be granted by the United States. The alleged lack of effective protection against such changes in the original tax-sparing clause with Pakistan was one of the criticisms consistently levied against it.⁶¹

⁶⁰ See 3d UN Report, *supra* note 36, at 90. Compare Art. XI(3)(b) of the Income Tax Agreement, Jan. 5, 1960, India-Japan, 384 UNTS 3 (effective June 31, 1960), which accords tax-sparing credits against Japanese tax to certain denominated concessions granted by India with the proviso that "the scope of the benefit accorded to the taxpayer by the said measures effective on the date of signature of the present agreement is not increased." Reprinted in G. POPHALE, *TAX TREATIES BETWEEN INDIA AND FOREIGN COUNTRIES* 118 (1966).

⁶¹ See Surrey, *supra* note 22, at 158; Surrey, *supra* note 39, at 2222; Smith, *supra* note 32, at 2201.

Note that according to I.R.C. Section 7852(d), no provision in the U.S. Internal Revenue Code "shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on the date of enactment" of the Code. See also I.R.C. §894(a). However, treaties entered into after 1954 do not receive the protection of Section 7852(d). Despite the fact that tax conventions are accorded the status of treaties, their authority is only equal to that of acts of Congress under the supremacy clause and, in case of conflict, the "last in time" principle is the prevailing rule. See Beemer, *Revenue Act of 1962 and United States Treaty Obligations*, 20 TAX L. REV. 125, 127 (1964-1965) and the cases cited therein. Hence, legislation

The third task is to determine the duration of the tax-sparing provision. Particularly in light of the fact that the efficacy of both tax sparing and the concession to be credited in attracting investment may be uncertain, it is desirable from the point of view of the United States to limit the period during which tax-sparing credits are to be accorded. It has also been noted that tax concessions are designed as relief measures during the initial start-up of operations and are not meant to operate as permanent subsidies.⁶² Some treaties merely utilize a "general formulation" for this purpose.⁶³ Others, however, prefer to set definite time limits, often of ten years' duration.⁶⁴ The writer believes the latter solution to be preferable. It reduces the uncertainty of a general formulation (e.g., "for a limited period of time") which may prompt rapid disinvestment and yet it is of sufficient duration for the effects of the concession and credit to be felt and properly analyzed. In some cases, however, the concession to be credited may expire in less than ten years. Thus, the credit should only be accorded until the occurrence of the first of two events—the lapse of the concession (unless it is extended without substantive alteration), or the expiration of ten years.

The final task is to draft the tax-sparing clause in such a way as to avoid windfalls, to eliminate loopholes, and to provide an inherent stimulus for reinvestment of subsequent earnings.⁶⁵ This may readily be accomplished by limiting the credit for "spared" taxes as follows:

(i) the credit shall not exceed the same proportion of the spared tax which the increase in value of the investment by the United States corporation in qualified assets subsequent to the date of the signature of the present Convention bears to the value of the total investment by the United States corporation in qualified assets as of the last day of its taxable year; and

(ii) the total amount of the credit shall be:

- (a) the credit calculated in subparagraph (i) multiplied by
- (b) a percentage equal to ten percent for the first taxable year in

enacted subsequent to the signing of a post-1954 treaty will override the conflicting treaty terms unless there is specific intent to the contrary. Compare Section 110 of the Foreign Investors Tax Act of 1966, Pub. L. No. 89-809, 80 Stat. 1539, 1575 ("No amendment made by this title shall apply in any case where its application would be contrary to any treaty obligation of the United States") with Section 31 of the Revenue Act of 1962, Pub. L. No. 87-834, 76 Stat. 960, 1069. (I.R.C. Section 7852(d) was made inapplicable to the provisions contained in the 1962 Act, thereby rendering the latter superior to all inconsistent treaty obligations). The suggested draft attempts to avoid the inevitability of abrogation by providing a mandatory negotiating period (with an option to extend) during which time the necessary adjustments may be agreed upon.

⁶² See 3d UN Report, *supra* note 36, at 90.

⁶³ See *id.*

⁶⁴ See, e.g., Article 2(3) of the Tax Convention between Brazil and Sweden, signed September 17, 1965, reprinted in G. CANTO & S. BILLE, *THE TAX CONVENTION BETWEEN BRAZIL AND SWEDEN WITH BRAZILIAN AND SWEDISH COMMENTARIES* (1968). Cf. Pepper, *Tax Relief Provisions Between Developed and Developing Countries*, 12 EUR. TAX. 1/3, 1/6 (1972) (5-10 year time periods are reasonable for outright exemptions from taxation).

⁶⁵ See text accompanying notes 38-40 *supra*.

which an investment is made by the United States corporation in qualified assets, such percentage to be increased by ten percent for each subsequent year, provided that the appropriate percentage shall not exceed one hundred percent and provided further, that the percentage shall be zero if the value of the qualified assets owned by the United States corporation is less than 25 percent of the value of the qualified assets owned by such corporation on the date the investment qualified for a tax exemption or reduction under Section — of the Income Tax Act, 1922 (XI of 1922), as in effect on the date of the signature of the present Convention.

The term "qualified assets" would be defined elsewhere in the Convention to refer to "those assets the investment in which qualifies for an exemption from or reduction of Pakistan income tax and supertax under Section(s) — of the Income Tax Act, 1922 (XI of 1922), as in effect on the date of the signature of the present Convention."⁶⁶

The first limitation primarily serves to diminish the incidence of windfalls to those corporations that have already invested in Pakistan before the Convention has been signed. As their investments were not induced by the existence of tax-sparing credits, such credits would be a wasteful "tax expenditure." This safeguard is instituted by limiting the credit to that amount of spared tax which is in proportion to the *increase* in investment over the investment that existed before the tax-sparing treaty was signed. In this way, U.S. corporations that have already invested in Pakistan would have to invest further sums to take advantage of the credit.⁶⁷ This provision also serves to encourage reinvestment rather than quick profitmaking since the tax credit is keyed to increases in investment. However, to insure that rapid repatriation is precluded in the case of a large input of capital which does qualify for tax-sparing credits under the first limitation, the second limitation allows the tax-sparing credit only on a graduated scale.

The scale is based on the number of years since the initial investment in so-called "qualified assets" was made, in other words, the number of years an undertaking has been in operation. Specifically, only ten percent of the otherwise allowable spared tax credit may be deducted from the taxpayer's U.S. taxes in the first year of the investment with the allowable percentage being augmented by another ten percent each year thereafter. The full tax-sparing credit therefore remains unavailable until ten years subsequent to the initial investment.⁶⁸ By that time, it might be hoped that the investor will have so established himself that he will lack any incentive to disinvest.

If a "qualified asset" is defined, in effect, as an entire undertaking (as it is, for example, under Section 15B of the Pakistani Income Tax Act), this

⁶⁶ The Section(s) of the Pakistan Income Tax Act is (are) left blank in light of the discussion in the text accompanying notes 56-59 *supra*.

⁶⁷ Windfalls are not entirely eliminated as there is no way to account for investments that would have been made subsequent to the signing of the treaty regardless of the absence of the tax-sparing credit.

⁶⁸ This is similar to the suggestion of reducing or denying tax-sparing benefits on earnings remitted to the United States within a certain period of time. See Comment, *supra* note 23, at 242.

graduated benefit scale also discourages the manipulative liquidation and reorganization of foreign subsidiaries, since new undertakings must begin anew at the bottom of the credit scale. In addition, should the value of the investment fall below twenty-five percent of the value at the time the investment qualified for the relevant tax concession, no credit will be granted. Hence, there is a stopgap against excessively manipulative disinvestment. If a U.S. taxpayer wishes to drain its foreign subsidiary, it must do so at the price of losing at least some of the benefits it originally sought to gain by the venture. If a recession or poor management diminishes the value of the assets without the aid of any disinvestment, this stopgap may provide an impetus for an additional injection of capital to revitalize the enterprise.

IV.

CONCLUSIONS

Although the tax-sparing credit may not be the optimal technique for stimulating greater private investment in the developing world, or the optimal strategy for the latter's development programs,⁶⁹ it has much merit as a contribution to solving the problems of U.S. foreign economic policy in the area of taxing the income from investments in developing countries. The developing countries themselves are desirous of concluding tax-sparing agreements,⁷⁰ implying, in turn, that such agreements may be used as "bargaining chips" to conclude more double taxation conventions with these countries.⁷¹ The suggested formula for drafting tax-sparing clauses aims to minimize the distortions inherent in tax-sparing credits and to restrict the benefits as much as possible to the "increment of total investment which would not have been made in the absence of the incentive provision."⁷² As has been indicated, the precise treaty language will vary from one treaty to another. However, it is hoped that the language suggested herein at least indicates that by careful negotiation and precise drafting, tax-sparing benefits may be limited to those incentives that may be deemed by the United States to be valuable, productive, and effectively administered contributions to the economic development of the developing states. Thus, there is a strong argument for the reconsideration of tax sparing as one of several available tools for the promotion of self-help in the context of the U.S. foreign aid effort.

⁶⁹ See Haynes, *supra* note 34.

⁷⁰ See notes 27 and 30 *supra*.

⁷¹ See Peterson, *supra* note 36, at 315, 317.

⁷² Kelley, *supra* note 28, at 167.

THE PEOPLE'S REPUBLIC OF CHINA AND THE CHARTER-BASED INTERNATIONAL LEGAL ORDER *

By Samuel S. Kim *

The entry of the People's Republic of China (PRC) into the world community has renewed an old question in a new global setting: Is China¹ a help or a hindrance to international law and order? What impact, if any, has China made upon the evolution of the Charter-based international legal order? Conversely, what impact, if any, has the international legal order had on the Chinese conception and practice of international law? China's participation for over six years in the activities of the United Nations, the specialized agencies, and UN-sponsored conferences, many of which are engaged in the development and clarification of law, now makes it possible to subject the above questions to a disciplined behavioral analysis.²

China's participation in a multitude of UN meetings has added a multilateral dimension to its legal concepts and practice, which had remained largely bilateral in nature and application. Suddenly, China is now faced with a challenge from which it can hardly escape: the need to pronounce its *opinio juris* on a myriad of international legal issues before the United Nations and then to have its state practice subjected to continuing scrutiny during the conduct of its multilateral diplomacy. Even a refusal by China to participate in a committee or conference of legal import or its failure to take a stand in the face of a challenge or opportunity runs the risk of being accepted by other member states as evidence of China's legal behavior.

The Chinese conception of the Charter-based international legal order³ which evolved during the period of exclusion (1950-1971) was largely hypothetical. China was denied an opportunity to practice its legal concepts. Although the impact of exclusion is difficult to quantify, it would be foolhardy to deny or to minimize its conceptual and psychological effect upon the development of the Chinese image of international legal order.⁴

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¹ Unless otherwise specified, the term "China" throughout this article refers to the People's Republic of China (PRC); this conforms to the UN practice.

² This article is based on Chapter 8 of *China, The United Nations, and World Order*, to be published in late 1978 by Princeton University Press. The author gratefully acknowledges his indebtedness to Monmouth College for a faculty creativity grant and the Center of International Studies, Princeton University, for a research travel grant, both of which supported the preparation of this article.

³ For a discussion on the Charter conception of international legal order, see Falk, *The Interplay of Westphalia and Charter Conceptions of International Legal Order*, in *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 48-64 (R. A. Falk & C. E. Black, eds. 1969).

⁴ A detailed analysis of the evolution of the Chinese attitude toward the Charter conception of international legal order during the preentry period (1950-1971) is contained in Chapter 8 of *China, the United Nations, and World Order*, *supra* note 2. The

Now that China is in the world community, would it confirm, revise, or repudiate its conception of the Charter-based international legal order which had developed during the period of exclusion? This article attempts to answer this and related questions by focusing on a few key issues of legal nature in UN politics. China's legal practice in the specialized agencies and in such UN-sponsored conferences as the Third United Nations Conference on the Law of the Sea is beyond the scope of the present inquiry.

THE NATURE AND SCOPE OF CHINESE LEGAL PRACTICE

For analytical convenience, we may first describe the nature and scope of the PRC's "legal resources," then define the types of legal organs and activities in which China has refused to participate, and finally analyze Chinese legal practice in a few representative subjects and organs in which it has participated.

Quite tellingly, there is no evidence that the PRC's participation in the UN system has rejuvenated the study of international law in China or restored it to the position that it enjoyed in the 1950's. Chou Keng-sheng is now dead; Ch'en Ti-ch'iang remains purged, to the best of the author's knowledge;⁵ none of the semi-scholarly journals of international law and politics has resumed publication to this date.⁶ The Chinese privately admitted to an official in the Office of Legal Affairs of the UN Secretariat that they did not have a single legal expert in their Permanent Mission to the United Nations in New York City.⁷

Furthermore, the Ministry of Foreign Affairs in Peking does not have a functional department devoted exclusively to legal affairs. Strangely, two departments in the Ministry were merged in 1972 into a single department with the ponderous title, "Department of International Organizations, Conferences, Treaties and Laws" or "Department of International Organizations, Law and Treaty."⁸ Since An Chih-yüan was transferred to head the

single most useful reference on this question is the late Chou Keng-sheng's *Hsien-tai ying-mei kuo-chi-fa te ssu-hsiang tung-hsiang* (Trends in Modern Anglo-American Thought on International Law) (1963).

⁵ *Id.* Chou Keng-sheng may be regarded as the dean of Chinese jurists in the 1950's and 1960's. Ch'en Ti-ch'iang, one of the most prominent Chinese scholars on international law, who headed the Division of International Law of the Institute of International Relations of the Chinese Academy of Sciences before he was purged in 1958, was attacked for having failed to grasp the fundamental fact that international law was a legal instrument in the service of Chinese foreign policy.

⁶ Such leading journals on international law and politics as *Cheng-fa yen-chiu* (Research on Politics and Law); *Kuo-chi wen-t'i yen-chiu* (Research on International Problems), *Fa-hsiieh* (Jurisprudence), and *Shih-chieh chih-shih* (World Knowledge) were all swept away by the Cultural Revolution in mid-1966 and have not resumed publication.

⁷ Based on the author's field interviews at UN Headquarters. Interview schedule is compiled in the editor's office for protocol purposes only.

⁸ There is a confusing array of titles for this department. Donald Klein uses the term, "International Organizations and Conferences and Treaty and Law Department," while Wolfgang Bartke speaks of "International Organizations and Conferences, Treaties and Laws." The Chinese themselves have been inconsistent in identification (or

PRC Permanent Mission to International Organizations in Geneva on October 28, 1975, the Department has been headed by two deputy-directors, Chi Chao Chu and Pi Chi-lung, as the Chinese Government failed to appoint a new Director.⁹

Pi Chi-lung has been the most active "legal worker" in Chinese multilateral diplomacy. He was a member of the Chinese delegation to the 27th and 30th sessions of the General Assembly, taking part on each occasion in the deliberations of the Sixth (Legal) Committee. He headed the Chinese delegation to the Diplomatic Conference of 1974 on Reaffirmation and Development of the International Humanitarian Law Applicable in Armed Conflicts. He headed the Chinese delegation to the third session of the Third UN Conference on the Law of the Sea in 1975. He was also the head of the PRC delegation to the Working Group on a Draft Charter of Economic Rights and Duties of States in Geneva,¹⁰ as well as taking an active part in the behind-the-scenes negotiations with the official missions of the specialized agencies of the UN system.¹¹

One of the salient characteristics of Chinese participation in the United Nations is a self-conscious avoidance of, and nonparticipation in, the organs and activities of a purely legal character. Although most issues in the United Nations have varying degrees of legal implications, international law issues defined in a traditional sense have not attracted Chinese interest or involvement. Of all the Main Committees of the General Assembly, for example, Chinese participation has been the lowest, and the most passive, in the Sixth Committee. The only subjects that invited Chinese response in the Sixth Committee have been such highly politicized legal issues as the definition of aggression, the question of Charter review, and international terrorism.

China's indifference toward the international judicial process was highlighted by its posture toward the International Court of Justice, the principal judicial organ of the United Nations. The Court was one of the few limited membership organs in the entire UN system where nationals of the Republic of China (ROC) sat during most of the time the ROC was present in the United Nations—Hsu Mo from 1946 to 1957 and V. K. Wellington Koo from 1957 to 1969 represented "China" on the Court. Since its

translation) of the term for this department. In all the English translations of the list of delegates to the General Assembly or other international conferences, the department has been identified as "Department of International Organizations, Law and Treaty" or "Department of International Organizations, Law and Treaties," but in the French, translation the department is referred to as "Département des organisations internationales et des traités et lois internationaux." See the following: D. Klein, *The Chinese Foreign Ministry* 174 (1974) (unpublished Ph.D. Dissertation, in Columbia University Library); W. BARTKE, *THE DIPLOMATIC SERVICE OF THE PEOPLE'S REPUBLIC OF CHINA AS OF JANUARY 1976 (INCLUDING BIOGRAPHIES)* 7 (1976); UN Docs. A/CONF.62/INF.3/Rev.2 (1974); A/CONF.62/INF.4/Rev. 1 (1975); Delegations to the General Assembly, 27th Sess., UN Doc. ST/SG/SER.B/26/Rev. 1, at 39-42 (1972).

⁹ For an analysis of geographical and functional departments in the Chinese Ministry of Foreign Affairs, see Klein, *supra* note 8, Ch. 4.

¹⁰ See UN Docs. TD/B/AC.12/2 (1973) and TD/B/AC.12/3 (1974).

¹¹ A comprehensive analysis of these behind-the-scenes negotiations is given in Chapter 7 of *China, the United Nations, and World Order*, *supra* note 2.

entry into the United Nations, the PRC has been presented with two opportunities to come forward with a candidate (in 1972 and 1975), when the General Assembly and the Security Council had to elect five judges for a nine-year term. On each occasion, China failed to advance a candidate, even though its nominee would easily have won, given the well-established practice of electing nationals of the Big Five to the Court. In the face of repeated friendly inquiries from the Office of Legal Affairs of the Secretariat on the submission of candidates for the World Court and the International Law Commission, the Chinese have been polite but deliberately ambiguous and noncommittal in their reply: "We are not ready yet."¹²

In view of the absence of international law as an independent academic discipline in China today, it is doubtful that China can be, or even wants to be, ready for membership in the Court in the foreseeable future. It may not be an exaggeration to say that international law constitutes one of the most primitive academic disciplines in Chinese higher education.¹³ Even if China should decide to claim its "legitimate" privilege to have a national on the Court, it might not wish to place itself in an embarrassing situation of having its national nominee unfavorably evaluated against the candidates of other countries—let alone against such a prominent jurist as V. K. Wellington Koo of the ROC—for the highest position in the international legal profession. It is not the Chinese diplomatic style to advance a Trojan Horse on a disruptive political or ideological mission.¹⁴

Like it or not, China as a member of the United Nations ipso facto became a party to the Statute of the International Court of Justice, but it had the option, according to Article 36, paragraph 2, of the Statute, of accepting or rejecting the compulsory jurisdiction of the Court. Not surprisingly, the PRC made it known in a letter to the Court dated September 5, 1972, that it "does not recognize the statement made by the defunct Chinese Government on 26 October 1946 . . . concerning the acceptance of the compulsory jurisdiction of the Court."¹⁵ In a similar vein, China strongly opposed the inclusion of provisions concerning the compulsory jurisdiction of an international judicial organ in a prospective international convention on the law of the sea at the Third United Nations Conference on the Law of the Sea.¹⁶

¹²Based on the author's field interviews at UN Headquarters with international civil servants, whose comments were solicited with the assurance that there would be no direct attribution.

¹³For discussions of the status and development of international law in China, see Chiu, *Communist China's Attitude Toward International Law*, 60 AJIL 2 (1966) and Ogden, *China and International Law: Implications for Foreign Policy*, 49 PACIFIC AFFAIRS 28-31 (1976).

¹⁴See Kim, *The People's Republic of China in the United Nations: A Preliminary Analysis*, 26 WORLD POLITICS 316, 328 (1974).

¹⁵REPORT OF THE INTERNATIONAL COURT OF JUSTICE, 1 AUGUST 1972-31 JULY 1973, 28 GAOR, Supp. (No. 5) 1, UN Doc. A/9005 (1973).

¹⁶See 5 THIRD UN CONFERENCE ON THE LAW OF THE SEA, OFF. REC. 24 (1976). Realizing that the compulsory jurisdiction has received a considerable amount of support from Third World countries, China suggested a compromise solution that the

It must be added here that China is not alone in its indifference toward the Court or in its rejection of the compulsory jurisdiction of the Court. The extent to which the work of the Court has languished in recent years may be seen in the brevity of its annual reports.¹⁷ While the 144 member states of the United Nations, together with Liechtenstein, San Marino, and Switzerland, were parties to the Statute as of July 31, 1976, only 45 states recognized the jurisdiction of the Court as compulsory and many of them with serious reservations. More significantly, however, the following states terminated, abrogated, or refused to renew their former declarations of acceptance of the compulsory jurisdiction during the period August 1, 1971 to July 31, 1976: the Philippines (Jan. 18, 1972); Turkey (May 23, 1972); France (Jan. 2, 1974); India (Sept. 18, 1974); and Australia (March 17, 1975).¹⁸

Likewise, China has shown no interest in having a national on the 25-member International Law Commission or the 36-member UN Commission on International Trade Law. On numerous occasions, Chinese delegates stated privately—at times, also publicly—that they were newcomers and had to acquaint themselves with the background of each legal issue under discussion before they could take a firm stand or an active part in its discussion. Chinese representative Ch'en Ch'u stated at the October 20, 1972, meeting of the First Committee of the General Assembly that: "The People's Republic of China did not participate in the Committee on the Peaceful Uses of Outer Space, and it still has to acquaint itself with and study the information and issues relevant to the peaceful uses of outer space. The Chinese Government reserves its right to make comments, and take action on related matters in the future."¹⁹ Four years later, this still represented the Chinese approach to the question of outer space, as well as to most other legal issues—neither outright support nor opposition but a carefully designed diplomatic posture calculated to underplay its indifference to, even possibly contempt for, many purely legal issues in the United Nations.

Given this lack of interest and of qualified legal personnel, it is not surprising that China failed to attend many UN meetings and conferences on international law questions. The four UN conferences on international law to which China did not send a delegation are worth listing:

(1) The United Nations Conference on Prescription (Limitation) in the

provisions of the compulsory jurisdiction on the settlement of disputes "should not be included in the convention itself but should form a separate protocol so that countries could decide for themselves whether to accept it or not." *Id.*

¹⁷ For example, the 1971-1972 annual report amounted to only four and a half printed pages. For the period Aug. 1, 1974 to July 31, 1976, the Court combined two years' work into one "biennial" report that was no more than three printed pages long.

¹⁸ Cf. REPORT OF THE INTERNATIONAL COURT OF JUSTICE, 1 AUGUST 1971-31 JULY 1972, 27 GAOR, Supp. (No. 5) 1, UN Doc. A/7217 (1972); REPORT OF THE INTERNATIONAL COURT OF JUSTICE, 1 AUGUST 1973-31 JULY 1974, 29 GAOR, Supp. (No. 5) 2, UN Doc. A/9605 (1974) and REPORT OF THE INTERNATIONAL COURT OF JUSTICE, 1 AUGUST 1974-31 JULY 1976, 31 GAOR, Supp. (No. 5) 1, UN Doc. A/31/5 (1976).

¹⁹ 27 GAOR, C.1 (1871st mtg.) para. 14 (1972).

International Sale of Goods (UN Headquarters, May 20, 1974-June 14, 1974);

(2) The United Nations Conference on the Representation of States in their Relations with International Organizations (Vienna, Feb. 4, 1975-March 14, 1975);

(3) The United Nations Conference of Plenipotentiaries on Territorial Asylum (Geneva, Jan. 10, 1977-Feb. 4, 1977); and

(4) The United Nations Conference on Succession of States in Respect of Treaties (Vienna, April 4, 1977-May 6, 1977).

UN MULTILATERAL TREATIES

The PRC's practice in the acceptance of UN multilateral treaties is highly eclectic and deliberately ambiguous. As of December 31, 1976, there were 197 multilateral treaties conceived under UN auspices, yet the PRC ratified or acceded to only seven, as shown in Table I. The table may beg more questions than it answers, because it includes the UN Charter, the Statute of the ICJ (which is an integral part of the Charter), and the amendments to the Charter. The PRC as a member of the United Nations is ipso facto bound by any amendments which have come into force.²⁰ However, a problem arises because of a discrepancy between the PRC's declaration on UN multilateral treaties and the UN practice that has developed regarding the succession of states in relation to multilateral treaties in respect of which the Secretary-General performs depositary functions.

According to the established UN practice:

States which recognize that they continue to be bound by a treaty made applicable to their territory by their predecessors address a formal notification to that effect to the Secretary-General, who, in the exercise of his depositary functions, informs all interested States accordingly.²¹

In addition, a state making such a notification is deemed to become a party in its own right to the treaty in question from the date of its independence. Since the PRC has consistently claimed that the issue of China in the United Nations during the exclusion period was one of procedure, not of substance, we may assume that all the rights *and* obligations of the predecessor government devolved upon the Government of the PRC based on the theory of state continuity. However, in a communication received by the Secretary-General on September 29, 1972, the PRC's Minister of Foreign Affairs stated:

1. With regard to the multilateral treaties signed, ratified or acceded to by the defunct Chinese government before the establishment of the Government of the People's Republic of China, my Government will examine their contents before making a decision in the light of the circumstances as to whether or not they should be *recognized*.

²⁰ Art. 108 of the UN Charter.

²¹ MULTILATERAL TREATIES IN RESPECT OF WHICH THE SECRETARY-GENERAL PERFORMS DEPOSITORY FUNCTIONS: LIST OF SIGNATURES, RATIFICATIONS, ACCESSIONS, ETC. AS AT 31 DECEMBER 1976, UN Doc. ST/LEG/SER.D/10 (1977), at xviii [hereafter cited as MULTILATERAL TREATIES].

2. As from October 1, 1949, the day of the founding of the People's Republic of China, the Chiang Kai-shek clique has no right at all to represent China. Its signature and ratification of, or accession to, any multilateral treaties by usurping the name of "China" are all illegal and null and void. My Government will study these multilateral treaties before making a decision in the light of the circumstances as to whether or not they should be *acceded to*.²²

The United Nations has simply decided to quote the PRC's declaratory statement in an explanatory preface, "Note concerning signatures, ratifica-

TABLE I
THE PRC'S RECOGNITION OF ACCESSION TO, OR RATIFICATION OF UNITED
NATIONS MULTILATERAL TREATIES IN RESPECT OF WHICH THE
SECRETARY-GENERAL PERFORMS DEPOSITARY FUNCTIONS
(AS OF 31 DECEMBER 1976)*

Subject	Date of Signature	Date of Entry into Force	Date of PRC's Action
Charter of the United Nations	26/6/45	24/10/45	28/9/45(R?)
Statute of the International Court of Justice	26/6/45	24/10/45	28/9/45(R?)
Amendments to Articles 23, 27, and 61 of the UN Charter	17/12/63	31/8/65	2/8/65(A?)
Amendment to Article 109 of the UN Charter	20/12/65	12/6/68	8/7/66(A?)
Amendment to Article 61 of the UN Charter	20/12/71	24/9/73	15/9/72(R)
Vienna Convention on Diplomatic Relations	18/4/61	24/4/64	25/11/75(R)
Amendments to Articles 24 and 25 of the WHO Constitution	23/5/67	21/5/75	14/1/74(R)
Amendments to Articles 34 and 35 of the WHO Constitution	22/5/73	Not Yet	5/3/76(R)
IMCO Convention	6/3/48	17/3/58	1/3/73(R)
Amendments to Articles 10, 16, 17, 18, 20, 28, 31, and 32 of the IMCO Convention	17/10/74	Not Yet	28/4/75(R)
Constitution of the Asia-Pacific Telecommunity	27/3/76	Not Yet	25/10/76(R)

* This table covers only those multilateral treaties which have been concluded under the auspices of the United Nations or its specialized agencies and the originals of which have been deposited with the Secretary-General. It does not therefore include the conventions of such specialized agencies as the ICAO, UPU, ITU, etc.

R? = Presumably recognized but without public or official declaration to that effect.

A? = Presumably acceded to but without public or official declaration to that effect.

R = Ratified or acceded to.

SOURCE: Adapted from MULTILATERAL TREATIES IN RESPECT OF WHICH THE SECRETARY-GENERAL PERFORMS DEPOSITARY FUNCTIONS: LIST OF SIGNATURES, RATIFICATIONS, ACCESSIONS, ETC., AS AT 31 DECEMBER 1976, UN DOC. ST/LEG/SER. D/10 (1977).

²² *Id.* at iii-iv (emphasis added).

tions, accessions, etc., on behalf of China," along with General Assembly Resolution 2758 restoring the "lawful rights" of the PRC in the United Nations,²³ in its annual publication, *Multilateral Treaties in Respect of Which the Secretary-General Performs Depositary Functions*. The note further states that "[a]ll entries recorded throughout this publication in respect of China refer to actions taken by the authorities representing China in the United Nations at the time of those actions." In other words, all the signatures, ratifications, or accessions by the ROC during the period from October 1, 1949 to October 25, 1971, are recorded in the annual *Multilateral Treaties* publication.

The PRC's own practice in carrying out its declaratory statement is also ambiguous. How should we interpret the PRC's reticence or lack of notification to the Secretary-General? We may safely assume that the PRC did not send official notifications of recognition or accession regarding the Charter, the Statute, and the amendments to the Charter because it was "superfluous" to do so, in spite of the clear implication in the communication of the Foreign Minister that nothing should be taken for granted without a specific decision by his government. What about all other UN multilateral treaties which the ROC had signed or ratified and which are still being recorded in the annual treaty publication? As of now, the PRC has not lodged any protest to the Office of Legal Affairs over such UN practice. Apparently, the PRC is content with the explanatory preface and all the footnotes throughout the publication referring to that preface.

The PRC's position on the question of the succession of states in respect of treaties has remained a mystery, as it has said virtually nothing on this subject. The only Chinese words on the matter that the author was able to locate through perusal of the official records of all the UN organs and agencies was a brief statement by a Chinese delegate in the Sixth Committee on October 9, 1972 that the "[t]he question of succession of States in respect of treaties was complicated and required serious study. [The] Government should be given sufficient time to study it."²⁴ Surely, China had had sufficient time to study this question by April 1977, when the UN Conference on Succession of States in Respect of Treaties was convened in Vienna. Yet China failed to send a delegation to this important conference which would have given the PRC an opportunity to clarify its position.

Although Table I does not include the conventions, protocols, and constitutions of most of the specialized agencies and such other important multilateral conventions as the 1925 Geneva Protocol on chemical and bacteriological warfare and the Geneva Conventions of 1949 on the Protection of War Victims, it does signify the PRC's reluctance to be a party to multilateral agreements. The eleven UN multilateral treaties in the table represent only 5.6 percent of the 197 UN multilateral treaties listed in the 1976 annual *Multilateral Treaties* publication.²⁵

²³ 26 GAOR, Supp. (No. 29) 2, UN Doc. A/8429 (1971).

²⁴ 27 GAOR, C.6 (1327th mtg.) para. 42 (1972).

²⁵ It may be noted here for purposes of comparison that of some 2,000 agreements that the PRC concluded between 1949 and 1967, 49 (or 2.45 percent) represented

The fact that the ROC had already signed and ratified many of the UN multilateral treaties, "usurping the name of China," seems to have been a hindering factor too. The PRC thus far has failed to decide whether it should accede to any of the UN multilateral treaties that the ROC had already signed and ratified with one important exception, the Vienna Convention on Diplomatic Relations of 1961 which the ROC had signed on April 18, 1961, and ratified on December 19, 1969, and which the PRC, to the surprise of many observers in the UN community, also accepted, depositing its instrument of accession on November 25, 1975. It is not clear whether the pressure of the General Assembly debate at its 30th session and the ensuing resolution reaffirming the need for strict implementation by states of the provisions of the Vienna Convention exerted any influence on Peking's decision.²⁶ In acceding to the Vienna Convention, however, the PRC attached reservations to "the provisions about nuncios and the representative of the Holy See in articles 14 and 16 and on the provisions of paragraphs 2, 3 and 4 of Article 37."²⁷

The PRC's infrequent participation in multilateral treaties does not necessarily mean that it is opposed to the substance of each treaty it has failed to ratify.²⁸ Instead, it seems to reflect an ambivalence in the contemporary Chinese image of the international legal order. This may be attributed to the contradictory demands and pressures in Chinese legal thinking. The fact that China has resorted on so many occasions and on so many legal issues to a combination of abstention and nonparticipation seems to suggest that it has not formulated a "principled stand" that is applicable to every legal issue that arises in the conduct of its multilateral diplomacy.

What are the conflicting demands and pressures contributing to this ambiguous legal posture? The Chinese image of the international legal order has been powerfully influenced by the Marxist notion that law, domestic and international, has always been used as a legitimizing instrument by the exploiting class or nation. Viewed in this light, law is seen more as an effective weapon for legitimizing an unjust status quo than as a revolutionary weapon for establishing a new order. In addition, the basic rules of UN multilateral treaties may be perceived as still following closely the

multilateral agreements involving four or more parties. See D. M. JOHNSTON & H. CHIU, *AGREEMENTS OF THE PEOPLE'S REPUBLIC OF CHINA 1949-1967: A CALENDAR* 275-76 (1968).

²⁶ GA Res. 3501, adopted without vote. 30 GAOR, Supp. (No. 34) 154, UN Doc. A/10034 (1975). In its Resolution 31/76 of 13 December 1976, the General Assembly noted that "since the adoption by the General Assembly of its resolution 3501 (XXX) of 15 December 1975 the number of States parties to the Vienna Convention on Diplomatic Relations of 1961 has increased." 31(1) GAOR, Supp. (No. 39) 181, UN Doc. A/31/39 (1976).

²⁷ *MULTILATERAL TREATIES*, *supra* note 21, at 55.

²⁸ Two examples can be cited here: The International Convention on the Suppression and Punishment of the Crime of Apartheid and the International Convention on the Elimination of All Forms of Racial Discrimination. *MULTILATERAL TREATIES*, *supra* note 21, at 84, 110; 29 GAOR, C.3 (2061st mtg.) paras. 6-8 (1974); 29 GAOR, SPC (940th mtg.) paras. 2-4 (1974); 30 GAOR, C.3 (2122d mtg.) para. 30 (1975).

traditional international law formulated by Western bourgeois nations. Hence, the Chinese may doubt that they can ever "win" or "gain" at this game.

The Chinese may also be skeptical of the assumption that a multilateral treaty can really control the recalcitrant behavior of sovereign states. That the Chinese do not see much political or practical utility in a UN multilateral treaty was reflected in the statement of a Chinese delegate in the Sixth Committee that "the protection of diplomatic agents and other internationally protected persons had already been provided for in international law and the internal laws of various countries" and that "Governments had the duty to adopt practical and effective measures to guarantee the safety of those persons."²⁹ Characteristically, the Chinese delegate stopped short of elaborating this interesting proposition. In this spirit, however, China has refused to ratify the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.³⁰

At the same time, the Chinese do realize that UN politics are no longer dominated by the superpowers, as of yore. If the Third World is indeed the motive force pushing forward the wheel of history, as the Chinese frequently assert, does it logically follow that the treaty-making process must also reflect this "irresistible historical trend"? Not necessarily. With a few exceptions, the Chinese do not believe that UN multilateral treaties can serve as a useful weapon in the united struggle of the Third World against the hegemonic politics of the superpowers. With the exception of the Charter itself, none of the 197 UN multilateral treaties has ever been invoked by Chinese delegates in support of their arguments in UN diplomacy. Tellingly, however, Chinese delegates on some occasions have invoked the Geneva Conventions of 1949, which they had recognized.³¹

True to its advocacy of international egalitarianism and participatory democracy in the management of world affairs, China has been prompt in ratifying one type of UN multilateral treaty—the amendatory protocols to the conventions or the constitutions of the specialized agencies and the amendment to Article 61 of the Charter of the United Nations, all of which were designed to increase the number of seats so as to broaden representation in the limited membership organs throughout the UN system. The Chinese support and practice have been firm and unequivocal on this issue.

²⁹ 27 GAOR, C.6 (1327th mtg.) para. 37 (1972).

³⁰ MULTILATERAL TREATIES, *supra* note 21, at 73 and UN Doc. A/PV.2202 at 103 (1973).

³¹ Chinese delegates repeatedly invoked the Geneva Conventions of 1949 in support of their position on the Bangladesh and Middle East questions. Even *Jen-min jih-pao* (People's Daily) cited the Geneva Conventions in legitimizing the Chinese position. For the references to the Geneva Conventions, see PEKING REV., Aug. 18, 1972, at 12-13; Sept. 1, 1972, at 7; Dec. 8, 1972, at 9; JEN-MIN JIH-PAO (ed.) Aug. 28, 1972, at 1; 27 GAOR, SPC (853rd mtg.) para. 53, (1972); *id.* (2105th plen. mtg.) para. 82; 30 GAOR, SPC (988th mtg.) para. 37 (1975).

TOWARD A NEW INTERNATIONAL LEGAL ORDER?

Their highly politicized legalism and lack of qualified "legal workers" have led the Chinese to concentrate on the nebulous domain of a new international legal order. The pattern of Chinese participation throughout the UN system and in UN-sponsored international conferences reveals that the Chinese are indeed interested and involved in what Oscar Schachter has called "the evolving international law of development."³² Given the Chinese conception of world order,³³ this is neither surprising nor illogical. To start with a bird's-eye view, the nature and scope of Chinese participation in the evolving international law of development may be summarized as follows:

(1) The norm-defining and law-declaring resolutions of the General Assembly, which were formulated in juridical language, or the obligations and rights of the member states;

(2) The laying of the three foundations of a New International Economic Order (NIEO),³⁴ especially participation in the UNCTAD Working Group on a Draft Charter of Economic Rights and Duties of States;

(3) The Sixth Committee of the General Assembly, concentrating on the definition of aggression, international terrorism, and the question of Charter review;

(4) The *Ad Hoc* Committee on the Charter of the United Nations and the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization;

(5) The Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction and the Third UN Conference on the Law of the Sea;

(6) The Intergovernmental Committee of the Whole to Draw Up a Constitution for UNIDO as a Specialized Agency;

(7) The United Nations Conference on the Human Environment held in Stockholm, especially in the drafting of the Stockholm Declaration containing a set of "common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment"; and

(8) The Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (held in Geneva outside the UN framework), the main purpose of which was to draw up two draft protocols additional to the Geneva Conventions of 1949.

The common conceptual theme running through the above list of Chinese involvements is the development of new rules, new values, and new norms

³² Schachter, *The Evolving International Law of Development*, 15 COL. J. TRANS. L. 1 (1976).

³³ See S. S. KIM, *THE MAOIST IMAGE OF WORLD ORDER* (1977).

³⁴ GA Res. 3201 & 3202, 6 Sp. GAOR, Supp. (No. 1) 3, UN Doc. A/9559 (1974), 13 ILM 715 (1974) and GA Res. 3281, 29 GAOR, Supp. (No. 31) 50, UN Doc. A/9631 (1974), 69 AJIL 484 (1975), 14 ILM 251 (1975).

of international legal order. Even though the Chinese have yet to use the term, "new international legal order" (*Hsin kuo-chi fa-li chih-hsü*), the Chinese theory and practice, as made manifest in the nature, type, and scope of its participation, clearly suggest a movement in the direction of seeking revision in the structure of the international legal order as part of an overall struggle of the Third World for "redistributive justice." To retain an analytical focus and to keep the present discussion within a manageable scope and length, only three substantive areas—the legal force of General Assembly resolutions, the question of Charter review, and the definition of aggression—have been selected to highlight the evolving Chinese position on a new international legal order.

A. *The Legal Force of General Assembly Resolutions*

For a number of years, many states and many international lawyers have rigidly adhered to the positivistic notion that international legal obligations of the state are confined to those to which it has actually given its consent. Moreover, they have denied—and many of them still do—any legislative status to General Assembly resolutions, except on such internal matters as budgetary questions under Articles 17 and 19 of the Charter. Thus Judge *Ad Hoc* van Wyk stated in the *South West Africa* cases that: "Applicants' contention involved the novel proposition that the organs of the United Nations possessed some sort of legislative competence whereby they could bind a dissenting minority." "It is clear from the provisions of the Charter," he went on to say, "that no such competence exists, and in my view it would be entirely wrong to import it under the guise of a novel and untenable interpretation of Article 38(1)(b) of the Statute of this Court."³⁵

In recent years, an increasing number of legal scholars have challenged such a formalistic interpretation of the processes of law creation in international society.³⁶ They have rejected the artificially rigid demarcation line between binding and nonbinding norms, between treaty and custom, and between lawmaking and law-declaring activities in international organizations. They have also called our attention to the discernible trend from consent to consensus in the mode of the decisionmaking process in international organizations.

Hence, General Assembly resolutions have been characterized as having

³⁵[1966] ICJ REP. 170.

³⁶See O. Y. ASAMOAH, *THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS* (1966); J. CASTAÑEDA, *LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS* (1969); H. CHIU, *THE CAPACITY OF INTERNATIONAL ORGANIZATIONS TO CONCLUDE TREATIES, AND THE SPECIAL LEGAL ASPECTS OF THE TREATIES SO CONCLUDED* (1966); I. DETTER, *LAW MAKING BY INTERNATIONAL ORGANIZATIONS* (1965); L. DI QUAL, *LES EFFETS DES RESOLUTIONS DES NATIONS-UNIS* (1967); Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AJIL 782-91 (1966); R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963); *id.*, *The United Nations and Lawmaking: The Political Organs*, 64 ASIL PROC., 37-48 (1970); Schachter, *supra* note 32; E. YEMIN, *LEGISLATIVE POWERS IN THE UNITED NATIONS AND SPECIALIZED AGENCIES* (1969).

"quasi-legislative force," or of being "soft laws," "*normes sauvages*," or "legal custom," if they meet the following conditions: (1) they were formulated as behavioral norms for the member states or they employed the peremptory language of legal rights and obligations; (2) they were repeated with sufficient frequency and regularity; and (3) they enjoyed consensus, if not unanimity. In short, norm-creating, value-realizing, and law-declaring activities of the General Assembly expressed through its resolutions have the characteristic of *opinio juris* and contribute to the development of customary international law.³⁷

During the period of its exclusion from the United Nations, the PRC's publicists often invoked the principle of *pacta tertiis nec nocent nec prosunt* (treaties create rights and duties only for the parties to them but have no effect on third parties) in maintaining that the PRC could not be legally bound by a number of international conventions.³⁸ The PRC had also invoked this principle whenever it rejected certain resolutions or decisions of the United Nations. Wu Hsiu-ch'uan, the PRC's special representative, declared in the Security Council in November 1950, for example, that "without the participation of the lawful delegates of the People's Republic of China, the people of China have no reason to recognize any resolutions and decisions of the United Nations."³⁹

At the peak of its disenchantment with the United Nations in 1965, Peking's new demands included, *inter alia*, the cancellation of the UN resolutions against the PRC and the Democratic People's Republic of Korea.⁴⁰ Therefore, the question was inevitably raised in the UN community on the eve of the PRC's entry as to whether it would stage an open confrontation in an attempt to undo the "unjust" resolutions of the past, especially General Assembly Resolution 377A, the Uniting for Peace Resolution,⁴¹ and General Assembly Resolution 498, which condemned the PRC for having committed aggression in Korea.⁴²

On November 16, 1971, the day after its debut in the General Assembly, China was presented with its first opportunity to vote on a draft resolution and to clarify its position on the question of past resolutions. The draft resolution condemned, in effect, the U.S. Congress for having passed the Byrd Amendment, which would constitute a "serious violation" of the relevant Security Council resolutions imposing sanctions against the "illegal regime in Southern Rhodesia."⁴³ Huang Hua voted in favor of the resolution but stopped short of fully elaborating China's position on the question

³⁷ Judge Tanaka's Dissenting Opinion in the *South West Africa* cases in [1966] ICJ Rep. 291. An argument along the same line has also been advanced by a prominent international lawyer regarding the establishing of international environment law. See Sohn, *The Stockholm Declaration on the Human Environment*, 14 HARV. INT. L. J. 514 (1973).

³⁸ 2 J. A. COHEN & H. CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW*, 1230-38 (1974).

³⁹ 5 SCOR, (527th mtg.) 4 (1950).

⁴⁰ Kim, *supra* note 14, at 301.

⁴¹ 5 GAOR, Supp. (No. 20) 10, UN Doc. A/1775 (1950).

⁴² 5 GAOR, Supp. (No. 20A) 3, UN Doc. A/1775/Add. 1 (1951).

⁴³ GA Res. 2765, 26 GAOR, Supp. (No. 29) 97, UN Doc. A/8429 (1971).

in everyone's mind: "[W]e wish to state that that [the support for the resolution on hand] does not mean that the Chinese Government is in favour of previous resolutions referred to therein."⁴⁴

Although, contrary to some predictions, China thus avoided an open confrontation on the question of past resolutions, Huang Hua's explanatory statement begged some puzzling questions. Did he really mean that China would not be in favor of all past resolutions adopted during its exclusion? Surely, the Chinese Government could not have any problem in supporting all the "previous resolutions referred to therein" since they had all dealt with the sanctions against the Smith regime in Southern Rhodesia.

The PRC publicists had insisted during the preentry period that the United Nations, in exercising its role in the maintenance of international peace and security, should not intervene in the internal affairs of states in violation of Article 2, paragraph 7 of the Charter. However, they also argued in support of UN intervention and sanctions in connection with colonial and apartheid questions involving Portugal, Southern Rhodesia, and South Africa. The PRC's rationale for this apparent double standard was that acts in support of national liberation movements could not constitute "matters which are essentially within the domestic jurisdiction of any State."⁴⁵ On the contrary, such acts, argued one leading PRC authority on the United Nations, run counter to the fundamental Charter principles of national self-determination and respect for human rights and also endanger the peace and security of the world. Hence, both the General Assembly and the Security Council have the duty and the authority to deal with this question.⁴⁶

Faced with probing questions in the wake of Huang Hua's above-quoted statement, Chinese delegates replied in private that they would judge past resolutions on their intrinsic merits, challenging some and accepting others. This appears to contradict Huang Hua's explanatory statement. There was a great deal of confusion among Chinese delegates to the 26th session of the General Assembly on this question. It was apparent that they did not have clear instructions on this matter, probably because the Ministry of Foreign Affairs did not expect its delegation to be so persistently pressed on the question.⁴⁷

Be that as it may, the promised challenge to the past resolutions judged to be bad or unjust never came. Peking apparently made a decision not to drag the skeletons out of the UN closet. China has followed the practice of repeatedly invoking certain resolutions in support of its multilateral diplomacy, all of which, with two exceptions, were adopted since its entry. Instead of attacking in public those resolutions which it judged to be ineffective, unjust, or in violation of the spirit of the Charter, China has decided simply to ignore them, with one exception to be noted later. When

⁴⁴ 26 GAOR (1984th plen. mtg.) para. 92. See also UN Doc. S/PV. 1825, at 38-40 (1975); 30 GAOR, C.4 (2159th mtg.) para. 9 (1975).

⁴⁵ Art. 2(7) of the UN Charter.

⁴⁶ KUO CH'ÜN, LIEN-HO KUO (The United Nations) 15 (1956).

⁴⁷ Based on the author's field interviews at UN Headquarters.

politically or tactically convenient, China has shown no hesitancy in invoking a resolution as an authoritative source of support in legitimizing its position or in attacking the policy and practice of others.

Does this mean that General Assembly resolutions have become legally binding? Characteristically, China has shied away from elaborating on such a legalistic question. Judging by China's state practice, however, it may be argued that resolutions that are regarded as being "just" or "in conformity with the spirit of the Charter" are held to be binding, while those that do not meet such subjective criteria are not binding. A few selected examples will illustrate this practice of selective reliance on law in Chinese multilateral diplomacy.

The PRC's practice of invoking UN resolutions as authoritative support for its position has centered on five issues: (1) the restoration of the lawful rights of the PRC in the UN system; (2) the Bangladesh membership question; (3) colonial and apartheid questions related to Southern Rhodesia, South Africa, Portugal (before 1975), and Namibia; (4) the NIEO; and (5) the law of the sea.

From the very beginning of the controversy about China in the history of the United Nations, it was the General Assembly that established the political guidelines for other organs and agencies of the UN system to follow. On October 26, 1971, Secretary-General U Thant transmitted to the executive heads of all the organs and agencies of the UN system the text of General Assembly Resolution 2758, the operative paragraph of which stated:

Decides to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and *in all the organizations related to it*.⁴⁸

The PRC for its part was not content with the General Assembly action. In a note of January 12, 1972, addressed to Secretary-General Kurt Waldheim, Huang Hua urged the UN Secretariat to take all necessary measures to ensure the following: (1) that the United Nations and all its related organizations immediately cease all contacts with "the Chiang Kai-shek clique"; (2) that all the assistance and contacts of the UN Development Programme and the Office of Technical Co-operation, as well as others related to "the Chiang Kai-shek clique," including projects in operation and projects that had not yet begun, should also cease, so that the resolution of the General Assembly on China might be implemented in earnest; and (3) that the PRC Permanent Mission should be informed at the earliest possible date of the results of actions taken in regard to these matters.⁴⁹ In short, the PRC has acted as if General Assembly Resolution 2758 has somehow

⁴⁸ *Supra* note 23, (emphasis added).

⁴⁹ Huang Hua *Urges UN and All Related Organizations to Cease Immediately All Contacts with Chiang Kai-shek Clique*, NCNA-English United Nations (Jan. 13, 1972), in SURVEY OF CHINA MAINLAND PRESS, No. 5062, Jan. 26, 1972, at 127.

become a universally binding law, applicable to all the specialized agencies and all the nongovernmental organizations (NGO's) which are affiliated with the specialized agencies, and it has attacked the Bank Group (IDA, IBRD, IFC, and IMF) for failing to implement this historic resolution.⁵⁰

The PRC has also invoked the relevant General Assembly resolutions in justification of its first veto in 1972 blocking Bangladesh's membership in the United Nations. Similarly, the PRC voted in favor of Bangladesh's membership in 1974 on the ground that all the relevant resolutions had been implemented. Based on the various resolutions of the General Assembly and the Security Council, China declared that the United Nations is indeed "the Administering Authority for Namibia" and that "it is the unshirkable duty of every Member State of the United Nations to fulfill and implement these resolutions."⁵¹ Likewise, China argued that "concrete and effective measures were urgently required to give effect to the many United Nations conventions and resolutions on racism and *apartheid* which had been adopted in the past."⁵² It was in this vein that China made one of its rare and specific attacks against the United States for the latter's failure to comply with Security Council resolutions on sanctions against Southern Rhodesia.

The PRC's invocation of the three NIEO resolutions—the Declaration on the Establishment of a New International Economic Order, the Programme of Action on the Establishment of a New International Economic Order, and the Charter of Economic Rights and Duties of States⁵³—has been pervasive throughout the UN system. Either by design or accident, Chinese representative Chang Tsien-hua went so far as to say in the *Ad Hoc* Committee of the sixth special session of the General Assembly that "the Programme of Action should be binding on States."⁵⁴ Since the 29th session of the General Assembly, the three NIEO resolutions have virtually replaced the UN Charter as the legitimizing source of China's position on development issues. In spite of this state practice, however, none of the Chinese delegates has ever made a single legal exposition as to why the three NIEO resolutions (two of which were adopted even without a vote) should be binding or why the specialized agencies with their own constitutions or even the NGO's should implement them.

At the second session of the Third UN Conference on the Law of the Sea held in Caracas in the summer of 1974, Chinese delegate Ko Tsai-shuo invoked "the relevant General Assembly resolutions on the international seabed regime" as the authoritative reference for the Conference to proceed on the issue. "Since the relevant General Assembly resolutions stated," continued Ko Tsai-shuo, "that the international sea-bed area should be used for peaceful purposes, military operations, the emplacement of nuclear and other

⁵⁰ For a further discussion, see CHINA, THE UNITED NATIONS, and WORLD ORDER, *supra* note 2, Ch. 7.

⁵¹ 27 SCOR (1656th mtg.) para. 92 (1972). See also UN Doc. S/PV. 1825, at 38-40 (1975); 30 GAOR, C.4 (2159th mtg.) para. 9 (1975).

⁵² 28 GAOR, C.3 (2007th mtg.) para. 35 (1973).

⁵³ *Supra* note 34.

⁵⁴ 6 Sp. GAOR, AC.166 (13th mtg.) para. 27 (1974).

weapons and activities of nuclear submarines in that area should be forbidden." However, what is most surprising is the invocation of General Assembly Resolution 2574D⁵⁵ which was adopted by a roll-call vote of 62 to 28 with 28 abstentions during the pre-entry period. "The principle clearly stated in General Assembly resolution 2574D (XXIV)," argued Ko Tsai-shuo, "that, pending the establishment of the international regime, States and persons should refrain from the commercial exploitation of the international area, must be respected."⁵⁶

Likewise, even though the Declaration of Principles Governing the Seabed and the Ocean Floor and the Subsoil Thereof Beyond the Limits of National Jurisdiction was adopted by the General Assembly during its exclusion, Chinese representative Hsia Pu declared in the UN Seabed Committee: "We hold that the foregoing provisions in the declaration of principles are basically in conformity with the interests of the peoples of all countries. Therefore, we agree in principle to establish an international regime governing the international sea-bed area on the basis of these provisions [in the resolution]."⁵⁷ This resolution was also cited approvingly in a "For Your Reference" commentary in the *Peking Review*, entitled "Struggle over Exploitation of International Seabed."⁵⁸

Two additional cases of selective Chinese reliance on law may be mentioned. When the Security Council was immobilized by the Soviet vetoes during the 1971 Indo-Pakistani War, China, without any reservations or qualifications, voted in favor of Security Council Resolution 303⁵⁹ which referred the deadlocked issue to the General Assembly for consideration, based specifically on the Uniting for Peace Resolution. Likewise, China voted for the Assembly's cease-fire and troop withdrawal resolution on the Indo-Pakistani War⁶⁰ without raising any objections to the citation of the Uniting for Peace Resolution as a legal basis for this Assembly action.⁶¹

What happened to China's principled stand on the Uniting for Peace resolution? China has never made its position clear on this resolution, as it has never attacked the resolution since its entry into the United Nations. While China has never publicly attacked any General Assembly resolutions, it did attack once, and for the first time in open confrontation with the superpowers, Security Council Resolution 339 as a "scrap of paper," in the course of a Council debate on the establishment of UNEF II on October 25, 1973.⁶²

⁵⁵ 24 GAOR, Supp. (No. 25) 11, UN Doc. A/7630 (1969).

⁵⁶ 2 THIRD UN CONF. ON THE LAW OF THE SEA, OFF. REC. 37 (1975).

⁵⁷ U.N. Sea-Bed Committee Ends Session, PEKING REV., Aug. 25, 1972, at 11.

⁵⁸ *Id.*, July 8, 1977, at 24.

⁵⁹ For the text of the resolution, in which a reference to GA Res. 377(A) is made, see 26 SCOR, RES. & DEC. 10 (1971).

⁶⁰ GA Res. 2793, 26 GAOR, Supp. (No. 29) 3, UN Doc. A/8429 (1971), adopted by a roll-call vote of 104 to 11, with 10 abstentions.

⁶¹ One of the preambular paragraphs of the resolution reads: "Mindful of the purposes and principles of the Charter and of the General Assembly's responsibilities under the relevant provisions of the Charter and of Assembly resolution 377(A) of 3 November 1950."

⁶² UN Doc. S/PV.1750, at 6 (1973).

What is revealing about Huang Hua's polemics during the debate is the fact that he attacked the resolution on political rather than on legal grounds. To the Chinese, the ghost of the Korean police action returned to the Security Council as it groped to work out a formula for UNEF II that would receive the blessing of the superpowers. "Through their prolonged struggle against foreign aggression over the past century and more," Huang Hua argued passionately, "the Chinese people have come to realize that a scrap of paper cannot drive away the aggressors."⁶³ He then asked: "What 'United Nations emergency peace-keeping force'? To put it bluntly, this is an attempt to occupy Arab territories. Is not South Korea a living example?"⁶⁴

From a legal point of view, Chinese practice here makes little sense. China had the Charter-given right to veto the authorizing resolution for UNEF II, yet it declined to do so on political grounds. Having allowed the resolution to pass, China then attacked it as a "scrap of paper" and, as will be shown, refused to assume any of the financial obligations incurred by UNEF-UNDOF operations. However, what makes little sense from a purely legal standpoint makes sense from the standpoint of China's own logic of its global strategy.

Does China itself practice what it often criticizes others for not doing in regard to General Assembly resolutions? This is a difficult and, in a sense, a misleading question, because most General Assembly resolutions are hortatory in nature. China is seldom the target of specific resolutions urging specific actions on its part. However, the budgetary question is an exception in this regard. The PRC's refusal to pay the assessed amounts for UNEF-UNDOF operations provides contradictory evidence of Chinese legal practice, and, as such, deserves a brief analysis here.

In the face of the threat that unilateral congressional or executive action might follow if the Fifth Committee of the General Assembly failed to adopt the U.S. proposal for reduction in its assessment to 25 percent, Chinese representative Hsing Sung-yi flatly declared on November 27, 1972: "China held that once the General Assembly had adopted the scale of assessments, it was incumbent upon every Member State to bear its share in accordance with the assessment."⁶⁵ However, after the establishment of UNEF II and UNDOF, the Chinese delegates have, in the form of non-participation in the vote, repeatedly expressed their opposition to including the expenses of UNEF II and UNDOF as a *UN expenditure*.⁶⁶

Surely, the Assembly decision on appropriations is no less legally binding than its decision on assessment. The Assembly decided to appropriate

⁶³ *Id.*

⁶⁴ *Id.*, at 7-10.

⁶⁵ 27 GAOR, C.5 (1536th mtg.) para. 50 (1972).

⁶⁶ For a comprehensive statement made by Chinese representative Wang Wei-tsai in the Fifth Committee on this question, see 28 GAOR, C.5 (1604th mtg.) paras. 60-66 (1973). For repetition of Wang Wei-tsai's exposition in subsequent discussions, see UN Doc. A/PV. 2303, at 76-80 (1974); 29 GAOR, C.5 (1654th mtg.) para. 16 (1974); UN Doc. A/PV. 2389, at 16 (1974); 30 GAOR, C.5 (1725th mtg.) 3; *id.* (1752d mtg.) 12 (1975); UN Doc. A/31/PV.41, at 6 (1976); UN Doc. A/C.5/31/SR.14, at 13 (1976).

the expenses of UNEF II and UNDOF and then to apportion them among all member states on a special scale.⁶⁷ Yet, China acted as if its non-participation in the vote made the Assembly decision not legally binding upon itself and hence cancelled its obligation to pay. To regard the costs of UNEF II and UNDOF as *expenses of the Organization*, Chinese representative Wang Wei-tsai argued in the Fifth Committee, "was tantamount to requesting all Member States to pull the chestnuts out of the fire for the two super-Powers."⁶⁸ The fact that China has voluntarily increased its own assessment in its own practical fashion or that the amounts it has withheld are relatively small cannot erase this conspicuous flaw in the Chinese record of compliance with the legally binding Assembly resolutions on budgetary matters.

Despite this flawed record in budgetary compliance, however, China has established an "excellent" reputation throughout the UN system for a high degree of credibility. Does China suffer any credibility problem from a discrepancy between what it says and what it actually does? Practically all of the author's respondents have answered this question in the negative. The explanation for the apparent paradox seems rather simple: there is no credibility problem with China because it does not promise what it is unable or unwilling to deliver, and it does fulfill promptly what little it does promise. There is an almost universally shared assumption among the participants that such great powers as the United States (UNESCO, ILO), the Soviet Union (UNEF I and ONUC), and the PRC (UNEF II and UNDOF) cannot be expected to pay for the programs or items that are perceived as being contrary to their national interests. This is a matter of perception, not of law, which does not need to be debated here. However, the legal hazards and ambiguities in Chinese budgetary practice are self-consciously left unclarified by both China and other member states. The desire not to reopen the Pandora's box of Article 19 seems to be universal.

Of course, China cannot escape from the right and responsibility of voting on issues of a purely legal nature. However, not many draft resolutions relating to Legal (Sixth) Committee matters are pressed to a roll call or recorded vote. Table II summarizes all the resolutions adopted by vote in the plenary of the General Assembly upon the recommendation of the Sixth Committee between 1972 and 1976, and the resolution on the peaceful settlement of international disputes which was considered directly in plenary. Although the table is admittedly limited in the number of legal issues covered (General Assembly Resolution 3314 containing the Definition of Aggression in its annex was adopted without vote, for example), it does nonetheless illustrate China's selective, pragmatic, and opportunistic posture on legal issues.

Despite the resort to a legally sweetening argument from time to time, the underlying basis of Chinese multilateral diplomacy is political. However, China has learned the art of legitimizing its multilateral diplomacy in terms of resolutions that it believes to be conceptually appealing to the

⁶⁷ GA Res. 3101, 28(1) GAOR, Supp. (No. 30) 122, UN Doc. A/9030 (1973).

⁶⁸ 28 GAOR, C.5 (1604th mtg.) para. 66 (1973).

TABLE II
THE PRC'S VOTING RECORD ON SELECT LEGAL RESOLUTIONS ADOPTED
BY THE GENERAL ASSEMBLY, 1972-1976

Subject	Resolution	Date	Vote	PRC's Vote
Report of the International Law Commission	2926	28/11/72	93:0:26	NP or Ab*
Respect for human rights in armed conflict	3032	18/12/72	103:0:25	NP or Ab
Measures to prevent international terrorism, etc.	3034	18/12/72	76:35:17	Yes
Respect for human rights in armed conflict	3102	12/12/73	107:0:6	Yes
Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes	3103	12/12/73	83:13:19	Yes
Peaceful settlement of international disputes	3283	12/12/74	68:10:35	Yes
Need to consider suggestions regarding the review of the Charter	3349	17/12/74	82:15:36	Yes
Implementation by states of the provisions of the Vienna Convention on Diplomatic Relations of 1961	31/76	13/12/76	92:0:25	NP or Ab

* NP = Nonparticipation. Ab = Absence.

Third World. The change of its vote from nonparticipation or absence to "yes" on the resolution regarding "respect for human rights in armed conflict" also suggests that the Chinese legal posture is amenable to "progressive" change and adaptation under the pressure of the Organization. The cumulative impact of China's practice of invoking resolutions in support of its multilateral diplomacy augurs well, too, since such a practice on the part of the member states helps the General Assembly's law-developing and norm-creating process.

B. *The Charter Review Question*

The General Assembly first considered the Charter review question in 1955 in compliance with Article 109(3) of the Charter and adopted a resolution deciding in principle that a conference to review the Charter should be held "at an appropriate time."⁶⁹ The Assembly disposed of the issue by establishing a committee of the whole to keep the matter under review. The question was raised at subsequent sessions. At its 25th session the General Assembly decided to request the Secretary-General to invite member states to submit their views on the need to review the Charter and to report to the 27th session, which adopted a similar resolution with re-

⁶⁹ GA Res. 992, 10 GAOR, Supp. (No. 19) 49, UN Doc. A/3116 (1955).

spect to the 29th session.⁷⁰ Following heated debates in the General Committee and the Sixth Committee, the General Assembly at its 29th session finally adopted a resolution (see Table II) establishing a 42-member *Ad Hoc* Committee on the Charter of the United Nations with a mandate to discuss and consider suggestions and observations from member states on the need and desirability of the Charter review question.

Of the Big Five, China has clearly distinguished itself from the outset as the only revisionist supporter on the Charter review question. However, the nature of Chinese support is more symbolic than substantive, more generalized than specific. This may be a function of its diplomatic style rather than a tactical move to disguise its true intentions.

The demands for Charter review and revision as advanced by many developing countries and Japan are congenial to the Chinese image of a new world order. Moreover, China's state practice is consistent with its advocacy of international egalitarianism, which is central to the question of Charter review.

The recorded vote of 82 to 15, with 36 abstentions, on General Assembly Resolution 3349⁷¹ clearly showed a sharp and fundamental divergence of opinion among member states on the need even to discuss the Charter review question. The 83 positive votes came from developing countries, plus Australia, China, Italy, Japan, New Zealand, and Spain, while the 15 opposing votes were cast by the United States, the United Kingdom, France, the Soviet Union, its "bloc member states," Saudi Arabia, and Democratic Yemen. The 36 abstainers represented a mixture of some West European and developing countries. Thus, China stood out as the only permanent member of the Security Council supporting Charter review and revision.

Before examining the Chinese position on the Charter review question, it may be helpful to define the scope of Chinese participation on this issue. Even before the establishment of the *Ad Hoc* Committee, the Charter review question was one of the few legal issues that invited Chinese response in the Sixth Committee. Following the establishment of the *Ad Hoc* Committee, China immediately showed its interest in serving on the Committee. The *Ad Hoc* Committee met from July 28, 1975 to August 22, 1975 in New York. At the 30th session of the General Assembly, the *Ad Hoc* Committee was converted into a 47-member Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization.⁷² China, as a member of the Special Committee, participated in both its first session (February 17, 1976 to March 12, 1976) and second session (February 14, 1977 to March 11, 1977). While China has been characteristically modest, passive, and reactive in the *Ad Hoc* and Special Committees, it has, unlike its actions in so many other *ad hoc* or special committees of the General Assembly, participated in every phase

⁷⁰ GA Res. 2697, 25 GAOR, Supp. (No. 28) 127, UN Doc. A/8028 (1970); GA Res. 2968, 27 GAOR, Supp. (No. 30) 116, UN Doc. A/8730 (1972).

⁷¹ 29(1) GAOR, Supp. (No. 31) 148, UN Doc. A/9631 (1974).

⁷² GA Res. 3499, 30 GAOR, Supp. (No. 34) 152, UN Doc. A/10034 (1975).

of the deliberations on the Charter review question. In addition, the question has received extensive coverage in the Chinese press.

From the beginning, the Chinese have seen the question of Charter review as a political struggle between the defenders of the status quo, who tenaciously adhere to their privileged status (the veto), and the revisionist underdogs, who wish to review and revise the Charter so as to make it reflect a new or more equitable order in UN politics. Although simplistic, such a conceptualization has an element of truth. When all the legal arguments for and against the Charter review question are stripped to their essence, one of the core issues centers on the *who*, *how*, and *what* aspects of the veto. In short, the issue is more political than legal.

To put the Chinese stand in a comparative frame of reference, the positions of the remaining four permanent members of the Security Council may be summarized.

From the outset, the Soviet Union assumed an unyielding posture of opposition even to discussion of the matter. When its proposal in the General Committee to delete the item from the provisional agenda for the 29th session of the General Assembly was rejected by a vote of 19 against, 3 in favor, with 2 abstentions, the Soviet Union became more militant in the *Ad Hoc* and Special Committees, presenting its view in absolute and categorical terms. In the Soviet image, the United Nations is a unique international organization because it protects—thanks to the principle of unanimity, which is claimed to be the keystone of the Charter—the equality of different social systems. It is not only Utopian but also dangerous to imagine that the United Nations can ever be transformed into some sort of supranational machinery, since this creates the possibility of subjecting states to a single social system. *Any* revision of the Charter, in particular any change in the principle of unanimity, may well shake the foundations of the United Nations and call into question the very existence of the Organization. The Charter is such a coherent and integral whole in the Soviet view that *any* amendment made to one part “would have a self-defeating effect and would destroy the entire structure of international law.”⁷³

The French position, though not as absolute or categorical as the Soviet Union's, is firmly opposed to any Charter review and revision. The Charter has proved to be flexible and adaptable, standing the test of time. “It is because the Charter gave the power of decision,” a French position paper states, “in matters relating to international peace, to the organ governed by the principle of unanimity among the Powers bearing the heaviest responsibilities in this field, that this result, however inadequate it may still seem, has been achieved.” What is required is “not a review of the Charter but the strict application of its provisions and full utilization of the

⁷³ UN Doc. A/C.6/31/SR.47, at 9 (1976). The Soviet position summarized in this article is based on the following: REPORT OF THE AD HOC COMMITTEE ON THE CHARTER OF THE UNITED NATIONS, 30 GAOR, Supp. (No. 33) 88-95, UN Doc. A/10033 (1975) [hereinafter cited as REP. AD HOC COMM.] and UN Docs. A/AC.182/SR. 11, at 2-5 and A/C.6/31/SR.47, at 7-11 (1976).

possibilities that it affords." "In order to cope with future difficulties," the French conclude, "the potential of the Charter must therefore be kept intact."⁷⁴

The British and American positions are strikingly similar in style and substance. While opposed to any general or comprehensive Charter review, both expressed willingness to consider specific amendment proposals on a case-by-case basis, provided they were well founded and had wide support among all sectors of the UN membership. But to initiate the process of general Charter review at this time in the absence of an overwhelming consensus (only 43 member states submitted position papers during a five-year period) is more likely to weaken than to strengthen the United Nations. In view of this conviction, the British and American position papers stopped short of elaborating their respective views on the principle of unanimity in the Security Council.⁷⁵

In contrast, China's support of Charter review and revision predated the establishment of the *Ad Hoc* Committee by two years. In his major policy speech before the plenary of the General Assembly on October 3, 1972, Ch'iao Kuan-hua for the first time made known the Chinese position on the question of Charter review in the following terms:

We maintain that on the basis of upholding the purpose and principles of the United Nations Charter, careful consideration should be given to the views of various countries for necessary revisions of the Charter so as to truly give effect to the principle that all Member States, big or small, are equal. Of course, we likewise consider that the revision of the Charter is a serious and important question, and we are ready to join you all in serious explorations.⁷⁶

Uncharacteristically, China has also submitted a position paper on the question of Charter review in response to the invitation of the Secretary-General.⁷⁷ Both Ch'iao Kuan-hua's statement and the position paper provided a basic diplomatic guideline for Chinese delegates to expound their position in the Sixth, *Ad Hoc*, and Special Committees.

How does China envisage the matter? In spite of its vague and often too generalized statements, one point emerges clearly: for China, the Charter review question is neither a legal issue nor an isolated political question. It is part of the larger struggle for "the establishment of a new international relations based on equality."⁷⁸ Rebutting the Soviet argument that the principle of unanimity (the veto) is "the keystone of the

⁷⁴ REP. AD HOC COMM., *supra* note 73, at 27-30 and UN Doc. A/AC.182/SR.8, at 3-6 (1976).

⁷⁵ REP. AD HOC COMM., *supra* note 73, at 96-101.

⁷⁶ *Chairman of Chinese Delegation Chiao Kuan-hua's Speech*, PEKING REV., Oct. 13, 1972, at 10.

⁷⁷ Operative paragraph 1 of GA Res. 2968 (*supra* note 70) "requests the Secretary-General to invite Member States that have not already done so to submit to him, before 1 July 1974, their views on the desirability of a review of the Charter of the United Nations and their actual suggestions in this respect." For the Chinese position paper, see UN Doc. A/9739, at 3-4 (1974).

⁷⁸ 29 GAOR, C.6 (1513th mtg.) para. 37 (1974).

Charter," Ho Li-liang declared in the Sixth Committee that "the cornerstone upon which the Organization rested was the principle of equal rights for all countries."⁷⁹ China has also linked the Charter review question, NIEO, and "a new law of the sea" as the three separate but mutually complementary dimensions of the struggle of the developing countries to establish a new world order.⁸⁰

Beyond the generalized guideline that "the Charter should be modified on the basis of the principle of the equality of all States,"⁸¹ however, the Chinese position on specifics seems deliberately ambiguous. For example, on the central question of the veto, China has stopped short of advocating its abolition or modification. Instead, Chinese support is expressed in the form of an *amicus curiae* argument.

Many countries had advanced views in principle on the revision of certain Charter provisions, such as expanding the power of the General Assembly, restricting the power of the Security Council, changing the composition of the Security Council, limiting or abolishing the veto rights of the States which were permanent members of the Council. Those views deserved serious consideration. . . . [I]f consultations and discussions were held on the basis of the principle of equality of all countries, it would be possible to find a rational solution acceptable to all.⁸²

Such vague and generalized support for Charter revision has invited trenchant Soviet attack: "The Chinese delegation had attacked the right of veto but a three years previously [*sic*] when the representative of the USSR had asked the Chinese delegation whether it was going to forgo the right it enjoyed as a member of the Security Council, it had received no answer. The Chinese delegation was using that issue for demagogic ends, in order to seek prestige in the eyes of the third world countries."⁸³ The Soviet Union thus "exposes" the Chinese position which is fraught with legal ambiguities and logical inconsistencies.

China declares that it upholds the principles and purposes of the Charter; it is the structure of power in the Organization that needs to be reviewed so as to reflect the "irreversible trend" of a new egalitarian order. If this is so, the veto is symbolically and practically the most logical target for reform. China should have, but has not, gone beyond the "serious consideration" proposal in attacking the veto as incompatible in theory and practice with the principle of the equality of all member states, large or small, in the management of UN affairs. Indeed, there is little risk in taking this approach since the veto cannot be abolished or modified without the unanimous consent of the Big Five. The great powers had already built into the Charter the mechanism for perpetuating their privileged status by making

⁷⁹ 30 GAOR, C.6 (1569th mtg.) para. 32 (1975).

⁸⁰ UN Doc. A/PV.2440, at 77 (1975).

⁸¹ 29 GAOR, C.6 (1462d mtg.) para. 31 (1974).

⁸² 30 GAOR, C.6 (1565th mtg.) para. 28 (1975). See also UN Doc. A/C.6/31/SR.47, at 4 (1976) and REP. AD HOC COMM., *supra* note 73, at 10-11.

⁸³ UN Doc. A/C.6/31/SR.47, at 11 (1976).

it impossible to amend any article in the Charter without their unanimous consent.⁸⁴

Instead of attacking the veto in theory, however, China has attacked the veto in practice. Not a single statement has been made *directly* challenging the veto per se as being contrary to the principle of the sovereign equality of states; instead, Chinese salvos have been directed at the abusive practices of the superpowers. The Soviet Union is accused of "wilfully abusing the veto right to practice big-power hegemonism and to cover up its social-imperialist features."⁸⁵ The cases of Czechoslovakia in 1968 and the Indo-Pakistani War in 1971 have been singled out as illustrative examples.⁸⁶ The United States is less strongly criticized for having abused the veto in connection with draft resolutions on South African questions and UN membership for Vietnam.⁸⁷ Curiously, abuse of the veto on the part of the United Kingdom and France is either forgotten or forgiven, while China's own two vetoes were excused as a legitimate exercise, upholding the principles of the Charter and relevant UN resolutions. Nonetheless, the PRC has been the most parsimonious of the Big Five in the exercise of the veto, as shown by the following distribution of the 37 vetoes on 29 different issues during the period November 23, 1971 to December 31, 1976: 17 by the United States; 9 by the United Kingdom; 5 by the Soviet Union; 4 by France; and 2 by China.⁸⁸

Despite the ambiguities inherent in China's general support of Charter review, the question has brought into focus the symbolic, normative, and behavioral dimensions of Chinese multilateral diplomacy. China has succeeded in symbolically projecting itself as the only permanent member of the Security Council willing to give moral and political support to the demands of the underdogs for a more egalitarian order and justice, even at the possible risk of forgoing its own privileged status in the United Nations.

It may also be added that the vehement Soviet opposition to Charter review has had the effect of "strengthening" the Chinese supportive position on the issue. However, the prospects of Charter revision are now in serious doubt. When things were not moving in his direction toward the end of the second session of the Special Committee in March 1977, Soviet representative Kolesnik threatened that "the subsequent participation of the Soviet delegation in the work of the Special Committee would have to be reconsidered."⁸⁹

⁸⁴ Art. 108 of the UN Charter.

⁸⁵ *A Just Demand of the Third World Countries*, JEN-MIN JIH-PAO, Mar. 24, 1977, at 6.

⁸⁶ See 30 GAOR, C.6 (1569th mtg.) para. 36 (1975) and UN Doc. A/C.6/31/SR.47, at 3 (1976).

⁸⁷ UN Doc. A/C.6/31/SR.47, at 3 (1976).

⁸⁸ A detailed analysis of Chinese voting behavior in the Security Council is contained in Chapter 4 of *China, the United Nations, and World Order*, *supra* note 2.

⁸⁹ UN Doc. A/AC.182/SR.20, at 15 (1977). What infuriated the Soviet representative was that the Committee—through a roll-call vote of 30 (including China) to 8 against (the USSR, the United Kingdom, the United States, Belgium, Czechoslovakia, France, German Democratic Republic, and Poland), with 5 abstentions—annexed to the Committee report two papers containing suggestions for revising the Charter and

C. *The Definition of Aggression*

On December 14, 1974, the General Assembly adopted by consensus the resolution approving the definition of aggression and calling on all states to refrain from all acts of aggression and other uses of force contrary to the UN Charter and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁹⁰ The resolution also called the attention of the Security Council to the definition and recommended that it should, as appropriate, take account of the definition as guidance in determining, in accordance with the Charter, the existence of an act of aggression.

The definition contains a preamble, reaffirming the fundamental principles upon which it is based, followed by eight operative articles. Articles 1 and 2 provide the general definition of aggression, emphasizing the two elements: the use of *armed force* and *the first use* of armed force. Article 3 enumerates seven acts that qualify as an act of aggression and Article 4 states that the list is not exhaustive. Article 5 mentions the legal consequences of aggression. Articles 6 and 7 assure the compatibility between the definition and Charter provisions concerning self-defense and the right of peoples to self-determination. And Article 8 states that the interpretation and application of the provisions in the definition should be made on the basis of the interrelation of all articles.⁹¹

To examine China's position in a broad historical perspective, several "background factors" that may have influenced the Chinese attitude toward the definition should be mentioned. First, the term "aggression" in the context of UN politics may easily have evoked a bitter and negative emotional response in the Chinese mind, given the fact that the PRC itself was condemned as an aggressor in General Assembly Resolution 498.⁹²

Second, the definition is the product of seven years of work by the Special Committee on the Question of Defining Aggression established by the General Assembly in 1967. As such, much of the Committee work was already in progress when the PRC entered the United Nations. There is no evidence that China has since shown any interest in serving on the Special Committee. The final report of the Special Committee as presented to the Sixth Committee therefore had no Chinese inputs. Finally, the excessive zeal traditionally shown by the Soviet Union on the question of defining aggression, in spite of its own dubious record, may have made China cynical as well as hardening its position.⁹³

strengthening the Organization's role. One paper (A/AC.182/L.12/Rev.1 (1977)) was submitted by 16 countries and the other (A/AC.182/L.15 (1977)) by Italy and Spain. For details, see UN Doc. A/AC.182/SR.20, at 1-17 (1977). For the Chinese reaction, see *A Just Demand of the Third World Countries*, JEN-MIN JIH-PAO, Mar. 24, 1977, at 6.

⁹⁰ GA Res. 3314, 29 GAOR, Supp. (No. 31) 142, UN Doc. A/9631 (1974).

⁹¹ For detailed analyses of the definition, see V. Cassin, *et al*, *The Definition of Aggression* 16 HARV. INT. L. J. 589 (1975) and J. Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 AJIL 224 (1977).

⁹² *Supra* note 42.

⁹³ It may be recalled here that the Soviet Union was the first state to propose a

Since the plenary adopted the resolution with the annexed definition by consensus, the actual debate on the definition took place in the Sixth Committee. However, that debate was not extensive; it was designed largely to accept and approve the *fait accompli*, the report of the Special Committee, while giving an opportunity to those member states that had not served on the Special Committee to express their views, reservations, or interpretations of the definition. The Sixth Committee adopted the draft resolution without a vote at its 1503rd meeting on November 21, 1974. Chinese representative Ho Li-liang expressed the Chinese position by stating that "if a vote had been taken on the draft resolution which had just been adopted, her delegation would not have taken part in it."⁹⁴ In short, China would have opted for nonparticipation in a roll-call or recorded vote as an expression of its serious reservations about, if not outright opposition to, the definition.

The Chinese press has virtually ignored the question of the definition of aggression in the United Nations. The analysis which follows is, therefore, based largely on the statements made by An Chih-yüan, Ho Li-liang, and Ling Ching in the course of the debate in the Sixth Committee during the 28th and 29th sessions of the General Assembly.

Characteristically, China took a deductive approach to the question of defining aggression. That is, China first expounded at a high conceptual level its own views on the subject matter before making specific comments on specific provisions or articles contained in the draft definition submitted by the Special Committee. There is no evidence that China makes a distinction between aggression and war.⁹⁵ In arguing for the critical importance of identifying the source of aggression in contemporary international politics, for example, Ling Ching stated that "the contention for world hegemony was the main content of imperialist foreign policy and that imperialism was the source of contemporary wars of aggression."⁹⁶ Thus aggression and war are synonymous in the Chinese view.

More significantly, the Chinese concept of aggression is oriented more toward what Inis Claude calls "a system of *selective* security, embodying the principle of some for some,"⁹⁷ than toward a system of collective

definition of aggression in 1933 and has been active ever since on this question in its multilateral diplomacy. For the text of the Soviet proposal on aggression submitted to the 1933 Conference for the Reduction and Limitation of Armaments, see 7 GAOR, Annexes (Agenda Item No. 54) 34-35, UN Doc. A/2211 (1957).

⁹⁴ 29 GAOR, C.6 (1503rd mtg.) para. 11 (1974). Following the adoption of the resolution by the plenary on December 14, 1974, Chinese representative An Chih-yüan again made China's position clear by stating that his delegation would not have participated in the vote, if the resolution had been pressed to a roll-call or recorded vote. See UN Doc. A/PV.2319, at 32-35 (1974).

⁹⁵ For my discussion of the conceptual problems in equating aggression and war, see Kim, *The Lorenzian Theory of Aggression and Peace Research: A Critique*, 13 J. OF PEACE RESEARCH 253-76 (1976).

⁹⁶ 28 GAOR, C.6 (1442d mtg.) para. 73 (1973).

⁹⁷ I. L. CLAUDE, JR., *SWORDS INTO PLOWSHARES* 266 (4th ed. 1971) (emphasis in original). For a more extensive discussion on the concept of collective security in comparison with other concepts of power management in international relations, see I. L. CLAUDE, JR., *POWER AND INTERNATIONAL RELATIONS* (1962).

the Security Council from adopting any resolution condemning the aggressor and supporting the victim." "Since an aggressor could veto any draft resolution of the Security Council stating that it had committed an act of aggression," continued An Chih-yüan, "it was difficult to see how the definition could have the effect of deterring a potential aggressor, simplifying the implementation of measures to suppress acts of aggression and protecting the rights and interests of the victim, as provided in the preamble of the draft definition."¹⁰⁶ Again, the Soviet invasion of Czechoslovakia in 1968 and the subsequent Soviet veto on the matter in the Security Council were cited as examples supporting the Chinese contention.

It is premature to assess the historical significance of the definition or the full impact of China's "nonparticipation" in the adoption of the definition. By citing Articles 39, 41, and 42 of the UN Charter in a preambular paragraph, the framers of the definition had clearly intended to enhance the effectiveness of the Security Council under Chapter VII. Yet, the United States, the United Kingdom, and France had, until recently, consistently refused to invoke Chapter VII as applied to South Africa.¹⁰⁷ The highly restrictive definition of aggression reflects a measure of their continuing interests and influence in selective use of the Security Council in the discharge of its peacekeeping and peace-enforcing functions.

On the other hand, China has shown in theory and practice that it wants the Security Council to broaden and expand its taking of sanctions under Chapter VII as applied to colonial and apartheid questions. The Chinese record on the selective application of Chapter VII to colonial and apartheid issues has been fairly consistent. China does not believe that aggression, defined as the first use of armed force by a state against the sovereignty, territorial integrity, or political independence of another state, is a meaningful, relevant, or practical notion in contemporary international politics. It is the structural violence embedded in "economic aggression" which is of critical importance to China.

China is not alone on this matter. "Economic aggression," states a working paper submitted by the Philippines for the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, "is as much a breach of the peace and in contravention of the Charter as any other form of aggression and it consequently calls for effective measures for its prevention and removal."¹⁰⁸ Be that as it may, a fundamental divergence of opinions among the permanent members of the Security Council on the nature, scope, and applicability of aggression call into question the practical value of the definition. As far as the Security Council is concerned, it may well prove to be less "epochal" than many have claimed it to be.

THE CHINESE CONTRIBUTION TOWARD A NEW INTERNATIONAL LEGAL ORDER

Let us now return to the question raised at the beginning of this article: What contribution, if any, has China made toward the evolving process of

¹⁰⁶ 29 GAOR, C.6 (1475th mtg.) para. 16 (1974).

¹⁰⁷ S/RES. 418 (1977).

¹⁰⁸ UN Doc. A/32/58/Add.1, at 2 (1977).

an international legal order? The foregoing analysis of Chinese legal behavior in the context of UN multilateral diplomacy provides an empirical basis for answering this question and for making a few broad observations. We may safely conclude that *substantive* Chinese contribution to or impact on legal issues has been virtually zero.

What about the political and symbolic contribution? This appraisal must be confined to the evolving international law of development, in the making of which China has participated. In the domain of UN multilateral treaties or conventions, or of purely legal issues of a traditional nature, China has assumed a self-conscious posture of no comment and no participation, rather than engaging in an ideological repudiation. Some may even read into the Chinese posture of noncommittal an implied acquiescence. Certainly, China has not presented itself as an obstacle in the domain of traditional international law.

However, it is extremely difficult to assess fairly and accurately the political and symbolic impact of China on the evolving process of a new international order. First, Chinese legal practice has shown a contradictory mixture of qualified acceptance of traditional international law, on the one hand, and a revisionist challenge to destroy the old legal order and to establish a new one, on the other. Second, the "new international legal order" is now in a state of normative confusion, as shown in the question of Charter review and the, thus far, inconclusive global conference to codify a new law of the sea. Part of the confusion stems from the mutually competing and often conflicting claims of law (or order) and justice (or equality).

As a latecomer to the world community, the PRC has had no part in the making and development of traditional international law. As a professed Marxist-Leninist state, China would have been expected to make an ideological assault on "bourgeois" international law. Yet in a curiously opportunistic manner, China, without saying so, has embraced the sovereignty-centered system of what Richard A. Falk calls "the Westphalia legal order."¹⁰⁹ A tendency to carry the logic of state sovereignty to an untenable extreme makes China somewhat anachronistic in the politics of establishing a new international legal order. Both conceptually and psychologically, China seems to be suffering from a siege mentality that goes back to the traumatic period of unequal treaties.

If the Westphalia legal order proved to be inadequate in the halcyon days of the past, there is no reason to believe that it can work any more effectively or justly in the nuclear-ecological age. It is difficult to argue that the traditional principles of state sovereignty and equality can somehow become the energizing force in the establishment of a viable and more just world legal order. On the contrary, they may well legitimize the law of the jungle and the sovereign prerogative of pursuing parochial and/or hegemonic interests and claims. That the poor and the weak cannot possibly win at this game hardly needs to be explained. In short, an excessive claim of state sovereignty may have the opposite effect of strengthening the structural violence inherent in the asymmetrical distribution of dignity and wealth in the international system. In strategic terms, therefore, the sov-

¹⁰⁹ Falk, *supra* note 3, at 43.

ereignty-centered image of international legal order may be incompatible with the normative commitment of China to a new international legal order.

On the positive side of our balance sheet, we may argue that China is indeed committed to the establishment of a new international legal order to the extent that it is perceived as being "just" oriented. Always an elusive and almost impossible concept to operationalize, justice in the Chinese normative disposition requires no abstract theorizing or philosophizing: Equality is justice, justice is equality. China has been so consistent in both theory and practice on this point as to make its claim highly credible.

What is unique about China's advocacy of international egalitarianism is the apparent incongruity with its own status in the international system. In international politics as in domestic politics, justice or equality is the ideological weapon of the underdog, while law or order is the ideological weapon of the topdog. Surely, China can no longer be characterized as an underdog in the global community in the 1970's. Yet China has pressed international egalitarianism to the point of conceptually undermining its own privileged status in the Security Council.

Furthermore, there is no evidence that China has sought any special or privileged position in the UN system owing to its size, financial contribution, or population. Available evidence indicates the opposite. The refusal to play an active, let alone a leading, role in many of the committees or conferences may be accepted as a corollary of a strong belief in international egalitarianism. It may also be argued that the anachronistic conception of state sovereignty is an extension of the commitment to state equality. Viewed in this light, China's symbolic contribution to the process of establishing a new and more equitable legal order cannot be gainsaid.

In addition, China's legal practice of invoking certain General Assembly resolutions, in particular, the NIEO resolutions which fall neatly into the category of the evolving international law of development, as the authoritative reference for its UN multilateral diplomacy can only contribute to the process of redefining and relegitimizing the sources of international law. "In institutional terms, the International Court of Justice, for example," Richard A. Falk observes, "lies primarily within the domain of law, while the General Assembly falls within the domain of justice."¹¹⁰ If a new international legal order is ever to be established, it is not likely to come from the advisory opinions or contentious judgments of the World Court or from a definitive codification of a new multilateral convention. It is most likely to evolve and crystallize from the political process of collective legitimization in the domain of justice.

¹¹⁰ Falk, *The Domains of Law and Justice*, 31 INT. J. 2 (1976). In a similar vein, Inis Claude, Jr. has argued "that the function of legitimization in the international realm has tended in recent years to be increasingly conferred upon international political institutions" and that "it is a fact of present-day international life that, for whatever reasons of whatever validity, statesmen exhibit a definite preference for a political rather than a legal process of legitimization." Claude, *Collective Legitimization as a Political Function of the United Nations*, 20 INT. ORG. 370-71 (1966).

In short, repeated references to certain resolutions in state practice may have the effect of transforming consensus into consent in the Assembly's norm-creating, value-realizing, and law-declaring activities. If this analysis is correct, the well-established Chinese legal practice of invoking General Assembly resolutions will have two legal consequences: first, it will make it increasingly difficult for China to defy Assembly resolutions without suffering a serious credibility problem in its multilateral diplomacy and, second, it will contribute to the process of broadening the scope of the Assembly's law-developing and law-legitimizing functions. In other words, the most significant "contribution" of China toward the establishment of a new international legal order may lie in its participation in the process of development of international law in the General Assembly.

EDITORIAL COMMENT

FOREIGN POLICY AND THE 1977 SOVIET CONSTITUTION

In presenting the draft of a new Constitution to the Soviet people in 1977 Leonid Brezhnev noted that for the first time in Soviet constitutional history a foreign policy statement had been placed in the supreme law of the land.¹ Previously, fundamental principles of foreign policy had been declared in the Program of the Communist Party alone.² This evident preference for the Party Program over the State Constitution as a repository of policy declarations had seemed reasonable to non-Soviet analysts in the light of Soviet history, for the Party Program has always been perceived to be more fundamental in policy matters than the Constitution. The Program has provided the document setting ultimate goals of social development, while the Constitution has defined the structures created for their implementation. In the words of a knowledgeable foreign comparatist with considerable experience in a Soviet law faculty, the Party Program is for Soviet law what the United States Constitution is for Americans and the Code Napoleon is for Frenchmen.³ It is the political touchstone on which the legal superstructure is built, the symbol of stability, the assurance to the public that lives may be planned ahead.

The Party Program being what it is, why is a statement on foreign policy now inserted not only in it but also in the Constitution? Is the new Constitution's chapter not surplus usage? Further, if it be no more than a restatement of what has already been declared in a more fundamental source, does its appearance in the new Constitution mean that Soviet leaders have revised their traditional thinking on what a Constitution should be, and, if so, why?

As the record shows so clearly, the inclusion of foreign policy clauses in constitutions is not a new phenomenon, except in the USSR. One might even conclude that since World War II it has become fashionable, and, perhaps, even psychologically necessary for leaders to declare foreign policy aspirations in the Basic Law in order to satisfy a state's own citizens and also governments of neighboring states that they can expect to live in peace. Constitutions have become increasingly policy-oriented documents; not just definitions of state structures. Contemporary draftsmen have moved a long way from pre-World War II patterns. The Marxists of Eastern Europe and Asia provide sharp contrast with Stalin's position of

¹ Report to the Plenary Meeting of the Communist Party of the Soviet Union's Central Committee, May 24, 1977. Eng. trans. in 29 CURRENT DIGEST OF THE SOVIET PRESS, No. 23, July 6, 1977, at 6-10. Also in 25 REPRINTS FROM THE SOVIET PRESS, No. 1, July 15, 1977, at 16.

² 1961 Program of the Communist Party of the Soviet Union, Part One, Chapter VIII. Eng. trans. in SOVIET COMMUNISM: PROGRAMS AND RULES 63-67 (J. Triska ed. 1962).

³ Osakwe, *The Common Law of Constitutions of the Communist Party States*, 3 REV. OF SOCIALIST L. 155 at 208 (1977).

1936, expressed in his rejection of a policy-oriented preamble proposed for the new Basic Law, which he was presenting to the Congress of Soviets in order to reflect in law what he declared to be the achievement of socialism. At that time he declared: "The Constitution is the registration and legislative embodiment of the gains that have already been achieved and secured. Unless we want to distort this fundamental character of the Constitution, we must refrain from filling it with historical references to the past, or with declarations concerning the future achievements of the working people of the U.S.S.R. For this we have other means and other documents."⁴

How far the wheel has turned toward foreign policy statements in post-World War II constitutions is evident from a glance at a few. An Austrian Constitutional Law has declared Austria's permanent neutrality.⁵ The two Germanies eschew aggressive war.⁶ Japan not only forever renounces war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes, but its Constitution declares that land, sea, and air forces as well as other war potential will never be maintained.⁷ There are some like those of India⁸ and Indonesia⁹ that declare their support for less specific programs of "peace" and "justice," and others, like those of Greece¹⁰ and Ghana¹¹ that declare their respect for international law and the United Nations Charter. Modern Latin American Constitutions in Argentina,¹² Ecuador,¹³ and the Dominican Republic¹⁴ support what may be summarized as good neighbor policies.

The unity of various regional groupings has concerned draftsmen among the Arabs, as with Egypt,¹⁵ Algeria,¹⁶ and Bahrain.¹⁷ Some Central Americans, as with Guatemala¹⁸ and Honduras,¹⁹ speak for Central American Union, while numerous Africans, as with Burundi,²⁰ Cameroon,²¹ Equatorial Guinea,²² and Guinea,²³ profess African unity.

Not all such statements of foreign policy are so pacific. Some constitutions enunciate irredentism, as with Guatemala's declaration of a wish to recover Belize,²⁴ or Guinea Bissau's call for liberation of Guinea and Cape Verde.²⁵ The Algerians declare for struggle against colonialism and neo-colonialism.

⁴ J. V. Stalin, *Report on the Draft Constitution of the USSR, November 25, 1936*, Part V. Eng. trans. in J. STALIN, *LENINISM* 379 at 396 (1942).

⁵ Federal Constitutional Law, October 26, 1955, Art. 1. This and subsequently cited constitutions and constitutional laws may be found conveniently in *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: A SERIES OF UPDATED TEXTS, CONSTITUTIONAL CHRONOLOGIES AND ANNOTATED BIBLIOGRAPHIES* (A. Blaustein and G. Flauzi eds. 1971-).

⁶ Federal Republic, Art. 26 (1); Democratic Republic, Art. 8 (2).

⁷ Art. 9.

⁸ Art. 51.

⁹ Preamble.

¹⁰ Part I, Sec. 1, Art. 2 (2).

¹¹ Art. 2.

¹² Art. 27.

¹³ Art. 6.

¹⁴ Art. 3.

¹⁵ Part I, Art. 1.

¹⁶ Arts. 86, 87, 88.

¹⁷ Art. 6.

¹⁸ Title I, Chapter 1, Art. 2.

¹⁹ Art. 9.

²⁰ Preamble.

²¹ Preamble.

²² Preamble and Art. 8.

²³ Preamble.

²⁴ Title X, Art. 1.

²⁵ Chapter I, Art. 3.

The record is full enough to suggest that it has become customary, if not fashionable, for constitutional draftsmen to include a foreign policy statement in a Basic Law. This fashion has become most noticeable among the states in the Marxist-oriented group of Eastern Europe and Asia, as draftsmen have introduced this novelty in the documents promulgated to replace the first constitutions drafted after World War II upon the Stalin model of 1936.²⁶ In consequence, the Soviet model has lost its place as a guide to Marxist constitutional draftsmen. It has become but a historic relic of Stalin's thought on what a Constitution should be.

Even the Chinese Communists, with whom the Soviet leaders are locked in intense ideological struggle, introduced a foreign policy statement in their new Basic Law of 1975, saying in the preamble that proletarian internationalism should be upheld; that unity with the socialist countries and all oppressed people and oppressed nations should be strengthened; and that peaceful coexistence was a goal on the basis of the Five Principles: namely, nonaggression, noninterference in each others' internal affairs, equality and mutual benefit, and peaceful coexistence.²⁷ Had the policy statement stopped there, no Soviet Communist could have taken issue with it, but it did not. There was inserted a challenge added to these well-known Five Principles in the form of a declaration of intent to oppose the imperialist and socialist-imperialist policies of aggression and to oppose the hegemonism of the superpowers.

Here was a charge of betrayal of Marxism which Brezhnev and his colleagues could hardly have let stand without reply, and it requires no stretch of the imagination to suppose that the Soviet Party leaders thought it not only desirable but also necessary to reply in their own Basic Law. If this be a correct evaluation of Soviet leadership thinking as it emerges from the ideological struggle which has been raging between the Chinese and Soviet Communists for the minds of men ever since Mao Tse-tung split with Nikita Khrushchev in 1963, it is not fashion alone that has moved Soviet draftsmen. It is the need to compete for the minds of men with their principal challengers as leaders of Marxist thought.

And how is this competition expressed in the new Soviet document? Is there something new, not found in the 1961 Party Program? Is there some contrast with what the Chinese Communists are offering their readers? Both the 1961 Party Program and the 1977 State Constitution declare for the keystone policy of "peaceful coexistence" under which all else has been subsumed ever since Khrushchev revived Lenin's early phrase to express his idea that war between the Communist and capitalist camps must be unthinkable because of its wholly destructive character since the advent of atomic warfare. The Party Program declares that "the chief aim of its foreign policy is to provide peaceful conditions for the building of communist society in the U.S.S.R. and developing the world socialist system, and together with other peace-loving peoples to deliver mankind

²⁶ These constitutions are collected in J. TRISKA, *CONSTITUTIONS OF THE COMMUNIST PARTY STATES* (1968).

²⁷ Eng. trans. in *PEKING REV.*, Jan. 24, 1975, at 12-17.

from a world war of extermination.”²⁸ For the 1977 Constitution, the aim is “ensuring international conditions favorable for the building of communism in the U.S.S.R., safeguarding the interests of the Soviet Union, consolidating the positions of world socialism, supporting the struggle of peoples for national liberation and social progress, preventing wars of aggression, achieving universal and complete disarmament, and consistently implementing the principle of peaceful coexistence of states with different social systems.”²⁹

Both the Party Program and the Constitution add detail to the generalities set forth in their key sentences just quoted. The Party program’s draftsmen were evidently allotted more space than those who had to compress policy within a document devoted primarily to state institutional structure, for the Program’s details cover five pages, while the Constitution’s are limited to one. In spite of this difference in depth, the detail of the two documents seems to do no more than embellish the initial declaration of “aim.” There is no change in emphasis from 1961 to 1977. Soviet draftsmen continue to emphasize today what they did in 1961, namely, that their concept of peaceful coexistence with accompanying ideological struggle remains the keystone of policy and includes support for developing world socialism.

Nothing is said in direct refutation of the Chinese charge that the Soviet leaders have become imperialists and seek with the United States to lead the world as a hegemonic superpower. Refutation of that charge may have seemed beneath the dignity of a constitution, since it must seem patently absurd to those who formulate Soviet policy, requiring no recognition at all.

Supposing that foreign policy is made a part of the Constitution because it is now fashionable to make such declarations in constitutions, and because without it the Soviet document would become a relic of a bygone age, and also because the Chinese ideological enemies have thrown down the gauntlet in their own Basic Law, are there other possible reasons for taking this innovative step? There may well be, and the reason may be “propaganda value” or “communication value.” The idea bears examination. There can be no doubt that Soviet information officers know the value of various media outside the Constitution to carry their message of peaceful coexistence and refutation of Chinese charges of imperialism. Daily use is made of the press, the radio, speeches in international fora, and even resolutions of the UN General Assembly. But speech and press are associated universally in the minds of men with ephemeral policies, here today and changed tomorrow as the tactical situation seems to require. On the other hand, constitutions are universally revered, even when vio-

²⁸ *Supra* note 2.

²⁹ Art. 28. An English translation indicating changes in the final text from the original draft submitted for public discussion is published in 29 *CURRENT DIGEST OF THE SOVIET PRESS*, No. 41, Nov. 9, 1977, at 4. A translation with Brezhnev’s report on the results of the nationwide discussion of the draft, October 4, 1977, is published in 25 *REPRINTS FROM THE SOVIET PRESS*, No. 8-9, Oct. 31-Nov. 15, 1977.

lated frequently. When a junta takes power in a coup, they promise always to reintroduce constitutional government after a period of suspension. There are almost no states in the world without constitutions, except those with British traditions or faced with such conflict over some issue of policy that to press for a constitution would rend society. Constitutions have become a way of life in the late twentieth century. They are published in millions of copies; published in translation by editors of regional or worldwide volumes, analyzed by comparatists and taken with great seriousness despite the sense on the part of some cynics that they are honored only in the breach.

The Soviet leadership since the beginning has sensed the need for a constitution even in a revolutionary state of constant social revision. Their answer to their need for change has been to replace outworn structures by new ones from time to time. They look upon such moments of change as ideal occasions for mass education in civics, and they organize discussion campaigns as they did during the summer of 1977, to bring the principles set forth in the Constitution before millions of persons, not only within the USSR but throughout the world. Constitutions are given many times more attention than ordinary laws, speeches, or policy papers presented in international fora.

In contrast, the Communist Party Program, which has the highest place within the USSR as a policy source, is read outside the USSR only by specialists. It is rarely translated and not included in Soviet or non-Soviet textbooks on the Soviet governmental system. In short, the Program is not an effective means of communicating with masses, while the Constitution is.

The conclusion is impelling that the Soviet leadership decided to depart from precedent in introducing a chapter on foreign policy in their 1977 Basic Law because they thought that thereby they would induce millions to read it and read it with a sense that it declares fundamentals, not ephemeral policies. It is an ideal place in which to counter Chinese propaganda and to win friends among peoples inclined to be receptive to its declarations; these peoples are numerous, especially in the developing world and in restless Western Europe where Communist parties are winning new friends.

In consequence, Article 29 with its details on what is fundamental to Soviet foreign policy is far more likely to be read by those who know nothing of the Communist Party Program or the resolutions of the General Assembly of the United Nations, from which many of its phrases are taken, or the textbooks and monographs devoted to international relations and law which have been saying the same thing for years, but only to the cognoscenti of the world. In a paragraph the casual reader, or the non-reader to whom the village scribe reads, is given the substance of what has been said in the elusive sources: that the principles on which Soviet foreign policy is based are—sovereign equality, mutual renunciation of the use of force or threats of force, inviolability of frontiers, the territorial integrity of states, peaceful settlement of disputes, nonintervention in

internal affairs, respect for human rights and fundamental freedoms, equal rights for all peoples and their right to decide their own destinies, cooperation among states, and fulfillment in good faith of obligations arising from the generally recognized principles and rules of international law and from international treaties signed by the USSR.

What this means in practice is left for the analyst to determine, and many have commented. None have been more vehement in rejecting the Soviet claims than the Chinese Communists. In their remarks on the foreign policy chapter they say: "This is evidently intended to gloss over the essence of the social-imperialist policy which Brezhnev has been pursuing with all his might."³⁰ Then they quote the Soviet Constitution and comment: "The chapter is swamped with phraesology extolling peace. . . . However, lies have short legs. The history of Soviet social-imperialism is one of aggression, expansion, intervention and subversion." They refer to the 1968 events in Czechoslovakia, to the separation of Bangladesh from Pakistan, to Angola, to the invasion of Zaire, to Soviet activities in the Middle East and in the Horn of Africa, and declare the Soviet Union to be posing a menace to Western Europe.

In spite of the strong Chinese attack, which the Soviet draftsmen must have anticipated, the chapter on foreign policy has been included in the Constitution. The outsider can only conclude that the Soviet leadership must believe that the Constitution offers an effective platform from which it can expound popular themes and that it can expect more people to read and believe them than if the same material were included in a Party Program which few outsiders ever read or in ephemeral documents in whose lasting value few have confidence.

JOHN N. HAZARD

³⁰ *Reactionary Essence of New Soviet Constitution*, PEKING REV., No. 25, June 17, 1977, at 15.

NOTES AND COMMENTS

THE RESEARCH AND STUDY ACTIVITIES OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

REPORT OF THE DIRECTOR OF STUDIES, 1975-1977

INTRODUCTION

This report presents in summary form the research and study activities of the American Society of International Law that were in progress during the period from mid-1975 to mid-1977. It was submitted earlier in slightly different form to the Ford Foundation, one of the major supporters of the Society's Research and Study Program for a number of years.

During the past two years, both the format and the general thrust of the Society's program have remained unchanged for the most part. Most of its activities have been carried out through panels or smaller working groups drawn from outside the Society's headquarters, while one substantial research project has been conducted "in house" by Society staff members. It has remained interdisciplinary and largely policy-oriented. Both the substance of the program and the sources of its financial support have remained widely varied. In more than one instance, subjects that were largely new to the Society have been studied.

My colleagues at the Society and I would welcome inquiries, comments, or suggestions about this program from whatever source.

I.

THE LAW OF THE POLITICAL FRAMEWORK

TERRITORIALITY AND FORCE

Project on the Legal Aspects of International Terrorism. Terrorism has been a most troubling form of illicit use of force in the postwar era, on the international as well as the national level. The Society has now completed and submitted to the U.S. Department of State a major study on the legal aspects of international terrorism; the threat or use of violence by private persons for political ends, where the conduct itself or its political objectives, or both, are international in scope.

The study was conducted through an interdisciplinary working group of lawyers and social scientists, cochaired by Professors Alona E. Evans of Wellesley College, and John F. Murphy of the University of Kansas. It was intended to be as comprehensive an examination as possible of the relevance of law to the contemporary problem of coping with international terrorism. It went about this task by examining, first, seven different areas in which societies are particularly vulnerable to terrorist activity, including aircraft and aviation facilities, nuclear facilities and materials, ocean vessels

and offshore structures, new vulnerabilities, and the acquisition of new weapons by nongovernment groups, protected persons and diplomatic facilities, "non-protected" persons or things, and personnel and property of transnational business operations. It then examined problems of effective international response to terrorist activities: apprehension and prosecution of offenders; criminological policy of governments; practical problems of law enforcement; state self-help and problems of public international law; and private measures of sanction against terrorist threats or actions. The Society expects to publish this study during the first part of 1978.

LAW AND THE MANAGEMENT OF STATE PARTICIPATION IN THE INTERNATIONAL SYSTEM

Panel on the Role of International Law in Government Decision-Making. Work has been under way for several years on a series of monographs being prepared by members of a special panel concerned with the question of how international law is taken into account in the planning and execution of international conduct by national governments, particularly in war-or-peace crises. All five of these volumes have now been completed. The final two, which will be published shortly by Oxford University Press, are a study by Georges Abi-Saab of the Congo Crisis of 1960, and a final volume setting out the theoretical basis of the role of law in government decision-making in international crises, written by the panel chairman, Roger Fisher. Monographs in the series already published are: *Cyprus 1958-1967*, by Thomas Ehrlich; *Suez 1956*, by Robert R. Bowie; and *The Cuban Missile Crisis*, by Abram Chayes.

DEVELOPING THE TERRITORIAL LAW OF THE SEA

The Society has continued its long-standing interest in the newly developing law of the use of ocean space which began, insofar as its research and study program is concerned, in 1969 with the establishment of a panel on the exploitation of the resources of the deep ocean floor. Since that time, as the process of international consultation and negotiation which culminated in the Third UN Conference on the Law of the Sea evolved, the Society has conducted studies on a substantial number of technical and policy issues relating to this complex international conference. These issues have ranged from global fisheries management and marine environmental protection, to the problems of reservations to a new comprehensive law of the sea treaty, and the legal and other consequences of failure by the Conference to produce any such treaty at all. Studies published within the past two years include two issues in the Society's occasional paper series, *Studies in Transnational Legal Policy*, entitled "Consequences of Non-Agreement at the Third UN Law of the Sea Conference," and "Policy Issues in Ocean Law." The latter paper included individual studies on "Reservations," by H. Gary Knight, "Revenue Sharing," by Jonathan I. Charney, and "Interim Arrangements," by Jon L. Jacobson.

These publications were a product of a Society Working Group on Tech-

nical Issues of the Law of the Sea, part of the Society's program on Science, Technology and International Law supported by the National Science Foundation, now concluded. This group received additional support which enabled the Society to conduct a program of travel, reporting, and research on the law of the sea conference. This program involved members of two subcommittees of the U.S. Government's Advisory Committee on the Law of the Sea, those on international law and relations, and on environment. This grant, now concluded, provided funds for travel by a number of members of these two subcommittees, all of whom were private citizens who had been asked by the Executive Branch to provide advice on the development of U.S. policy, to attend meetings of the Advisory Committee and the conference negotiation sessions. In addition, the members of the two subcommittees provided reports to the Society on the sessions of the Conference itself, which contained analyses of negotiations and the results. They also assisted the Society by providing recommendations for further research in the field of ocean law and participating in the planning and in some cases the execution of that research (as in the case of the two studies mentioned above).

Working Group on Ocean Boundary Disputes. The major thrust of the new ocean regime which is emerging in the law of the sea negotiations is to redraw the jurisdictional lines which determine the prerogatives of states in the use of the ocean—as, for example, extending the territorial sea to a distance of 12 miles rather than the three miles traditionally supported by the United States and establishing a much broader coastal zone of perhaps 200 miles in which the coastal state would have the right to dispose of economic resources. While there is as yet no fundamental agreement on a comprehensive treaty (and at the present writing the future of the negotiations remains somewhat in doubt), the major jurisdictional or territorial features of a new treaty may be predicted with some precision. Moreover, for practical purposes, the jurisdictional map of the ocean has already been substantially changed during the course of the negotiations by unilateral claims on the part of various coastal states, including the United States, which recently asserted a 200-mile fishing jurisdiction. Consequently, the Society began more than two years ago to plan toward a study on the politics, practice, and jurisprudence of the resolution of ocean boundary disputes, looking forward to the practical application of a radically revised territorial regime in the ocean. A working group on this subject has now been established, with the support of the Ford Foundation, consisting of lawyers, geographers, and other experts, in the expectation that these changes will necessitate the demarcation of new ocean boundaries in dozens and possibly hundreds of new situations around the globe which will have conflict-generating potential.

THE STATE AS PARTICIPANT IN THE LEGAL ORDER

Panel on State Responsibility. "State responsibility" has to do with the extent to which states may be held accountable in international law for acts which the law regards as wrongful, the criteria by which wrongfulness

of acts are determined, and the procedural and other consequences under international law which flow from the commission of such acts. This broad subject is an evolving one with high political content in certain areas: for example, a state's responsibility with respect to the treatment of foreign-owned property within its territory, and has been the subject of somewhat rarified consideration by the UN International Law Commission. The primary function of this international body of experts is the formulation of draft treaties on subjects of general importance referred to it by the UN General Assembly for later consideration by international conferences as the basis for discussion on the creation of multilateral treaties.

For several years the Society has maintained a panel on the subject of state responsibility which has followed the work of the International Law Commission. This panel has been engaged in the writing of a book of studies on selected issues in the contemporary law of state responsibility. The book aims at a reassessment of both traditional and emerging views on the subject in light of the great changes which have taken place in the political and legal milieu since World War II. It will include studies on transnational enterprise in the law of state responsibility, the doctrine of attribution in state responsibility, the jurisprudential underpinnings of the law of state responsibility for injury to aliens, a functional analysis of claimant eligibility, remedies and sanctions for breaches of state responsibility, the new international economic order and the deprivation of foreign wealth, wealth deprivation, creditor claims, and claims for other injuries. The group is chaired by William Bishop of the University of Michigan Law School; its rapporteur and the editor of the volume in preparation is Professor Richard Lillich of the University of Virginia School of Law.

SYSTEMS OF TRANSNATIONAL MANAGEMENT

Over the last six years, the Society has conducted a series of "in-house" projects at the Society's headquarters and carried out primarily by members of the Society's staff, dealing with transnational systems of regulation, control, and management. There have now been three such studies, of which the general approach in each case has been to couple a series of detailed case studies with generalizations, conclusions, and recommendations based on the totality of the studies. All have been concerned with the spectrum of regulatory approaches and techniques developed over recent decades on the international scene and employed in a fragmentary way by various international entities concerned with widely different, but often highly specialized and nonpolitical subjects. No previous evaluation of the dynamic forces involved in the development and application of these regulatory and management methods has been made to our knowledge, nor have the various conditions which influence their transferability from one problem to another been examined.¹

Project on International Regulatory Regimes. The first of the studies, undertaken with the support of the National Science Foundation, was directed by David M. Leive and yielded two substantial volumes, entitled *International Regulatory Regimes: Case Studies in Health, Meteorology and*

Food, published by Lexington Books. The work analyzes in detail three of the specialized UN international regulatory regimes. The regimes examined concern health (centered in the World Health Organization), food standards (centered in the Food and Agriculture Organization), and meteorological observation and data exchange (centered in the World Meteorological Organization).

Project on Application of International Regulatory Techniques to Scientific/Technical Problems. Under the direction of David A. Kay, the second project in this area has now been completed. Like its predecessor, it assumed that a major political-technological challenge of the future will be to develop new approaches to deal with the burgeoning number of problems that cannot be successfully managed within the jurisdictions of individual states. The overall purpose of the second project was to select six such problems and to survey and explore the wide spectrum of existing international management and regulatory techniques now being directed toward their solutions. Each problem had a heavy scientific-technological component, and each required international action. The project examined in a systematic way the circumstances and conditions under which these various techniques might be brought to bear upon the resolution of specific technology-related transnational policy issues.

The first stage of this project examined the six selected transnational policy problems: pesticide residues in food, international trade in pharmaceutical drugs, earth resource survey satellites, food reserve systems, the international marine transport system, and regional fishing arrangements. In each of these areas the evolving pattern of international scientific-technological relationships was described and that pattern projected ahead by a decade or so. A framework for analysis of these relationships that explores the range of possibilities for international action in each is suggested. Reports on three of the six problems have been published.

Following the completion of the individual studies, the project uses the data collected in the first stage to construct a paradigm of international regulatory activity for use both by the policymaker and by the scholar. Its aim was a better understanding of such features of transnational management systems as norm-creation, allocation of costs and benefits, compliance with agreed standards, expansion of management, control and regulatory functions, and the transferability of techniques among different scientific-technological areas.

Publication of the remaining individual studies, as well as the book drawing on each of the six and containing the results of the second phase of the project, is expected to take place in conjunction with the following project during 1978.

Project on the Functioning and Effectiveness of Selected United Nations System Programs. This project, also directed by David A. Kay, is in many respects a follow-on of his earlier undertaking. The purpose is to begin the development and testing of a methodology for evaluating the performance and effectiveness of the UN system's operational programs. The imperatives of emerging economic and technical interdependence and the de-

mands of developing countries for internationally provided services have transformed the UN system from what had been essentially a center for debate and the passing of nonbinding resolutions into a major operational activity that in 1976 expended over \$2.5 billion (not including World Bank lending of over \$5 billion a year) and maintained staff and programs in approximately 100 countries.

This project involves a general examination of the growth of the operational component of three UN activities, an examination of the impact of increased politicization on these activities, and detailed evaluation of UN operational activities in three areas. These three areas are human nutrition, international narcotics control, and international safeguards on nuclear materials. The three case studies will be published as a Society occasional paper during 1978. The results of these two projects directed by Dr. Kay will be combined into a single study on transnational management patterns that will also be ready for publication in 1978.

SUB-GLOBAL SYSTEMS

Project on the Future of the Inter-American System. In 1975, the Society began a study on the status of and prospects for the Organization of American States and the Inter-American system itself. This project was conducted through a working group chaired by Tom J. Farer of Rutgers, the State University School of Law, and is nearing completion. It is expected to produce a report written by Professor Farer, to be published in the series *Studies in Transnational Legal Policy*, and a book on the future of the Inter-American system, edited by Professor Farer and containing essays by him and other members of the panel, to be published in 1978. The book will include a view of what may lie beyond the present Inter-American system, an essay on whether the system does indeed have a future, an examination of Latin America's options in the reality of North/South relationships, and studies of hemispheric economic relations in the global context, trade relations in the Inter-American system, human rights and the Inter-American system, the Inter-American military system (its history, current status, and implications for U.S. foreign policy), Brazil within the Inter-American system, and the Inter-American system as seen from Caracas.

II.

THE LAW OF TRANSACTION

Project on National Treaty Law and Procedure. A great deal of the world's business is conducted within the intricate network of treaty relationships among nations. That network has grown explosively in scope and complexity in the last generation. Not only does it provide a formal framework for fundamental political, economic, and strategic relationships; it also links national systems into routine working arrangements of many kinds.

Treaty law having come to dominate the corpus of international law in both bulk and dynamism, it is inevitable that the Society be concerned with it at many points. For example, in the late 1960's a panel was established to analyze problems being grappled with by the UN Conference on the Law of Treaties then getting underway. More recently, the Society organized a project on National Treaty Law and Procedure. The aim of the project was to bring together an international working group of foreign office officials actually responsible for administering the treaty relationships of their governments, along with a small number of international legal scholars, to do a comparative study identifying and analyzing the practical problems confronted by such officials, as well as the law and practice of their respective governments with respect to treaties. Such a study is of special interest in the United States at the present time because of the intense and profoundly important debate which has taken place in recent years between the Congress and the Executive Branch on the subject of international agreements. One aspect of this phenomenon has been the effort by the Congress, in a mood strongly reminiscent of that prevailing at the time of the Bricker Amendment conflict of the 1950's, to limit the Executive Branch's capacity to conclude international agreements, particularly executive agreements, which traditionally had been reviewed by Congress only rarely prior or subsequent to their conclusion.

The first phase of this project was a conference held at the Villa Serbelloni in Bellagio, Italy, for the purpose of examining preliminary drafts of several national studies by scholars or foreign office officials. It is expected that a book-length volume will be produced on the basis of a number of such studies and discussion of them among the members of this international working group.

III.

THE LAW OF THE COMMUNITY HERITAGE

As in the past, much of the Society's energy has been directed to problems of management, through institutions of international community, of matters in which many or all of the members of that community share a common interest. In our world these community institutions are often rudimentary and fragile. But they are nevertheless a presently important part of the political organization of the human society on a global scale, and they are of great significance for its future organization. The values and resources to which they address themselves may properly be characterized as a part of the shared heritage of the global community as a whole.

PROTECTION OF INDIVIDUAL HUMAN RIGHTS

The early months of the Carter Administration in the United States have brought a new topicality to the subject of the international protection of human rights. As a result, wider scrutiny has been brought to bear upon the international protection of the rights of the individual vis-a-vis national

political authority—since World War II a major preoccupation of those concerned with the development of legal standards and procedures within the international community. That governments would take seriously the very idea of such standards is a twentieth century innovation—aside, perhaps, from the historical standards relating to human rights in armed conflict. And the idea in any event has radical implications for the long-term development of global legal and political relationships.

Such standards have been articulated repeatedly in various instruments produced by UN organs or regional international organizations. They have taken the form both of recommendatory declarations and of treaties, showing a tendency toward dealing in greater and greater detail with more and more specialized areas of concern. More recently, within both the United Nations and regional organizations (notably those of Europe and Latin America), there has been a special emphasis on the development of international procedures for implementing human rights standards, with a growing recognition that individuals feeling themselves aggrieved should have standing to complain against an offending government in an international forum.

Panel on International Human Rights Law and Its Implementation. The last project of this panel has now been published in the *Texas International Law Journal*. It is a collection of individually written studies on special contemporary problems of human rights law and its implementation within the United Nations and Inter-American systems, edited by Thomas Buerghenthal, rapporteur of the panel. It includes studies on the contemporary human rights law of the UN Charter, the United Nations reaction to "gross violations" of human rights law (especially with respect to new powers conferred on the Human Rights Commission and one of its subcommissions); the development of new implementation procedures in the Inter-American system; and a number of other studies.

Project on the Human Rights Aspects of the Helsinki Accord. While the panel on Human Rights Law just mentioned was completing its work, the Society embarked on a new program devoted primarily to work in the field of international human rights. This program encompasses five separate but closely related projects, of which the Society has selected two for its initial concentration.

One of these deals with the Final Act of the 1975 Helsinki Conference on Security and Cooperation in Europe: the "Helsinki Accord." Its purpose is to analyze this instrument and the significant political transaction which it embodies as an important element in the law, practice, and political commitment of states to the international protection of human rights. The Final Act itself is not a treaty, but a political declaration drawing heavily in some parts on the language of treaties or of UN resolutions that are regarded as authoritative interpretations of the UN Charter. The Society's project also aims at an assessment of the impact of the human rights provisions of the Helsinki Final Act on the conduct of the 35 signatory states of Western and Eastern Europe and North America, up to the time of the

review conference scheduled for Belgrade in the fall of 1977. The project has been carried out through an international working group drawn from the scholarly community in North America and Western Europe. A number of studies were prepared by individual members for consideration at a meeting of the working group in Strasbourg in June 1977. After further revision, the studies, together with conclusions and recommendations that emerged in the course of discussions at that meeting, were published in book form in the fall of 1977. Subjects covered include the unique nature of the Final Act; the argument that human rights are strictly a matter of domestic jurisdiction; the obligations assumed by the signatories; the inter-relationship among the Final Act, the Human Rights Covenants, and the European Convention on Human Rights; the effect of the Final Act on the principle of self-determination; and a review of the two-year experience in implementing the human rights provisions of the Final Act.

Project on United States Ratification of Human Rights Treaties. The second priority project concerns United States ratification of human rights treaties. The question of United States ratification of human rights treaties (mainly those drafted through the United Nations) is both perennial and troubling. Of some 19 major human rights treaties produced by the United Nations (or as to which the UN Secretary-General acts as depositary) and a smaller number produced by the International Labor Organization, UNESCO, and the Organization of American States, the United States has ratified very few (only four of the UN conventions), and has not even signed more than a handful. Over the last fifteen years there have been periodic attempts to secure ratification of some of the signed conventions submitted to the Senate by President Kennedy, including the Convention on the Prevention and Punishment of the Crime of Genocide. A number of other important UN conventions not ratified by the United States, including the UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, adopted in 1966, have recently entered into force or will probably soon do so.

The Society has thought for some time that there is a great practical service to be performed in the systematic examination of the issues posed for the Constitution, laws, and policy of the United States by the prospect of ratification of some of these conventions, to be selected on the basis of the relative strength of their claims to consideration for ratification by this country. Prior to the present Ford Foundation-supported program in human rights, the Society had already performed this task with respect to two important treaties, in reports prepared and published on the question of ratification of the Inter-American Convention on Human Rights and the UN Convention on the Elimination of Racial Discrimination. It is now in a position to undertake a similar analysis with respect to a number of other human rights treaties and has chosen to concentrate initially on the two UN Covenants, which together comprise by far the most comprehensive body of human rights law that the United Nations has produced. An initial draft of a report on these two treaties has been in preparation under

the supervision of Professor C. Clyde Ferguson of the Harvard Law School with the advice of a working group of legal scholars. It will be considered by a broader group and is intended for publication when completed in the Society's series *Studies in Transnational Legal Policy*.

Remaining projects in this program will include studies on human rights as a factor in U.S. foreign policy, human rights in the restructuring of the United Nations, and an international project aimed at making the legal regime established by the UN Covenants more effective.

Project on the Role of Law in Social Change in Latin America. In this project the Society has turned from its usual emphasis on international standards designed to provide a basis for judging the conduct of states, to focus on the question of internal mechanisms by which existing rights under national legal systems can be enforced by the poor or by other deprived groups. The project has been directed by a panel composed largely of Latin American and Caribbean specialists in the fields of legal aid, public interest law, and law reform. The first panel session, in Washington, brought about far-ranging discussion of the need for and possibilities of work in these fields in the region, and in enhancing the protection of human rights generally; the second conference, in Barbados, brought together some members of the panel with a varied group of other Latin American and Caribbean participants, who discussed their national programs, their successes and failures, and their common needs; a meeting followed in Bogota, which amplified a statement of objectives and a program of action adopted in Barbados. At a subsequent meeting of the Inter-American Juridical Committee, an official part of the Organization of American States, a resolution approving these steps was adopted and the matter is now to be put by the Secretary General to "an appropriate organ" of the OAS. A final panel session considered the recommendations previously made for the establishment of something like an "Inter-American Legal Services Corporation," which could serve as a small base for the exchange of information on legal aid and related programs, could give advice and store data, and could serve as the focus of regular meetings among organizations working to provide legal services and to reform laws on behalf of the poor or otherwise under-represented.

This project has been financed by a grant from the Agency for International Development, with a supplementary grant from the Inter-American Foundation. The interest shown in it by the participants and in its relation to a fundamental aspect of human rights indicates a strong possibility that it may lay the foundation for ongoing action.

MANAGING GLOBAL ECONOMIC RELATIONS

Project on International Trade Policy and Institutions. In 1973, the Society established a panel under the chairmanship of Anthony Solomon, former Assistant Secretary of State for Economic Affairs and presently Under-Secretary of the Treasury. This group's mandate was to consider the need for a restructuring of the multilateral institutions and procedures

BOOKS RESULTING FROM COLLABORATIVE PROJECTS

by Donald F. McHenry, 1975, Carnegie En-

... [F]or instance ... you would come to talk about questions like the condemnation of some country for political actions rather than anything related to labor standards at all. And then another principle, of course, is tripartitism. And in this, of course, the International Labor Organization is unique among United Nations organizations [in] that it has representatives of unions, workers, employers and Government from different countries, and tripartitism means that the labor and employer representatives really represent labor and employers.

Too frequently that principle was diluted when the delegates represented Government almost exclusively. So those were the four basic concerns that we had about the operations of the ILO.²

During this briefing session, Secretary Marshall expressed doubt that a one-year extension of the notice of intention to withdraw given in a letter dated November 5, 1975, from Secretary of State Kissinger to Francis Blanchard, Director General of the ILO, was permissible under the ILO constitution:

... [W]e would be subject to challenge if we tried to participate with the one-year extension when the constitution, we thought, was fairly clear on that matter.

A problem that we have, of course, is we have objected in the past to other countries twisting the language of the constitution in order to fit their own purposes. And so we thought that the question of a one-year extension was questionable at best ... and I guess the real and final reasoning is it is hard to see what you could accomplish in one year with an extension. ...³

Secretary Marshall indicated that in spite of the withdrawal and the consequent termination of about \$20 million in annual, direct contributions by the United States to the ILO, the United States would continue to follow and in some cases to support indirectly some ILO activities:

I think, of course, it is important to clarify that even though the United States withdraws, we intend to continue to watch the ILO's activities very carefully. And I hope personally that the time will come when we can see our way to get back in.

Also, we will continue to contribute to the ILO's activities because most of its technical assistance funds, some \$35 million a year, come from the UNDP, United Nations Development Program, and we contribute over \$100 million a year to that program and will continue to do that.

I think we will continue to contribute to the information gathering and statistical activities.⁴

² White House Press Release, Nov. 1, 1977, 16 ILM 1562 (1977).

³ *Id.* 1565.

⁴ *Id.* 1565-66.

LEGAL EFFECTS OF ACTS
(U.S. *Digest*, Ch. 2, §4G)

UN Resolutions and Declarations

In his November 11, 1977, statement concerning the *Report of the International Law Commission on Its Twenty-Ninth Session*,¹ Robert Rosenstock, U.S. Representative to the Sixth (Legal) Committee of the UN General Assembly, described, *inter alia*, how a UN General Assembly resolution may in exceptional cases contribute to the development of international law. Mr. Rosenstock's comments were made while discussing the Commission's proposed draft Article 22, entitled "Newly Independent States," on succession of states in respect of matters other than treaties. Mr. Rosenstock took exception to the Commission's commentary in its *Report* suggesting that the UN General Assembly had "developed" the principle of permanent sovereignty over natural resources by passing Resolution 3201, entitled "Declaration on the Establishment of a New International Economic Order," and Resolution 3281, entitled the "Charter of Economic Rights and Duties of States."

Portions of Mr. Rosenstock's statement follow:

... In paragraphs 61 and 62 of the commentary on article 22 of the draft, the Commission discusses the principle of permanent sovereignty over natural resources. In paragraph 61, it correctly quotes the pertinent passage of the International Covenants on Economic, Social and Cultural Rights, and on Civil and Political Rights. However, in paragraph 62, it then proceeds to make this startling statement: "The General Assembly has only recently reiterated and developed that principle" and in support of that conclusion quotes from General Assembly Resolution 3201 of the Sixth Special Session and the Charter of Economic Rights and Duties of States.

My government finds this statement startling because it is open to the interpretation that this General Assembly, by its adoption of controverted resolutions, "develops" principles which arguably are of a legal character. That is an interpretation of the powers and practice of this Assembly which is not accepted by my government, and which does not conform to the United Nations Charter or to international law.

This Assembly is not a lawmaking body. Its resolutions, in the ordinary course, do not enact, formulate or alter international law, progressively or regressively. In the exceptional cases in which a General Assembly resolution may contribute to the development of international law, it can do so only if the resolution gains virtually universal support, if the Members of the General Assembly share a lawmaking or law-declaring intent—and if the content of that resolution is reflected in general state practice. The General Assembly Resolution on the Principles of International Law Concerning Friendly Relations and Cooperation Among States may be an authoritative interpretation of international law, adopted as it was unanimously and stated as it was by many Members to be such—at any rate, if it is supported by state practice. But the resolutions of the Sixth Special Session cannot be said to have developed international law on the points at issue, for, on those very points, my government and other Members

¹ 32 GAOR, Supp. (No. 10), UN Doc. A/32/10 (1977).

of this Assembly expressed the most vigorous and precise disagreement. My government and others took particular care to state that those resolutions had no effect on the international law of matters which are comprehended by the concept of permanent sovereignty over natural wealth and resources. As to the Charter of Economic Rights and Duties of States, the situation, if anything, is clearer still. Sixteen states voted against key provisions of the article on permanent sovereignty and expropriation and nineteen voted for a substitute Western amendment; seventeen industrialized democracies voted for its deletion of article 16. To suggest that those resolutions "developed" the principle of permanent sovereignty is accordingly baffling, at any rate if the Commission is using the term in the sense of article 13 of the United Nations Charter.

For these reasons, my government takes serious exception to this passage of the Commission's report, which we find unnecessary as well as erroneous. Both codification and progressive development must proceed from a firm basis.²

TRUST TERRITORIES
(U.S. *Digest*, Ch. 2, §6)

On October 24, 1977, President Carter proclaimed that the Constitution of the Northern Mariana Islands shall come into full force and effect on January 9, 1978. Presidential Proclamation 4534 also brought into full force and effect specified sections of the Covenant signed by representatives of the United States and the Marianas Political Status Commission on February 15, 1975, and reserved the authority of the President under Section 1004 of the Covenant to suspend the application of any provision of law to or in the Northern Mariana Islands until the termination of the Trusteeship Agreement.¹ The text of Proclamation 4534 follows:

On February 15, 1975, the Marianas Political Status Commission, the duly appointed representative of the people of the Northern Mariana Islands, and the Personal Representative of the President of the United States signed a Covenant, the purpose of which is to provide for the eventual establishment of a Commonwealth of the Northern Mariana Islands in political union with the United States of America. This Covenant was subsequently approved by the Mariana Islands District Legislature and by the people of the Northern Mariana Islands voting in a plebiscite. The Covenant was approved by the Congress of the United States by joint resolution approved March 24, 1976 (Public Law 94-241; 90 Stat. 263).

In accordance with the provisions of Article II of the Covenant, the people of the Northern Mariana Islands have formulated and approved a Constitution which was submitted to me on behalf of the Government of the United States on April 21, 1977, for approval on the basis of its consistency with the Covenant and those provisions of the Constitution, treaties and laws of the United States to be applicable to the

² Press Release USUN-112(77), at 16-18 (Nov. 11, 1977).

¹ The Trusteeship Agreement for the former Japanese Mandated Islands was approved by the UN Security Council on April 2, 1947, and by the United States on July 18, 1947. TIAS No. 1665, 61 Stat. 3301, 12 Bevans 951, 8 UNTS 189, entered into force on July 18, 1947.

Northern Mariana Islands. Pursuant to the provisions of Section 202 of the Covenant, the Constitution of the Northern Mariana Islands will be deemed to have been approved by the Government of the United States six months after the date of submission to the President unless sooner approved or disapproved.

The six-month period of Section 202 of the Covenant having expired on October 22, 1977, I am pleased to announce that the Constitution of the Northern Mariana Islands is hereby deemed approved.

I am satisfied that the Constitution of the Northern Mariana Islands complies with the requirements of Article II of the Covenant. I have also received advice from the Senate Committee on Energy and Natural Resources and the Subcommittee on National Parks and Insular Affairs of the House Committee on Interior and Insular Affairs that the Constitution complies with those requirements.

Sections 1003(b) and 1004(b) of the Covenant provide that the Constitution of the Northern Mariana Islands and the provisions specified in Section 1003(b) of the Covenant shall become effective on a date proclaimed by the President which will be not more than 180 days after the Covenant and the Constitution of the Northern Mariana Islands have both been approved.

NOW, THEREFORE, I, JIMMY CARTER, President of the United States of America, do hereby proclaim as follows:

SECTION 1. The Constitution of the Northern Mariana Islands shall come into full force and effect at eleven o'clock on the morning of January 9, 1978, Northern Mariana Islands local time.

SEC. 2. Sections 102, 103, 204, 304, Article IV, Sections 501, 502, 505, 601-605, 607, Article VII, Sections 802-805, 901 and 902 of the Covenant shall come into full force and effect on the date and at the time specified in Section 1 of this Proclamation.

SEC. 3. The authority of the President under Section 1004 of the Covenant to suspend the application of any provision of law to or in the Northern Mariana Islands until the termination of the Trusteeship Agreement is hereby reserved.

IN WITNESS WHEREOF . . .²

The Constitution of the Northern Mariana Islands proclaimed by President Carter contains eighteen articles and a schedule on transitional matters. The titles of the articles are: Personal Rights; Legislative Branch; Executive Branch; Judicial Branch; Representation in the United States; Local Government; Eligibility to Vote; Elections; Initiative, Referendum and Recall; Taxation and Public Finance; Public Lands, Restrictions on Alienation of Land; Eminent Domain; Natural Resources; Education; Corporations; Oath of Office; Constitutional Amendment.

Article V, entitled Representation in the United States, states:

Section 1: Representative to the United States. A representative to the United States shall be elected to represent the Commonwealth in the United States and to perform those related duties provided by law. The governor shall provide a certification of selection promptly to the United States Department of State and to the representative.

² 42 Fed. Reg. 56,593 (1977).

Section 2: Term of Office. The term of office of the representative shall be two years unless it is increased to no more than four years by initiative under article IX, section 1.

Section 3: Qualifications. The representative shall be qualified to vote in the Commonwealth, a citizen of the United States, at least twenty-five years of age, and a resident and domiciliary of the Commonwealth for at least seven years immediately preceding the date on which the representative takes office. A different period of residence and domicile may be provided by law. No person convicted of a felony in the Commonwealth or in any area under the jurisdiction of the United States may be eligible for this office unless a full pardon has been granted.

Section 4: Annual Report. The representative shall submit a written report by the second Monday of January of each year to the governor and legislature on the representative's official activities during the preceding year and matters requiring the attention of the government or people of the Commonwealth.

Section 5: Compensation. The representative shall receive an annual salary and reasonable allowance for expenses provided by law. The salary may not be changed during a term of office.

Section 6: Vacancy. In the event of a vacancy in the office of representative to the United States, the governor shall appoint a successor with the advice and consent of the legislature.

Section 7: Impeachment. The representative is subject to impeachment as provided in article II, section 8, of this Constitution for treason, commission of a felony, corruption or neglect of duty.

The Schedule on Transitional Matters deals with the continuity of laws, judicial, legislative and related matters as well as such topics as citizenship, elective offices, statutes of limitations, and approval of the Constitution by the United States.³

NATIONALITY (U.S. Digest, Ch. 3, §1)

Acquisition of Nationality

The Constitution of the Northern Mariana Islands, proclaimed on October 24, 1977, by President Carter, contains a section entitled Interim Definition of Citizenship in its Schedule of Transitional Matters. Section 8 defines the term "United States citizen" or "United States national" as used in the Constitution of the Northern Mariana Islands as follows:

For the period from the approval of the Constitution by the people of the Northern Mariana Islands to the termination of the Trusteeship Agreement, the term United States citizen or United States national as used in the Constitution includes those persons who, on the date of the approval of the Constitution by the people of the Northern Mariana Islands, do not owe allegiance to any foreign state and who qualify under one of the following criteria:

a) persons who were born in the Northern Mariana Islands, who are citizens of the Trust Territory of the Pacific Islands on the date of the

³ Dept. of State File IO/UNP.

approval of the Constitution by the people of the Northern Mariana Islands, and who on that date are domiciled in the Northern Mariana Islands or in the United States or any territory or possession thereof;

b) persons who are citizens of the Trust Territory of the Pacific Islands on the date of the approval of the Constitution by the people of the Northern Mariana Islands, who have been domiciled continuously in the Northern Mariana Islands for at least five years immediately prior to that date, and who, unless under age, registered to vote in elections for the Mariana Islands District Legislature or for any municipal election in the Northern Mariana Islands prior to January 1, 1975; or

c) persons domiciled in the Northern Mariana Islands on the date of the approval of the Constitution by the people of the Northern Mariana Islands who, although not citizens of the Trust Territory of the Pacific Islands, on that date have been domiciled continuously in the Northern Mariana Islands beginning prior to January 1, 1974.¹

PROTECTION OF HUMAN RIGHTS
(U.S. *Digest*, Ch. 3, §6)

UN System

On December 5, 1977, Ambassador Andrew Young, U.S. Representative to the United Nations, made a statement in the Third (Social, Humanitarian, and Cultural) Committee of the UN General Assembly explaining the U.S. abstention on a draft resolution concerning means of improving the enjoyment of human rights.¹ In his statement Ambassador Young described how a state could violate international law by subjecting a person to the deprivation of such individual rights as freedom of speech and freedom from torture. He also indicated that the United States favors the progressive achievement of such basic economic rights as those set out in the International Covenant on Economic and Cultural Rights but that the United States does not agree that the realization of the New International Economic Order is a precondition to the effective advancement of human rights.

The text of Ambassador Young's statement appears below:

It is with regret that the United States found it necessary to abstain on this resolution, for we warmly support many of the provisions of the resolution. We congratulate the cosponsors for their cooperation during the negotiations.

However, several paragraphs of this resolution could be subject to interpretations unacceptable to us and I wish to clarify these.

Examples of our concern are paragraphs 1E and 1F which could be interpreted to imply that priority should be given to the advancement of particular segments of human rights over others. However, such an interpretation would be inconsistent with paragraph 1A, which urges "equal attention and urgent consideration" to all categories of human rights. The promotion of these collective human rights illustratively listed in paragraph 1E must clearly be given attention, but

¹ Dept. of State File IO/UNP.

¹ UN Doc. A/C.3/32/L.17/Rev. 1 (1977).

not a higher priority than is accorded to the promotion of vital individual rights, such as freedom of speech, freedom from torture or other grave violations of the sanctity of the individual. If a person is subjected to the deprivation of these and other individual rights by the very State to which he is entitled to look for protection, a violation of international law arises to which the United Nations should respond if it is to be true to the Universal Declaration of Human Rights and the United Nations Covenants on Human Rights.

The United States interprets the reference in paragraph 1E to mean "mass and flagrant violations of human rights of peoples and persons" as including violations of the rights of the individual, and of particular persons. It is clear that in any pattern of gross violation of individual human rights—as by torturing a number of individuals—there is a mass and flagrant violation of the human rights of persons.

The United States believes that the statements in the resolution pertaining to the rights of states to exercise full sovereignty over their natural wealth and resources must be interpreted to include the principle that the exercise of sovereignty over natural wealth and resources has to be conducted in accordance with the principles of international law.

The United States also is not in agreement with any interpretation of paragraph 1F which could suggest that the realization of the New International Economic Order is a *precondition* to the effective advancement of human rights. Under no circumstances can the recognition and implementation of human rights be delayed or circumvented with the excuse that a particular economic system must first be in place. No group of rights can legitimately be downgraded until another group of rights is securely established. The United States views on the New International Economic Order were authoritatively set forth in my July 1977 speech to ECOSOC. Consistent with that position, we believe that basic economic rights, such as those set out in the International Covenant on Economic and Cultural Rights, are of vital importance and must be progressively achieved.

In spite of these clarifications, there is a great deal in this resolution that the United States strongly supports; in particular, paragraphs 1A, 1G and 1H. We believe the international community is steadily evolving an international consensus on this important subject. And in this regard I would like to underscore the words of paragraph 1A:

All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights;

It is this acknowledgment of the mutual reinforcing character of all of these rights that will enable us to make progress. It is this approach which will guide the policies of my Government.²

The revised draft resolution was adopted as Resolution 32/130 by the General Assembly on December 16, 1977, by a recorded vote of 123 to none, with 15 abstentions.³

² Press Release USUN-131(77) (Dec. 5, 1977).

³ UN Doc. A/32/P.V.105 (1977).

DIPLOMATIC MISSIONS AND EMBASSY PROPERTY
(U.S. Digest, Ch. 4, §1)

Privileges and Immunities

On August 1, 1977, Bruno A. Ristau, Chief of the Foreign Litigation Section of the Civil Division of the Department of Justice, testified on H.R. 7679,¹ a bill to provide for direct actions against insurers on claims against persons entitled to diplomatic immunity. In his testimony before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, Mr. Ristau described how the enactment of H.R. 7679 would fill the gap left open by the Foreign Sovereign Immunities Act of 1976 and the pending legislation on diplomatic immunities. Mr. Ristau analyzed U.S. case law, the European Convention on Compulsory Insurance against Civil Liability in Respect of Motor Vehicles of April 20, 1959, and provisions of the U.S. Constitution in arriving at his conclusion that the Congress is fully authorized to enact a limited federal direct action statute such as H.R. 7679. Portions of Mr. Ristau's testimony appear below:

The Department of Justice considers it imperative that H.R. 7679 be enacted if the United States is to modernize fully and comprehensively its laws dealing with the redress which citizens of this country may obtain in our courts against foreign states and officials of foreign states. . . .

H.R. 7679 will, in our view, complete the circle and fill the gap still left open by the Foreign Immunities Act and by the proposed Diplomatic Immunities Act: it will provide an effective remedy and ensure collectability on claims against foreign diplomats under circumstances where diplomats themselves will remain personally immune from suit in the courts of our country.

The bill would cure a serious deficiency of our legal system which prevents an injured party from obtaining effective redress from a foreign diplomat's insurance carrier. This deficiency is due to the common law rule requiring a negligently injured party to assert its damage claim against the tortfeasor personally, and denying the injured party the opportunity to reach directly any proceeds under a contract of indemnity or insurance which the tortfeasor may have with a third party. Indeed, at common law, the mere mention of "insurance" at trial could lead to a mistrial.

The enactment of a Federal "direct action" statute applicable to insurance policies issued to persons who enjoy personal immunity from suit as a matter of Federal law would, in our view, go a long way in remedying that deficiency. The idea of a direct action statute is certainly not new. Numerous States of the Union have had on their books for several decades statutes permitting direct actions against insurers under a variety of circumstances. . . .

In at least one instance that we are aware of, the right to proceed directly against an insurer was created by the courts. In *Shingleton v. Bussey*, 223 So.2d 713 (1969), the Supreme Court of Florida held that

¹ H.R. 7679, 95th Cong. 1st Sess., 123 CONG. REC. H. 5626 (daily ed. 1977).

under Florida law an injured party was a third-party beneficiary of a motor vehicle liability policy and had a direct cause of action against the insurer (overruling earlier case law which had denied such right). The following language of the Supreme Court of Florida is most apposite to H.R. 7679:

It cannot be disputed that securance of liability insurance coverage protection for the operation of a motor vehicle, regardless of whether the policy is secured to meet the requirements of Ch. 324, F.S., is an act undertaken by the insured with the intent of providing a ready means of discharging his obligations that may accrue to a member or members of the public as a result of his negligent operation of a motor vehicle on the public streets and highway of this State.

Viewed in this light, we think there exists sufficient reason to raise by operation of law the intent to benefit injured third parties and thus to render motor vehicle liability insurance amenable to the third-party beneficiary doctrine.

Once it is established that a person injured by the act of an insured while operating a motor vehicle is a party entitled to maintain a cause of action directly against the liability insurer of the tort-feasor, the question then presented is when may the injured party exercise his right to bring suit on the cause of action vested in him. Resolution of this question entails the effect to be attributed to rules of civil procedure and provisions of the policy as well as the process of weighing and measuring certain countervailing public policies.

In reaching the foregoing conclusion, we are cognizant that the primary reason advanced in those jurisdictions which have sustained "no joinder clauses" in the area of liability insurance is that such a clause serves to prevent prejudice to the insurer through the prophylactic effect of isolating from the jury's consideration any knowledge that coverage for the insured exists. Such a result is deemed desirable because of the notion that a jury is prone to find negligence or to augment damages, if it thinks that an affluent institution such as an insurance company will bear the loss. See Appleman, 8 Insurance Law and Practice, §4861. While we will not go so far as to assert that the above proposition has been all but obliterated by the more recent indications to the effect that the injection of insurance does not operate to increase the size of jury verdicts, we do think the stage has now been reached where juries are more mature. Accordingly, a candid admission at trial of the existence of insurance coverage, the policy limits of same, and an otherwise aboveboard revelation of the interest of an insurer in the outcome of the recovery action against insured should be more beneficial to insurers in terms of diminishing their overall policy judgment payments to litigating beneficiaries than the questionable "ostrich head in the sand" approach which may often mislead juries to think insurance coverage is greater than it is. [223 So.2d at 716, 718.]

None of the jurisdictions in which the problem of traffic accidents caused by foreign diplomats is most pronounced—the District of Columbia, Virginia, Maryland and New York—has a direct action statute. A Federal direct action statute would create a Federal substantive right, enforceable in Federal or State courts, to proceed for damages directly against the insurers of foreign diplomats.

We have done some comparative research to determine how other countries cope with the problem of damage claims against foreign

diplomats involved in traffic accidents. As an example, . . . the "European Convention on Compulsory Insurance against Civil Liability in Respect of Motor Vehicles" of April 20, 1959, 720 U.N.T.S. 119 (1970), . . . is now in force in most countries of Western Europe. That multi-lateral convention requires each signatory state to enact domestic legislation providing for mandatory insurance and a right in the injured party to proceed directly against insurers. As a result, American diplomats stationed in these countries have for many years been required to carry liability insurance on their privately owned vehicles, and the direct action feature of the legislation enacted in the countries of the European Community allows individuals who are injured by our diplomats to recover compensation directly from the insurers of our diplomats. As you can see, the European Community is well ahead of us in remedying the problems created by diplomatic traffic accidents. Indeed, it is safe to say that the problems of diplomatic immunity which continue to vex the Congress and the executive branch are wholly unknown in Europe. I believe we should learn from the Continental experience; it is my understanding that the direct action statute scheme has worked extremely well in Europe.

It may also be profitable for me to point out that when the States of our Union first began enacting direct action statutes, the statutes were subjected to close judicial scrutiny. In the landmark case of *Watson v. Employers Liability Corp.*, 348 U.S. 66 (1954) the Louisiana direct action statute was challenged on every conceivable constitutional ground. A unanimous Supreme Court rejected all challenges . . .

There can be no question that Congress is fully authorized to enact a limited Federal direct action statute as envisaged by H.R. 7679. Although under the Commerce Clause of the Constitution Congress could undoubtedly enact a general Federal direct action statute, H.R. 7679 is less ambitious; it draws on Congress' power over international affairs. Since the immunity of foreign diplomats from suit is a privilege accorded by Federal law, Congress has a legitimate interest in protecting the rights of persons injured in the United States by those who enjoy a Federal immunity from suit. If Congress has the power to require that foreign diplomats obtain liability insurance as a condition to driving in the United States . . . Congress can, by parity of reasoning, also ensure that the insurance affords effective redress to the injured person by allowing determination of the person's claim in the courts, and not leaving the injured person at the mercy of an insurance adjustor.

. . . [T]he Department of Justice wholeheartedly and without qualification supports H.R. 7679.²

The text of H.R. 7679 appears below:

To amend title 28, United States Code, to provide for actions against insurers on claims against persons entitled to diplomatic immunity.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 85 of title 28, United States Code, is amended by the addition of the following new section:

"§1364. Actions against insurers involving claims against members of missions and their family members

²Dept. of Justice release (Aug. 1, 1977). (Appendices omitted.)

"(a) Any person having a claim arising in the United States against an individual who is a member of a mission or is a member of the family of a member of a mission as defined in the Vienna Convention on Diplomatic Relations may bring an action on such claim, regardless of the amount in controversy, in any district court against any person who by contract has insured such individual against liability with respect to such a claim, within the terms and limits of such contract.

"(b) In any action brought under subsection (a), it shall not be a valid defense that the insured is immune from suit, that the insured is an indispensable party, or, in the absence of fraud or collusion, that the insured has violated a term of the contract, unless the contract was cancelled before the claim arose."

.....

In response to questions posed by the Subcommittee on International Operations of the Committee on International Relations of the House of Representatives, the Department of State answered a series of questions dealing with automobile insurance for U.S. personnel abroad and for cars registered by embassies, permanent missions to the United Nations, and UN officials in New York. These questions and answers on the topic of insurance appear below:

Question 7. Do all categories of U.S. personnel in foreign countries have to have automobile insurance?

(a) If not, in which countries are they exempted?

(b) Which categories of personnel are exempted?

Answer. (a) We know of no countries in which Foreign Service personnel are posted where all those who own and operate automobiles do not comply with the local law or standard embassy requirement that their cars be adequately insured.

(b) As indicated in (a) above, we know of no categories of Foreign Service personnel exempted from the requirement to insure one's automobile(s) against public liability.

Question 10. How many countries require automobile liability insurance as a condition of entering the country?

Answer. The Department of State does not have current data on the number of countries requiring automobile insurance as a condition of permitting a car to enter the country. All European countries require evidence, in the form of the so-called "Green Card," of insurance coverage before a car can cross the border to enter one of these countries. An official hearing transcript also shows that Representative Sam M. Gibbons, in his opening statement at the hearing on compulsory foreign nonresident automobile insurance and registration held by the Subcommittee on Trade of the Committee on Ways and Means on September 20, 1976, stated that "the United States is the only major country in the world not requiring automobiles to carry liability insurance as a condition of their entering the country."

Question 16. How many diplomatic cars are insured in the United States?

Answer. All cars registered by diplomats, permanent missions to the United Nations, and top UN officials in New York are insured because of local mandatory insurance laws. We have no accurate means of approximating the number of diplomatic cars in the Washington area that

are insured, since the District of Columbia and Virginia do not require evidence of insurance coverage as a prerequisite to automobile registration.

Question 17. Do our diplomats overseas carry motor vehicle liability insurance?

Answer. We know of no countries in which U.S. Foreign Service personnel are posted where all those who own and operate automobiles do not comply with the local law or the standard embassy requirement that their cars be adequately insured.

Question 18. How many lawsuits per year would you estimate are frustrated due to lack of insurance? Are any of these cases covered by State laws which provide uninsured motorist coverage?

Answer. We would estimate that not more than half a dozen cases per year are frustrated due to lack of insurance. Some of these would likely be covered by State laws that provide uninsured motorist coverage; for example, uninsured motorist coverage did operate to provide the Rosenbaums a modest indemnity for Dr. Hall Brown's tragic injuries.³

CONSULAR OFFICERS AND CONSULATES (U.S. *Digest*, Ch. 4, §2)

Functions of Consuls

In a telegram dated November 9, 1977, the Department of State sent instructions and made inquiry concerning a U.S. consular officer's actions in protecting a group of U.S. citizens detained by local police in a foreign country. The telegram noted that the principal issues in such cases are "not whether the group had violated [local] law, nor whether [members of the group] were discriminated against or were victims of [arbitrary action by the local police]." The key issues "relate to the actions of [the local] law enforcement authorities after the group's arrest and the actions . . . on the part of embassy officers after they were notified of the arrest." The telegram described the kind of actions that are expected of U.S. consular officers as follows:

If we are to insist that foreign governments, particularly those who are signatories to the Vienna Convention on Consular Relations, notify an American consular officer promptly upon the arrest of an American citizen, it behooves the consular officer to take prompt, expeditious action upon receipt of information on the arrest of an American citizen, regardless of the source of the information. Otherwise the sincerity of the United States Government's concern for the legal and human rights of its citizens abroad will be called into question and the consular officer's credibility eroded. (See chapter 1 of the *Arrests Handbook*)¹

³ *Diplomatic Privileges and Immunities. Hearings and Markup Before the Subcomm. on International Operations of the House Comm. on International Relations*, 95th Cong. 1st Sess. 214, 217, 218 (1977).

¹ The *Arrests Handbook*, whose full title is the *Special Consular Services Handbook: Protection of American Nationals Arrested, on Trial, or Imprisoned*, has six chapters dealing with the responsibility of a U.S. consular officer with regard to arrests, pretrial confinement, trial, prolonged imprisonment, death of a prisoner, and release.

... Whenever an American is maltreated, and the Embassy is aware of the maltreatment, a protest should be made if the victim gives his permission, whether or not the protest may be helpful to the victim in that particular case. It has been the Department's experience that when such protests are made, even after the release of the maltreated American, by putting the host government on notice that the U.S. Government will not condone or tolerate maltreatment of its citizens, the treatment of Americans in later arrest cases has improved markedly. If we do not protest, there is no reason to hope for improvement in the treatment of arrested Americans. The Department also wishes to point out that such protests should and must be made regardless of how a host government treats its own citizens when they are arrested.²

FOREIGN AGENTS
(U.S. *Digest*, Ch. 4 §4)

Foreign Agents Registration Act

In August of 1977, Senator John Sparkman, Chairman of the Senate Foreign Relations Committee, caused to be printed a report prepared for his Committee by the American Law Division of the Congressional Research Service of the Library of Congress on the Foreign Agents Registration Act of 1938. Chairman Sparkman's preface described the contents of the committee print in part as follows:

The print includes a detailed description of the background of the 1938 legislation, as amended, its operation, administration and enforcement, current problems associated therewith, and recommended changes to make the Act more workable. In addition, the print contains a number of other materials on the subject of lobbying and propaganda activities by nondiplomatic representatives, including Justice and State responses to Committee interrogatories, which should prove beneficial during the Subcommittee on International Relations upcoming investigation into the subject—the first such investigation since the one that preceded the 1966 amendments.¹

The print contains a report submitted on March 13, 1974, by Elmer B. Staats, then Comptroller General of the United States, to Senator J. W. Fulbright, then Chairman of the Senate Committee on Foreign Relations, concerning the effectiveness of the Act. Mr. Staats gave the following reasons for the preparation of the report by the General Accounting Office (GAO):

The Senate Committee on Foreign Relations asked GAO to review the Foreign Agents Registration Act, as amended, and to point out areas needing additional corrective action. This report covers the effects of the 1966 amendments on the number and types of registered foreign agents; an appraisal of the sufficiency and timeliness of the information filed by registered agents in fulfilling the purposes of the act; and an analysis of the monitoring and enforcement actions taken by the Department of Justice.²

The recommendations contained in the digest of the GAO report suggest

² Dept. of State telegram 268315 (Nov. 9, 1977).

¹ Senate Comm. on Foreign Relations, Comm. Print prepared by the American Law Division of the Cong. Research Service of the Library of Cong., 95th Cong., 1st Sess., *The Foreign Agents Registration Act (1977)*, 161-62.

² *Id.* 86.

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CORRESPONDENCE

TO THE EDITOR-IN-CHIEF

February 17, 1978

In "Torture and Emergency Powers Under the European Convention on Human Rights: Ireland v. The United Kingdom,"¹ Michael O'Boyle cites a section of *The Irish Triangle*² as a condemnation of the Compton Committee's examination into allegations of torture and brutality in Northern

¹ 71 AJIL 674 (1977).² Reviewed at 71 AJIL 375 (1977).

Ireland. While I certainly do not disagree with Mr. O'Boyle's statement, I must point out that, given the format of the book, the citation is wrong since it refers to views that I hypothesized might be set forth by an opponent of the existing Ulster regime.

In any case, however, Mr. O'Boyle is right in condemning Compton. Although it is admittedly difficult for a person to find fault with his or her own country, the strained reasoning of Compton (and Parker, and later Widgery) was disappointing and ostensibly nothing more than an attempt to protect the guilty; and although the dissenting vote of Gardiner in the Parker Committee's report was a welcome relief to those dismayed with Britain's legal processes in the North, it could not overcome the feeling that what was perhaps needed was an inquiry into the British inquiries.

ROGER H. HULL
Syracuse University

Austrian State Practice
February 17, 1978

TO THE EDITOR-IN-CHIEF

The practice of states in questions of international law constitutes, undoubtedly, a main factor in the creation as well as the progressive development of international law. Hence, it is already a truism to emphasize the importance of a periodical publication of relevant documents and reports on the state practice. Such reports concerning several states have already been systematically included in other journals of international law; the Austrian State practice, however, has on a systematic basis hitherto escaped the attention of authors of international law.

For these reasons, on behalf of the editors of the *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht*, I would like to draw your and the readers' attention to a new annual section on the Austrian practice in international law which is included in that journal. The eminent Austrian international lawyer, Professor Verdross, has given the impetus to the establishment of this section; the first report covering the period 1975/76 appeared in volume 27 (1976), pp. 301-71, the second, covering the period 1976/77 in volume 28 (1977), pp. 303-49.

These annual reports follow a general outline printed in full in volume 27, p. 303, comprising a wide range of topics of general international law combined with some items arising from Austria's specific position in international law. The new section falls into two parts: the first contains the judicial practice (Austrian international law cases) and is compiled by Professor P. Fischer; the second contains the diplomatic practice (Austrian digest of international law) and is compiled by myself. An English summary is added to each case to open access to the main subjects of these materials to English speaking lawyers.

I may add that the title of our journal because of this new section has been altered from *Österreichische Zeitschrift für öffentliches Recht* (Austrian Journal of Public Law) to *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* (Austrian Journal of Public and International Law).

GERHARD HAFNER
Assistant editor

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

JOHN A. BOYD *

The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

MEMBERSHIP AND REPRESENTATION (U.S. *Digest*, Ch. 2, §4C)

International Labor Organization

On November 1, 1977, Secretary of Labor F. Ray Marshall read at a news conference at the White House the following statement on behalf of President Carter announcing the termination of U.S. membership in the International Labor Organization:

Two years ago, the United States gave official notice that we would leave the International Labor Organization unless corrective measures were taken to restore that organization's commitment to its original purposes. Because such measures have not been taken, I direct that United States membership in ILO be terminated. The United States remains ready to return whenever the ILO is again true to its proper principles and procedures.¹

During the briefing session subsequent to the announcement, Secretary Marshall outlined the reasons for the termination:

There were . . . three or four essential problems involved. One was the unequal application of standards which was a very important principle of the ILO. The heart of the ILO is that it has a procedure for adopting and implementing labor standards. And that procedure is to have a committee of the experts investigating violations of those standards and then make a report.

One concern that people had was the uneven application of those standards, as the same standards were not applied, in other words, to all countries.

A second problem which involved due process was the condemnations were frequently made without adequate investigation of the charges that were being made against various people within that organization. Another very important principle is that the main purpose of the International Labor Organization is . . . to adopt and enforce labor standards. And too often the basic purpose was diverted by extraneous political matters that were injected into the procedures of the ILO.

* Office of the Legal Adviser, Department of State.

¹ 13 WEEKLY COMP. OF PRES. DOC. 1705-06 (Nov. 7, 1977).

....

... [F]or instance ... you would come to talk about questions like the condemnation of some country for political actions rather than anything related to labor standards at all. And then another principle, of course, is tripartitism. And in this, of course, the International Labor Organization is unique among United Nations organizations [in] that it has representatives of unions, workers, employers and Government from different countries, and tripartitism means that the labor and employer representatives really represent labor and employers.

Too frequently that principle was diluted when the delegates represented Government almost exclusively. So those were the four basic concerns that we had about the operations of the ILO.²

During this briefing session, Secretary Marshall expressed doubt that a one-year extension of the notice of intention to withdraw given in a letter dated November 5, 1975, from Secretary of State Kissinger to Francis Blanchard, Director General of the ILO, was permissible under the ILO constitution:

... [W]e would be subject to challenge if we tried to participate with the one-year extension when the constitution, we thought, was fairly clear on that matter.

A problem that we have, of course, is we have objected in the past to other countries twisting the language of the constitution in order to fit their own purposes. And so we thought that the question of a one-year extension was questionable at best ... and I guess the real and final reasoning is it is hard to see what you could accomplish in one year with an extension. ...³

Secretary Marshall indicated that in spite of the withdrawal and the consequent termination of about \$20 million in annual, direct contributions by the United States to the ILO, the United States would continue to follow and in some cases to support indirectly some ILO activities:

I think, of course, it is important to clarify that even though the United States withdraws, we intend to continue to watch the ILO's activities very carefully. And I hope personally that the time will come when we can see our way to get back in.

Also, we will continue to contribute to the ILO's activities because most of its technical assistance funds, some \$35 million a year, come from the UNDP, United Nations Development Program, and we contribute over \$100 million a year to that program and will continue to do that.

....

I think we will continue to contribute to the information gathering and statistical activities.⁴

² White House Press Release, Nov. 1, 1977, 16 ILM 1562 (1977).

³ *Id.* 1565.

⁴ *Id.* 1565-66.

LEGAL EFFECTS OF ACTS
(U.S. *Digest*, Ch. 2, §4G)

UN Resolutions and Declarations

In his November 11, 1977, statement concerning the *Report of the International Law Commission on Its Twenty-Ninth Session*,¹ Robert Rosenstock, U.S. Representative to the Sixth (Legal) Committee of the UN General Assembly, described, *inter alia*, how a UN General Assembly resolution may in exceptional cases contribute to the development of international law. Mr. Rosenstock's comments were made while discussing the Commission's proposed draft Article 22, entitled "Newly Independent States," on succession of states in respect of matters other than treaties. Mr. Rosenstock took exception to the Commission's commentary in its *Report* suggesting that the UN General Assembly had "developed" the principle of permanent sovereignty over natural resources by passing Resolution 3201, entitled "Declaration on the Establishment of a New International Economic Order," and Resolution 3281, entitled the "Charter of Economic Rights and Duties of States."

Portions of Mr. Rosenstock's statement follow:

... In paragraphs 61 and 62 of the commentary on article 22 of the draft, the Commission discusses the principle of permanent sovereignty over natural resources. In paragraph 61, it correctly quotes the pertinent passage of the International Covenants on Economic, Social and Cultural Rights, and on Civil and Political Rights. However, in paragraph 62, it then proceeds to make this startling statement: "The General Assembly has only recently reiterated and developed that principle" and in support of that conclusion quotes from General Assembly Resolution 3201 of the Sixth Special Session and the Charter of Economic Rights and Duties of States.

My government finds this statement startling because it is open to the interpretation that this General Assembly, by its adoption of controverted resolutions, "develops" principles which arguably are of a legal character. That is an interpretation of the powers and practice of this Assembly which is not accepted by my government, and which does not conform to the United Nations Charter or to international law.

This Assembly is not a lawmaking body. Its resolutions, in the ordinary course, do not enact, formulate or alter international law, progressively or regressively. In the exceptional cases in which a General Assembly resolution may contribute to the development of international law, it can do so only if the resolution gains virtually universal support, if the Members of the General Assembly share a lawmaking or law-declaring intent—and if the content of that resolution is reflected in general state practice. The General Assembly Resolution on the Principles of International Law Concerning Friendly Relations and Cooperation Among States may be an authoritative interpretation of international law, adopted as it was unanimously and stated as it was by many Members to be such—at any rate, if it is supported by state practice. But the resolutions of the Sixth Special Session cannot be said to have developed international law on the points at issue, for, on those very points, my government and other Members

¹ 32 GAOR, Supp. (No. 10), UN Doc. A/32/10 (1977).

of this Assembly expressed the most vigorous and precise disagreement. My government and others took particular care to state that those resolutions had no effect on the international law of matters which are comprehended by the concept of permanent sovereignty over natural wealth and resources. As to the Charter of Economic Rights and Duties of States, the situation, if anything, is clearer still. Sixteen states voted against key provisions of the article on permanent sovereignty and expropriation and nineteen voted for a substitute Western amendment; seventeen industrialized democracies voted for its deletion of article 16. To suggest that those resolutions "developed" the principle of permanent sovereignty is accordingly baffling, at any rate if the Commission is using the term in the sense of article 13 of the United Nations Charter.

For these reasons, my government takes serious exception to this passage of the Commission's report, which we find unnecessary as well as erroneous. Both codification and progressive development must proceed from a firm basis.²

TRUST TERRITORIES
(U.S. *Digest*, Ch. 2, §6)

On October 24, 1977, President Carter proclaimed that the Constitution of the Northern Mariana Islands shall come into full force and effect on January 9, 1978. Presidential Proclamation 4534 also brought into full force and effect specified sections of the Covenant signed by representatives of the United States and the Marianas Political Status Commission on February 15, 1975, and reserved the authority of the President under Section 1004 of the Covenant to suspend the application of any provision of law to or in the Northern Mariana Islands until the termination of the Trusteeship Agreement.¹ The text of Proclamation 4534 follows:

On February 15, 1975, the Marianas Political Status Commission, the duly appointed representative of the people of the Northern Mariana Islands, and the Personal Representative of the President of the United States signed a Covenant, the purpose of which is to provide for the eventual establishment of a Commonwealth of the Northern Mariana Islands in political union with the United States of America. This Covenant was subsequently approved by the Mariana Islands District Legislature and by the people of the Northern Mariana Islands voting in a plebiscite. The Covenant was approved by the Congress of the United States by joint resolution approved March 24, 1976 (Public Law 94-241; 90 Stat. 263).

In accordance with the provisions of Article II of the Covenant, the people of the Northern Mariana Islands have formulated and approved a Constitution which was submitted to me on behalf of the Government of the United States on April 21, 1977, for approval on the basis of its consistency with the Covenant and those provisions of the Constitution, treaties and laws of the United States to be applicable to the

² Press Release USUN-112(77), at 16-18 (Nov. 11, 1977).

¹ The Trusteeship Agreement for the former Japanese Mandated Islands was approved by the UN Security Council on April 2, 1947, and by the United States on July 18, 1947. TIAS No. 1665, 61 Stat. 3301, 12 Bevans 951, 8 UNTS 189, entered into force on July 18, 1947.

Northern Mariana Islands. Pursuant to the provisions of Section 202 of the Covenant, the Constitution of the Northern Mariana Islands will be deemed to have been approved by the Government of the United States six months after the date of submission to the President unless sooner approved or disapproved.

The six-month period of Section 202 of the Covenant having expired on October 22, 1977, I am pleased to announce that the Constitution of the Northern Mariana Islands is hereby deemed approved.

I am satisfied that the Constitution of the Northern Mariana Islands complies with the requirements of Article II of the Covenant. I have also received advice from the Senate Committee on Energy and Natural Resources and the Subcommittee on National Parks and Insular Affairs of the House Committee on Interior and Insular Affairs that the Constitution complies with those requirements.

Sections 1003(b) and 1004(b) of the Covenant provide that the Constitution of the Northern Mariana Islands and the provisions specified in Section 1003(b) of the Covenant shall become effective on a date proclaimed by the President which will be not more than 180 days after the Covenant and the Constitution of the Northern Mariana Islands have both been approved.

NOW, THEREFORE, I, JIMMY CARTER, President of the United States of America, do hereby proclaim as follows:

SECTION 1. The Constitution of the Northern Mariana Islands shall come into full force and effect at eleven o'clock on the morning of January 9, 1978, Northern Mariana Islands local time.

SEC. 2. Sections 102, 103, 204, 304, Article IV, Sections 501, 502, 505, 601-605, 607, Article VII, Sections 802-805, 901 and 902 of the Covenant shall come into full force and effect on the date and at the time specified in Section 1 of this Proclamation.

SEC. 3. The authority of the President under Section 1004 of the Covenant to suspend the application of any provision of law to or in the Northern Mariana Islands until the termination of the Trusteeship Agreement is hereby reserved.

IN WITNESS WHEREOF . . .²

The Constitution of the Northern Mariana Islands proclaimed by President Carter contains eighteen articles and a schedule on transitional matters. The titles of the articles are: Personal Rights; Legislative Branch; Executive Branch; Judicial Branch; Representation in the United States; Local Government; Eligibility to Vote; Elections; Initiative, Referendum and Recall; Taxation and Public Finance; Public Lands, Restrictions on Alienation of Land; Eminent Domain; Natural Resources; Education; Corporations; Oath of Office; Constitutional Amendment.

Article V, entitled Representation in the United States, states:

Section 1: Representative to the United States. A representative to the United States shall be elected to represent the Commonwealth in the United States and to perform those related duties provided by law. The governor shall provide a certification of selection promptly to the United States Department of State and to the representative.

² 42 Fed. Reg. 56,593 (1977).

Section 2: Term of Office. The term of office of the representative shall be two years unless it is increased to no more than four years by initiative under article IX, section 1.

Section 3: Qualifications. The representative shall be qualified to vote in the Commonwealth, a citizen of the United States, at least twenty-five years of age, and a resident and domiciliary of the Commonwealth for at least seven years immediately preceding the date on which the representative takes office. A different period of residence and domicile may be provided by law. No person convicted of a felony in the Commonwealth or in any area under the jurisdiction of the United States may be eligible for this office unless a full pardon has been granted.

Section 4: Annual Report. The representative shall submit a written report by the second Monday of January of each year to the governor and legislature on the representative's official activities during the preceding year and matters requiring the attention of the government or people of the Commonwealth.

Section 5: Compensation. The representative shall receive an annual salary and reasonable allowance for expenses provided by law. The salary may not be changed during a term of office.

Section 6: Vacancy. In the event of a vacancy in the office of representative to the United States, the governor shall appoint a successor with the advice and consent of the legislature.

Section 7: Impeachment. The representative is subject to impeachment as provided in article II, section 8, of this Constitution for treason, commission of a felony, corruption or neglect of duty.

The Schedule on Transitional Matters deals with the continuity of laws, judicial, legislative and related matters as well as such topics as citizenship, elective offices, statutes of limitations, and approval of the Constitution by the United States.³

NATIONALITY (U.S. Digest, Ch. 3, §1)

Acquisition of Nationality

The Constitution of the Northern Mariana Islands, proclaimed on October 24, 1977, by President Carter, contains a section entitled Interim Definition of Citizenship in its Schedule of Transitional Matters. Section 8 defines the term "United States citizen" or "United States national" as used in the Constitution of the Northern Mariana Islands as follows:

For the period from the approval of the Constitution by the people of the Northern Mariana Islands to the termination of the Trusteeship Agreement, the term United States citizen or United States national as used in the Constitution includes those persons who, on the date of the approval of the Constitution by the people of the Northern Mariana Islands, do not owe allegiance to any foreign state and who qualify under one of the following criteria:

a) persons who were born in the Northern Mariana Islands, who are citizens of the Trust Territory of the Pacific Islands on the date of the

³ Dept. of State File IO/UNP.

approval of the Constitution by the people of the Northern Mariana Islands, and who on that date are domiciled in the Northern Mariana Islands or in the United States or any territory or possession thereof;

b) persons who are citizens of the Trust Territory of the Pacific Islands on the date of the approval of the Constitution by the people of the Northern Mariana Islands, who have been domiciled continuously in the Northern Mariana Islands for at least five years immediately prior to that date, and who, unless under age, registered to vote in elections for the Mariana Islands District Legislature or for any municipal election in the Northern Mariana Islands prior to January 1, 1975; or

c) persons domiciled in the Northern Mariana Islands on the date of the approval of the Constitution by the people of the Northern Mariana Islands who, although not citizens of the Trust Territory of the Pacific Islands, on that date have been domiciled continuously in the Northern Mariana Islands beginning prior to January 1, 1974.¹

PROTECTION OF HUMAN RIGHTS
(U.S. *Digest*, Ch. 3, §6)

UN System

On December 5, 1977, Ambassador Andrew Young, U.S. Representative to the United Nations, made a statement in the Third (Social, Humanitarian, and Cultural) Committee of the UN General Assembly explaining the U.S. abstention on a draft resolution concerning means of improving the enjoyment of human rights.¹ In his statement Ambassador Young described how a state could violate international law by subjecting a person to the deprivation of such individual rights as freedom of speech and freedom from torture. He also indicated that the United States favors the progressive achievement of such basic economic rights as those set out in the International Covenant on Economic and Cultural Rights but that the United States does not agree that the realization of the New International Economic Order is a precondition to the effective advancement of human rights.

The text of Ambassador Young's statement appears below:

It is with regret that the United States found it necessary to abstain on this resolution, for we warmly support many of the provisions of the resolution. We congratulate the cosponsors for their cooperation during the negotiations.

However, several paragraphs of this resolution could be subject to interpretations unacceptable to us and I wish to clarify these.

Examples of our concern are paragraphs 1E and 1F which could be interpreted to imply that priority should be given to the advancement of particular segments of human rights over others. However, such an interpretation would be inconsistent with paragraph 1A, which urges "equal attention and urgent consideration" to all categories of human rights. The promotion of these collective human rights illustratively listed in paragraph 1E must clearly be given attention, but

¹ Dept. of State File IO/UNP.

¹ UN Doc. A/C.3/32/L.17/Rev. 1 (1977).

not a higher priority than is accorded to the promotion of vital individual rights, such as freedom of speech, freedom from torture or other grave violations of the sanctity of the individual. If a person is subjected to the deprivation of these and other individual rights by the very State to which he is entitled to look for protection, a violation of international law arises to which the United Nations should respond if it is to be true to the Universal Declaration of Human Rights and the United Nations Covenants on Human Rights.

The United States interprets the reference in paragraph 1E to mean "mass and flagrant violations of human rights of peoples and persons" as including violations of the rights of the individual, and of particular persons. It is clear that in any pattern of gross violation of individual human rights—as by torturing a number of individuals—there is a mass and flagrant violation of the human rights of persons.

The United States believes that the statements in the resolution pertaining to the rights of states to exercise full sovereignty over their natural wealth and resources must be interpreted to include the principle that the exercise of sovereignty over natural wealth and resources has to be conducted in accordance with the principles of international law.

The United States also is not in agreement with any interpretation of paragraph 1F which could suggest that the realization of the New International Economic Order is a *precondition* to the effective advancement of human rights. Under no circumstances can the recognition and implementation of human rights be delayed or circumvented with the excuse that a particular economic system must first be in place. No group of rights can legitimately be downgraded until another group of rights is securely established. The United States views on the New International Economic Order were authoritatively set forth in my July 1977 speech to ECOSOC. Consistent with that position, we believe that basic economic rights, such as those set out in the International Covenant on Economic and Cultural Rights, are of vital importance and must be progressively achieved.

In spite of these clarifications, there is a great deal in this resolution that the United States strongly supports; in particular, paragraphs 1A, 1G and 1H. We believe the international community is steadily evolving an international consensus on this important subject. And in this regard I would like to underscore the words of paragraph 1A:

All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights;

It is this acknowledgment of the mutual reinforcing character of all of these rights that will enable us to make progress. It is this approach which will guide the policies of my Government.²

The revised draft resolution was adopted as Resolution 32/130 by the General Assembly on December 16, 1977, by a recorded vote of 123 to none, with 15 abstentions.³

² Press Release USUN-131(77) (Dec. 5, 1977).

³ UN Doc. A/32/P.V.105 (1977).

DIPLOMATIC MISSIONS AND EMBASSY PROPERTY
(U.S. *Digest*, Ch. 4, §1)

Privileges and Immunities

On August 1, 1977, Bruno A. Ristau, Chief of the Foreign Litigation Section of the Civil Division of the Department of Justice, testified on H.R. 7679,¹ a bill to provide for direct actions against insurers on claims against persons entitled to diplomatic immunity. In his testimony before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, Mr. Ristau described how the enactment of H.R. 7679 would fill the gap left open by the Foreign Sovereign Immunities Act of 1976 and the pending legislation on diplomatic immunities. Mr. Ristau analyzed U.S. case law, the European Convention on Compulsory Insurance against Civil Liability in Respect of Motor Vehicles of April 20, 1959, and provisions of the U.S. Constitution in arriving at his conclusion that the Congress is fully authorized to enact a limited federal direct action statute such as H.R. 7679. Portions of Mr. Ristau's testimony appear below:

The Department of Justice considers it imperative that H.R. 7679 be enacted if the United States is to modernize fully and comprehensively its laws dealing with the redress which citizens of this country may obtain in our courts against foreign states and officials of foreign states. . . .

.

H.R. 7679 will, in our view, complete the circle and fill the gap still left open by the Foreign Immunities Act and by the proposed Diplomatic Immunities Act: it will provide an effective remedy and ensure collectability on claims against foreign diplomats under circumstances where diplomats themselves will remain personally immune from suit in the courts of our country.

The bill would cure a serious deficiency of our legal system which prevents an injured party from obtaining effective redress from a foreign diplomat's insurance carrier. This deficiency is due to the common law rule requiring a negligently injured party to assert its damage claim against the tortfeasor personally, and denying the injured party the opportunity to reach directly any proceeds under a contract of indemnity or insurance which the tortfeasor may have with a third party. Indeed, at common law, the mere mention of "insurance" at trial could lead to a mistrial.

The enactment of a Federal "direct action" statute applicable to insurance policies issued to persons who enjoy personal immunity from suit as a matter of Federal law would, in our view, go a long way in remedying that deficiency. The idea of a direct action statute is certainly not new. Numerous States of the Union have had on their books for several decades statutes permitting direct actions against insurers under a variety of circumstances. . . .

In at least one instance that we are aware of, the right to proceed directly against an insurer was created by the courts. In *Shingleton v. Bussey*, 223 So.2d 713 (1969), the Supreme Court of Florida held that

¹ H.R. 7679, 95th Cong. 1st Sess., 123 CONG. REC. H. 5626 (daily ed. 1977).

under Florida law an injured party was a third-party beneficiary of a motor vehicle liability policy and had a direct cause of action against the insurer (overruling earlier case law which had denied such right). The following language of the Supreme Court of Florida is most apposite to H.R. 7679:

It cannot be disputed that securance of liability insurance coverage protection for the operation of a motor vehicle, regardless of whether the policy is secured to meet the requirements of Ch. 324, F.S., is an act undertaken by the insured with the intent of providing a ready means of discharging his obligations that may accrue to a member or members of the public as a result of his negligent operation of a motor vehicle on the public streets and highway of this State.

Viewed in this light, we think there exists sufficient reason to raise by operation of law the intent to benefit injured third parties and thus to render motor vehicle liability insurance amenable to the third-party beneficiary doctrine.

Once it is established that a person injured by the act of an insured while operating a motor vehicle is a party entitled to maintain a cause of action directly against the liability insurer of the tort-feasor, the question then presented is when may the injured party exercise his right to bring suit on the cause of action vested in him. Resolution of this question entails the effect to be attributed to rules of civil procedure and provisions of the policy as well as the process of weighing and measuring certain countervailing public policies.

.....

In reaching the foregoing conclusion, we are cognizant that the primary reason advanced in those jurisdictions which have sustained "no joinder clauses" in the area of liability insurance is that such a clause serves to prevent prejudice to the insurer through the prophylactic effect of isolating from the jury's consideration any knowledge that coverage for the insured exists. Such a result is deemed desirable because of the notion that a jury is prone to find negligence or to augment damages, if it thinks that an affluent institution such as an insurance company will bear the loss. See Appleman, 8 Insurance Law and Practice, §4861. While we will not go so far as to assert that the above proposition has been all but obliterated by the more recent indications to the effect that the injection of insurance does not operate to increase the size of jury verdicts, we do think the stage has now been reached where juries are more mature. Accordingly, a candid admission at trial of the existence of insurance coverage, the policy limits of same, and an otherwise aboveboard revelation of the interest of an insurer in the outcome of the recovery action against insured should be more beneficial to insurers in terms of diminishing their overall policy judgment payments to litigating beneficiaries than the questionable "ostrich head in the sand" approach which may often mislead juries to think insurance coverage is greater than it is. [223 So.2d at 716, 718.]

None of the jurisdictions in which the problem of traffic accidents caused by foreign diplomats is most pronounced—the District of Columbia, Virginia, Maryland and New York—has a direct action statute. A Federal direct action statute would create a Federal substantive right, enforceable in Federal or State courts, to proceed for damages directly against the insurers of foreign diplomats.

We have done some comparative research to determine how other countries cope with the problem of damage claims against foreign

that the Attorney General take the following steps:

Establish a system which would bring all foreign agent files up to date and require that filings be made on time. Review supplemental statements to identify and revise all questions which confused the registrants, to reduce or eliminate the high incidence of insufficient responses. Assess the Registration Section's needs, including those for more staff, and establish a review system to insure that the Department carries out its registration and enforcement activities effectively.³

In a letter dated June 26, 1974, Acting Assistant Attorney General for Administration Glen E. Pommerening wrote to Chairman Fulbright "concerning action taken, or planned to be taken, by the Department of Justice to meet the problems discussed by the Comptroller General's report. . . ." Mr. Pommerening indicated the Department of Justice concurred "in general with the criticisms and recommendations" contained in the GAO report and suggested that the Justice Department's Registration Unit would take the following measures to comply with the report's recommendations:

To comply with the recommendations of the report, we plan to establish attorney teams in the Registration Unit to (1) conduct ongoing examinations of the records of registrants, (2) establish and maintain liaison with congressional committees and U.S. agencies dealing with foreign matters, (3) ascertain whether agents are complying with their obligations to disclose the identities of their foreign principals when dealing with U.S. officials and agencies, (4) followup by personal inspection the issuance of Notices of Deficiency to determine whether activity of the agent continued beyond the 10-day limit, and (5) call on and consult with registrants having problems in complying with the Act.⁴

Mr. Pommerening also discussed the GAO's recommendations to achieve better coordination with the Department of State in the administration of the Act:

Relative to the GAO recommendation that an interagency agreement be worked out with the State Department concerning the referral and followup of persons who are potentially subject to registration as agents of foreign nationals under the provisions of the Foreign Agents Registration Act, efforts have been initiated to establish such a procedure. It has always been our position that solicitation of a registration will be initiated if timely information is furnished as to (1) the identity of the person, (2) an address in the United States where the person may be reached, and (3) the basis on which an obligation to register can be founded. We will initiate the appropriate action on any such information that the Department of State may furnish concerning the proposed activities of visitors to the United States.⁵

ARMED FORCES
(U.S. *Digest*, Ch. 4, §5)

Lawmaking Conferences

On September 8, 1977, George H. Aldrich, Deputy Legal Adviser, Department of State, and Chairman of the U.S. Delegation to the Fourth Ses-

³ *Id.* 107 (footnotes omitted).

⁴ *Id.* 107.

⁵ *Id.* 111. The entire text of Mr. Pommerening's memorandum can be found in pages 107-112 of the committee print.

sion of the Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, submitted to the Secretary of State the report of the U.S. Delegation in which he described how the adoption of a quasi-consensus procedure requiring a decisive majority of the votes had helped contribute to a successful conference. Portions of the conclusions of the Delegation report follow:

The Conference succeeded beyond our expectations in codifying and developing the law applicable in armed conflict.

.....

We agreed in Istanbul in 1969 to the ICRC [International Committee of the Red Cross] effort that laid the foundation for this Conference, but we did so with considerable misgivings. As a country that relies for its military effectiveness more on technology, modern equipment, and firepower than on massed manpower, the United States had to approach this Conference with caution and concern. Moreover, we had seen in other contexts the risk that conferences of one hundred or more countries would be dominated by a majority of developing countries, a majority which all too often seems to be led by radical states bearing grudges against the wealthy countries in general and against the United States in particular . . .

.....

Consistent with these concerns, we approached the Conference as more of a hazard than an opportunity. Thus, we were able to make clear from the outset that we were not prepared to pay a high price in terms of military effectiveness or political barnacles in order to obtain treaty provisions that we desired. Although there were, indeed, provisions we desired, such as a better protecting power system, specific requirements to account for missing in action and the dead, and a clear statement that prisoners could not be denied protection through allegations that they were fighting an aggressive war, we were never prepared to pay an unreasonable price for such provisions. We made this unwillingness clear from the outset, and we worked assiduously with allied delegations and with the Soviet Union to ensure that the other major military powers had similar approaches. Thus, it became clear that if it were to develop Protocols acceptable to the major powers, the Conference would have to work by a modified form of consensus.

The developing countries, although they had, as always, a decisive majority of the votes, accepted the quasi-consensus procedure. Perhaps this reflected in part the fact that the Conference did not deal with economic issues on which "North-South" differences are sharpest, but it seemed also to reflect general acceptance of the fact that an agreement unacceptable to the major powers was not worth having. The United States Delegation concludes from this experience that it is most important for us in any broad multilateral conferences in the future to be in such a posture that we can get along without an agreement, to make this relative independence clear and credible, and to work closely with the other developed countries to ensure a coherent approach.

It should also be noted that a complementary, and perhaps vital, element of our success was our constant concern to identify and meet,

insofar as possible, the real needs of the other Conference participants. Given sufficient time and effort, it was usually possible to arrive at a solution to any particular problem that met at least the *minimum* requirements of virtually all delegations. Our efforts to find these solutions and make the necessary accommodations may have contributed significantly to the necessary attitude of compromise which was indispensable to success. This attitude certainly was not present during the first session of the Conference and developed only slowly during the second, after the contentious political issues had been dealt with. Ultimately it reached the point where the Africans, for example, were looking to us to draft an acceptable text on mercenaries, and the Vietnamese and the PLO delegates were working helpfully with the American rapporteur of Committee III to produce a text on the protection of guerrillas, because they knew that we would do our best to find an acceptable compromise that reconciled to the extent possible the divergent interests. It is questionable whether the Conference could have succeeded if these attitudes had not developed.¹

INTERNATIONAL ACTS NOT CONSTITUTING AGREEMENTS
(U.S. *Digest*, Ch. 5, §6)

Statement of Intent Concerning Arms Limitation Negotiations

On October 19, 1977, Senator John J. Sparkman, Chairman of the Senate Foreign Relations Committee, moved the approval of Senate Concurrent Resolution 56, entitled "a concurrent resolution expressing the concurrence of the Senate and the House of Representatives with respect to presidential action affecting the limitations of strategic armaments." Set forth below is the text of the resolution as passed by the Senate on that day:

Whereas the Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with Respect to the Limitation of Strategic Offensive Arms expired on October 3, 1977;

Whereas a temporary further observance of the limitations of the interim agreement will provide time for further negotiations, consistent with Public Law 92-484, toward a treaty limiting strategic offensive arms;

Whereas the Congress desires that the United States negotiate a treaty supportive of United States national security without the burden and pressure of imminent deadlines;

Whereas the Arms Control and Disarmament Act contemplates close cooperation and consultation between the executive and legislative branches on matters of important substance;

Whereas the interests of the United States are best served by a mutual recognition, in a spirit of comity, by the Congress and the Executive, of the importance of close consultation, cooperation, and adherence to the constitutional and statutory sharing of responsibility in the conduct of foreign affairs;

Whereas the administration has stated its unilateral intent that, while the strategic arms limitation negotiations are being completed, the United States intends not to take any action inconsistent with the

¹ Report of the U.S. Delegation to the Conference 28-30, Sept. 8, 1977.

interim agreement: *Provided*, That the Soviet Union exercises similar restraint; and

Whereas the Administration has expressly represented to Congress that the aforesaid declaration of intent is nonbinding and nonobligatory upon the United States: Now, therefore, be it

Resolved by the Senate (the House of Representatives concurring), That the President is authorized to proceed in accordance with the declaration of intent of the Secretary of State of September 23, 1977, and the Senate and the House of Representatives of the United States concur: *Provided, however*, That nothing herein shall or may be construed to prevent any action or prohibit any weapons' system development, procurement, or deployment heretofore or hereafter authorized or provided for by the Congress of the United States; be it further

Resolved, That the Secretary of State shall at least once every six months during negotiations for a SALT II Agreement report to the Congress on the exact status of negotiations for such SALT II Agreement.¹

On October 3, 1977, Senator Frank Church introduced into the *Congressional Record* the text of Secretary Vance's September 23, 1977, statement:

In order to maintain the status quo while SALT II negotiations are being completed, the United States declares its intention not to take any action inconsistent with the provisions of the Interim Agreement on Certain Measures With Respect to the Limitations of Strategic Offensive Arms which expires October 3, 1977, and with the goals of these ongoing negotiations provided that the Soviet Union exercises similar restraint.²

During Senate consideration of this resolution on October 3, 1977, Senator Church also received unanimous consent to have printed the following letter of September 21, 1977, to Chairman Sparkman from Secretary Vance describing the purposes of the statement of intent:

As you know, we have been exploring for some time ways in which we can facilitate an early and successful conclusion of the SALT II negotiations. One aspect of this subject which State and ACDA staffs have discussed with you is the situation that will exist after the present Interim SALT Agreement expires on October 3. In this regard, we have been considering a policy declaration expressing our intention, while the negotiations are being completed, not to take any action that would be inconsistent with the Interim Agreement's provisions, or with the goals of the ongoing negotiations, provided that the Soviet Union exercises similar restraint. Under this proposal, although the Soviets may also issue a statement of their policy in this regard, along the same lines, there would be no agreement limiting strategic offensive arms in force between the United States and the Soviet Union after October 3 and pending the conclusion of a new SALT Agreement.

Our objective is to maintain the status quo while the SALT II negotiations are being completed, and to complete the work on a SALT II Agreement within the near future. We do not seek to enter into a new agreement extending SALT I during this period, by an "exchange"

¹ 123 CONG. REC. S 17372-73 (daily ed. Oct. 19, 1977).

² *Id.* S 16133 (daily ed. Oct. 3, 1977).

of statements or otherwise. Accordingly, we have informed the Soviets that we intend to issue a unilateral policy declaration along the following lines:

In order to maintain the status quo while [SALT II] negotiations are being completed, the United States declares its intention not to take any action inconsistent with the provisions of the Interim Agreement on Certain Measures With Respect to the Limitation of Strategic Offensive Arms which expires October 3, 1977, and with the goals of these ongoing negotiations, provided that the Soviet Union exercises similar restraint.

In considering how to proceed in this matter, we considered and rejected the possibility of a joint U.S.-Soviet statement which might have raised the question of whether an international agreement was intended. We do not intend to enter into an agreement and believe that our proposal is consistent with this intent, in substance as well as in form.

As indicated in our discussions with you and with the Committee staff, it is our desire to proceed in this matter in close consultation with the Congress. We fully recognize your committee's responsibilities with regard to international agreements generally and SALT II in particular. We hope you share our assessment that our discussions of this subject have been most helpful and constructive.³

On September 24, 1977, a communique and joint statement were issued after meetings between President Carter, Secretary Vance, and Andrei A. Gromyko, Member of the Politburo of the Central Committee of the Communist Party of the Soviet Union and Minister of Foreign Affairs of the U.S.S.R. Portions of the communique and all of the joint statement read as follows:

COMMUNIQUE

Both sides expressed their desire for a constructive and stable development of relations between the United States and the Soviet Union, building on existing treaties and agreements. To this end, both sides consider it necessary to intensify their efforts to find mutually acceptable solutions to existing problems. Both sides agreed that such efforts, which can assure progress in various spheres of U.S.-Soviet relations, serve the interests of their peoples as well as contributing to the strengthening of peace and the lessening of international tensions.

Both sides attach particular importance to the development and implementation of further measures aimed at the effective prevention of nuclear war and the limitation of armaments, thereby contributing to progress toward real disarmament.

In their discussions, the two sides focused on issues relating to the limitation of strategic arms, particularly those pertaining to the preparation of a new agreement on the limitation of strategic offensive arms. Progress was achieved in bringing closer together the positions of the two sides. However, there are still issues requiring agreement. They have issued additional statements on this subject.

³ *Id.* S 16128 (daily ed. Oct. 3, 1977).

Other specific arms limitations issues which are the subject of negotiations between the U.S. and the U.S.S.R. were also discussed: negotiations for a comprehensive ban on nuclear testing; the nonproliferation of nuclear weapons; the prohibition of chemical weapons; the prohibition of radiological and other new types and systems of mass destruction weapons; and questions relating to the Indian Ocean. The two sides noted the utility of the negotiations on these issues that have so far taken place and expressed their intention of continuing their active efforts to achieve practical results.

JOINT STATEMENT

In discussions between Secretary Vance and Minister Gromyko on the questions related to strategic arms, both sides—the Soviet Union and the United States of America—have reaffirmed their determination to conclude a new agreement limiting strategic offensive arms, and have declared their intention to continue active negotiations with a view to completing within the near future the work on that agreement.

The United States and the Soviet Union agree that the Treaty on the Limitation of Anti-Ballistic Missile Systems, signed in Moscow in 1972 and amended in 1974, serves the security interests of both countries. They share the view that this Treaty decreases the risk of nuclear war and facilitates progress in the further limitation and reduction of strategic offensive arms. Both sides also agree that the ABM Treaty has operated effectively, thus demonstrating the mutual commitment of the U.S.S.R. and the U.S.A. to the goal of nuclear arms limitations and to the principle of equal security.

Accordingly, in connection with the five-year review of the ABM Treaty, the two sides reaffirm their commitment to the Treaty. It is agreed that this review will be conducted in the Standing Consultative Committee after its regular fall meeting.⁴

During the October 3, 1977, Senate debate concerning Concurrent Resolution 56, Senator George McGovern obtained unanimous consent to have printed in the *Congressional Record* a legal memorandum prepared on September 23, 1977, by Michael J. Glennon, Legal Counsel of the Senate Committee on Foreign Relations, and a statement given on September 26, 1977, by Paul C. Warnke, Director, U.S. Arms Control and Disarmament Agency, before the Senate Foreign Relations Committee. Portions of the text of these documents dealing with Secretary Vance's September 21, 1977, statement of intent read as follows:

To: Members, Committee on Foreign Relations.
From: Michael J. Glennon, Legal Counsel.

Subject: Does the unilateral declaration of policy outlined in Secretary Vance's September 27, 1977, letter to the Chairman—(1) constitute an international agreement; (2) require Congressional approval; or (3) violate section 33 of the Arms Control and Disarmament Act?

Whether a given arrangement constitutes an international agreement depends upon the intent of the parties, which may be inferred from a number of factors, including the following: whether it is binding on all

⁴ Dept. of State Press Release No. 432 (Sept. 24, 1977).

parties and governed by international law; whether promises are exchanged for each other, as a quid pro quo, through a bargaining process aimed at achieving a meeting of the minds; whether similar, past arrangements have been regarded as agreements; and international custom and practice. If, applying these criteria, an agreement is found to exist, the question becomes whether the agreement is such as to require some form of congressional approval.

It is clear that the proposal outlined in the Secretary's September 21 letter and in thorough discussions with the Committee staff will not constitute an agreement. It is nonbinding, it is not governed by international law, no exchange of promises has been bargained, other such actions have not been so construed, and the parties do not intend for an agreement to exist—indeed, there are no “parties” as such. The staff is assured by Mr. Warnke that no collateral exchanges have occurred with Mr. Gromyko which would alter the legal status of the declaration described in the September 21 letter.

Since no international agreement exists, the question of whether Congressional approval is required is not reached. The only issue remaining is whether the proposed action would violate any law—specifically, the proviso to section 33 of the Arms Control and Disarmament Act. The proviso to section 33 provides that—

“no action shall be taken under this or any other law which will obligate the United States to disarm or to reduce or to limit the Armed Forces or armaments of the United States, except pursuant to the treaty-making power of the President under the Constitution or unless authorized by further affirmative legislation by the Congress of the United States.”

It is clear that the action proposed to be taken will not violate the proviso to section 33, for two reasons. First, it will not obligate the United States; the action will be a non-binding, unilateral policy declaration. Second, the prohibition contained in the proviso applies only to an “action . . . taken under this or any other law”; the action to be taken will not be taken under the Arms Control and Disarmament Act or any other statute, but under the Constitution. The proviso does not purport to affect the President's constitutional power.

Accordingly, issuance of the non-binding policy declaration and its implementation fall within the clear-cut constitutional prerogatives of the President.

STATEMENT OF HON. PAUL C. WARNKE, DIRECTOR, U.S. ARMS CONTROL AND DISARMAMENT AGENCY BEFORE THE SENATE COMMITTEE ON FOREIGN RELATIONS

. . . I appreciate the opportunity to appear before the Committee today to discuss the expiration of the SALT ONE Interim Agreement on Offensive Arms. The 1972 Interim Agreement expires on October 3 and it is clear that a SALT TWO Agreement to replace it cannot be concluded by that date. In recent days, there has been much discussion in the press about the Administration's plans with respect to this matter. On September 23, Secretary Vance issued a statement to the effect that, in order to maintain a stable situation while the SALT TWO negotiations are being completed, the United States intends not to take any action inconsistent with the Interim Agreement or the goals of the ongoing negotiations, provided that the Soviet Union exercises

similar restraint. The Soviets have now issued a policy statement along the lines of our statement. It should be noted that U.S. defense plans would not cause us to exceed any of the Interim Agreement limits in the near future, while the Soviets are in a position to do so because of their active ongoing SLBM construction program.

... [O]ur policy statement is exactly what it says—a declaration of present intent. It is non-binding and nonobligatory. The Interim Agreement will expire on October 3 and will not be extended. No agreement limiting strategic offensive arms will be in force after next Monday. The U.S. will be free to change the policy announced in its statement of September 23 at any time. Because our non-binding statement is not part of an international agreement and does not impose any obligation on the U.S., we have not requested Congressional approval for it. We will carefully and continually monitor Soviet activities.

If these activities or any other circumstances warrant, we will be free to take whatever actions are appropriate, irrespective of the provisions set forth in the Interim Agreement.

We will of course, continue to consult closely with members of this committee and other members of Congress on the progress of SALT. We hope you will support our efforts in this regard.⁵

On September 28, 1977, Herbert J. Hansell, Legal Adviser, Department of State, wrote a letter to Chairman Sparkman giving his opinion concerning Secretary Vance's September 23 statement. The text of the letter, which points out in part that the September 23 statement is not unilaterally binding, follows:

I am writing in response to your request for my opinion relating to the statement released by Secretary Vance on September 23. That statement declared the intention of the United States not to take any action inconsistent with the provisions of the SALT I Interim Agreement of 1972 and with the goals of the SALT II negotiations provided that the Soviet Union exercises similar restraint. Shortly after the release of that statement, the Soviet Union made a similar statement.

The principal question raised with regard to the statement is whether it requires authorization by treaty or legislation under section 33 of the Arms Control and Disarmament Act (the "Act"). That inquiry, in turn, raises the further question whether the statement legally obligates the United States.

Section 33 of the Act prohibits any action "under this or any other law that will obligate the United States to disarm or to reduce or to limit the Armed Forces or armaments of the United States . . ." except pursuant to treaty or legislation. The language and legislative history of the Act make clear that Section 33 is confined to obligatory arms control arrangements effected by binding international agreement "entered into pursuant to the Act or other law. It does not purport to limit the constitutional power of the President to take non-obligatory measures in connection with conduct of international negotiations.

The United States statement of September 23 does not, alone or in conjunction with the Soviet statement, impose an obligation on the United States. The United States has declared that its statement is

⁵ 123 CONG. REC. S 16134 (daily ed. Oct. 3, 1977).

"non-binding and nonobligatory."^b Neither country has committed itself in its statement. Each has only stated a present intention to refrain from certain action provided that the other refrains from similar action. Each is free to reverse its intention at will; the negotiations which the policy of restraint is intended to facilitate could continue even if the declared policies were abandoned.

These circumstances thus lack essential elements of an obligation or a binding agreement; there is no intent by either party to be bound;^c each may at any time cease to do what it has said it presently intends to do; and there would be no legal consequences if either changed its stated policy.

Accordingly, I am of the opinion that the September 23 statement does not legally obligate the United States, by binding international agreement or otherwise, and does not require authorization under section 33 of the Act.^d

On September 22, 1977, Representative Clement J. Zablocki, Chairman of the Committee on International Relations of the House of Representatives, and Representative William S. Broomfield, Ranking Minority Member of that committee, sent Secretary Vance a letter supporting the policy outlined in Secretary Vance's September 21 letter. The letter read in part:

It is our view that under existing circumstances a unilateral policy declaration along the lines you indicated would not constitute an international agreement. We believe such a declaration would be preferable to a joint statement which would raise questions as to whether congressional approval would be necessary. In our opinion, no such approval would be required for the non-binding arrangement you have outlined.^e

The text of the statement issued by the Soviet Union on September 24, 1977, as reported on September 26, 1977, in Foreign Broadcast Information Service (FBIS), reads as follows:

In accordance with the readiness expressed by both sides to complete within the near future the work on a new agreement limiting strategic offensive arms and in the interests of maintaining the status quo while the talks on the new agreement are being concluded, the Soviet Union expresses its intention to keep from any actions incompatible with the provisions of the interim agreement on some measures

^d 123 CONG. REC. S16126 (daily ed. Oct. 3, 1977). The following are the footnotes to the Legal Adviser's letter:

^a Language in the House bill (H.R. 7936) which would have included "measures" other than international agreements within the Act's definition of "disarmament" was deleted prior to enactment.

^b Mr. Warnke so testified to the Committee on Foreign Relations on September 26.

^c The International Court of Justice has ruled that in some circumstances a state may be legally bound by a unilateral statement. (Nuclear Test Cases, *Australia v. France* and *New Zealand v. France*, Judgment of 29 Dec. 1974, I.C.J. Reports 1974, pp. 253 and 457.) However, that decision turned on the intent of the declaring state to be bound and the likelihood of reliance by other states on the binding character of the declaration. Its rationale is not applicable in the present circumstances in which the United States has publicly made clear that it does not intend its statement to be binding.

^e Dept. of State File No. P78 0019-542.

pertaining to the limitation of strategic offensive arms which expires on October 3, 1977, and with the goals of the talks that are being conducted, provided that the United States of America shows the same restraint.

ACTS OF FOREIGN STATES
(U.S. *Digest*, Ch. 6, §8)

Act of State Doctrine

On October 21, 1977, A. Daniel Fusaro, Clerk of the U.S. Court of Appeals for the Second Circuit, wrote Herbert J. Hansell, Legal Adviser of the Department of State, to request the views of the Department on certain aspects of the cases of *The Muslim Commercial Bank Limited v. M. Golodetz & Company and Waterman Steamship Corp.* and *Pubali Bank, Rupali Bank, Sonali Bank and Adamjee Jute Mills, Ltd. v. M. Golodetz & Company and Waterman Steamship Corp.* The cases involved some bills of lading expropriated by the Government of Bangladesh subsequent to the establishment of its independence from Pakistan. Mr. Fusaro posed to Mr. Hansell, as well as to the attorneys for the plaintiffs and defendants, nine specific questions and the following general question concerning the act of state doctrine:

... The Court desires generally to have the views of the Department of State on the applicability of the act of state doctrine, as modified by the Hickenlooper amendment, to the facts of this case. In particular, would a decision in favor of or against recognition of the Bangladesh decrees adversely affect the foreign relations of the United States?¹

On December 8, 1977, Lee R. Marks, Deputy Legal Adviser of the Department of State, responded to this inquiry by indicating in part that the Department did "not have special knowledge or interest" in the first nine questions and "therefore offers no views on them." However, as to the act of state doctrine, Mr. Marks indicated that the Department was of the view that the Hickenlooper Amendment was inapplicable in this case because the statute "does not apply to expropriation of property not owned by Americans."

The portion of Mr. Marks' letter appears below:

In the Department's view, the Hickenlooper Amendment is inapplicable in this case because it does not apply to expropriation of property not owned by Americans. *Menendez v. Saks & Co.*, 485 F. 2d 1355, 1372 (2d Cir. 1973); *Occidental of Umm Al Qay, Inc. v. Cities Service Oil Co.*, 396 F. Supp. 461, 472 (D.C. La. 1975).

In general, the Department takes the view that foreign policy interests do not require U.S. courts to refrain from reviewing acts of foreign states on the merits. See, the Legal Adviser's letter to the United States Solicitor General in *Alfred Dunhill of London, Inc. v. The Republic of Cuba*, 425 U.S. 682, 706 (1976), app. 1. Similarly, in this case, the Department does not believe that United States foreign policy interests would be adversely affected were the Court to recognize or refuse to recognize the expropriation decrees at issue. How-

¹ Dept. of State File No. P78 0005-1847.

ever, the Department has not made a "determination" to this effect, as that term is used in the Hickenlooper Amendment.²

A memorandum prepared on December 7, 1977, by David H. Small, Assistant Legal Adviser for Near Eastern and South Asian Affairs, concerning this inquiry reads in part as follows:

The subject matter of this litigation is a fund of \$521,568.00 plus accrued interest, which represents the proceeds from the sale of jute. The claimants to the fund and the only parties with a stake in the outcome are the Muslim Commercial Bank, i.e., the Pakistani claimant, and Rupali Bank, Sonali Bank, Pubali Bank and Adamjee Jute Mills, Ltd., collectively referred to as the Bangladeshi claimants. M. Golodetz and Company (hereafter "Golodetz") and the Waterman Steamship Company (hereafter "Waterman"), both of which are American citizens, are captioned as defendants in both actions, but are mere "stakeholders" who have by consent of all parties been discharged from liability upon Golodetz's deposit of the fund in escrow pending adjudication of the claims against the fund.

On or about November 10, 1971, in the territory of East Pakistan (now the Republic of Bangladesh), Waterman, an ocean carrier, issued two order bills of lading in connection with a shipment of a quantity of jute from East Pakistan to the Dominican Republic. The bills were payable to the order of the Pakistani claimant and were to be delivered to Golodetz, a New York jute brokerage firm and intermediary buyer in this transaction.

By November 19, 1971, the shipment had left East Pakistan territorial waters and subsequently arrived in the Dominican Republic on or about December 17, 1971. During that interval, Bengali insurgents, supported by regular Indian troops, engaged in armed hostilities with the Pakistani Army in East Pakistan. On December 29, 1971, the government of the new Republic of Bangladesh, having successfully wrested political control from the Government of East Pakistan, assumed control of all branches of the Pakistani banks, including the Pakistani claimant, located in the new republic. By order dated February 28, 1972, the Bangladeshi government expropriated all property owned by "enemy aliens," including the property and indebtedness of the Pakistani claimant. By order dated March 26, 1972, the government vested in Bangladeshi claimants Rupali Bank and Sonali Bank the previously expropriated assets of the Pakistani claimant including the two bills of lading involved in the sale of jute.

In 1972, the Bangladeshi claimants presented the expropriated bills of lading to Golodetz for payment. The Pakistani claimant also sought payment from Golodetz. Claiming no interest in the proceeds from the sale of the jute, Golodetz deposited the funds in escrow pending adjudication of this consolidated suit.

Recommended Disposition of the Court's Requests

.....

The . . . judicial request to be disposed of is the Hickenlooper Amendment/act of state issue. . . .

As you know, for a number of years, the Department has taken the view that foreign policy interests do not ordinarily require U.S. courts

²Dept. of State File No. P78 0005-1857.

to refrain from reviewing on the merits acts of foreign states that allegedly violate international law. Thus, in the cases that have arisen to date, the Department has found it unnecessary to invoke the proviso of the Hickenlooper Amendment which allows the President, for foreign policy reasons, to require a court in the United States to give effect to the federal act of state doctrine in cases involving foreign expropriations.

The Department's view in this regard was recently expressed in a letter submitted by a former Legal Adviser, Monroe Leigh, to the United States Solicitor General in connection with the case of *Alfred Dunhill of London, Inc. v. The Republic of Cuba*, 425 U.S. 682 (1976). On that occasion, the Legal Adviser stated,

Significantly, the [*Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967), cert. denied, 390 U.S. 956 (1968); *Bernstein v. N. V. Nederlandsche-Amerikaasche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954); *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972)] cases each involved an executive branch determination which opened the way for U.S. courts to review an act of state on the merits under international law. In each of these cases, the claim or counterclaim in question alleged that an act of state violated customary international law. Thus, at least on a case-by-case basis, the trend in executive branch pronouncements has been that foreign relations considerations do not require application of the act of state doctrine to bar adjudications under international law.

.....

In general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy. Thus, it is our view that if the Court should decide to overrule the holding in *Sabbatino* so that acts of state would thereafter be subject to adjudication in American courts under international law, we would not anticipate embarrassment to the conduct of the foreign policy of the United States. E. C. McDowell, 1975 *Digest of U.S. Practice in International Law*, 373, 374.

In this particular case, however, there is a jurisdictional deficiency which precludes the applicability of the Hickenlooper Amendment, namely, that there was no taking of American-owned property. As an earlier Second Circuit panel held, in *Menendez v. Saks and Company*, 485 F.2d 1355, 1372 (2d Cir. 1973):

In *Banco Nacional de Cuba v. First National City Bank*, 431 F.2d 394 (1970)] Judge (then Chief Judge) Lumbard, after an exhaustive analysis of the amendment's legislative history, concluded that it was intended to be limited to cases involving claims of title with respect to *American-owned property* nationalized by a foreign government in violation of principles of international law. For instance, the amendment might be invoked by an American firm if an effort should be made to market the product of such an expropriation in the United States. (Emphasis added.)

Moreover, the *Menendez* Court noted in a footnote, to its opinion that upon review of the *Banco Nacional de Cuba* case, the United States Supreme Court did not disturb that court's conclusion that American-owned property must be involved before the Hickenlooper Amendment can be invoked. 485 F.2d, *supra*, at 1372, n. 21.

Consequently, since the circumstances of this case do not involve the taking of American-owned property, the Hickenlooper Amendment does not apply and thus no foreign policy determination pursuant to that Amendment need be made. . . .

Finally, it should be noted that the District Court has already passed judgment on the expropriation decrees—without seeking comment from the Department—and has concluded that there were no “acts of state” involved, within the meaning of the act of state doctrine. Recalling the holding in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897), that the doctrine applies only with respect to acts of a foreign government *done within its own territory*, the District Court found that the seizure of the bills of lading had not come to complete fruition within Bangladesh such as to amount to a “fait accompli,” since both the jute and the proceeds from the sale of the jute were outside of the dominion of the Bangladeshi Government. Hence, the Court ruled, it cannot be said that the mere seizure of the bills, without more, was an “act of state” within the meaning of the doctrine.³

INTELLECTUAL PROPERTY
(U.S. Digest, Ch. 10, §7)

Protection of Industrial Property

On November 9, 1977, Lutrelle F. Parker, Acting Commissioner of Patents and Trademarks of the U.S. Department of Commerce, announced that the Patent Cooperation Treaty (PCT) and annexed Regulation done at Washington on June 19, 1970, will come into force on January 24, 1978.¹ With the ratification of the PCT by the United Kingdom on October 24, 1977, the necessary number of nations have ratified the treaty and it will come into force three months from that date. He described the PCT as “the most important Treaty on patents that the United States has joined in nearly 100 years.”

Under its terms, the treaty enters into force three months after eight states have deposited their instruments of ratification or accession, provided that at least four of those states have major patent activity. As of November 9, 1977, the states with major patent activity which had ratified the PCT in addition to the United Kingdom were Switzerland, the Federal Republic of Germany, and the United States. In addition, Cameroon, Central African Empire, Chad, Congo, Gabon, Madagascar, Malawi, Senegal, and Togo have ratified it.

The date from which international applications may be filed is expected to be July of 1978 though the exact date will be set by the Assembly of the PCT.

The Patent and Trademark Office in the U.S. Department of Commerce will act under the PCT as a receiving office and an international searching authority for the purpose of processing international applications and providing international search reports. By filing an international application, U.S. patent applicants will be able to effect a simultaneous filing in

³ Dept. of State File No. P78 0005-1850.

¹ U.S. Dept. of Commerce PAT 77-8 (Nov. 9, 1977). The text of the PCT may be found in S. Ex. S, 92d Cong., 1st Sess., Sept. 12, 1972 and 9 ILM 978 (1970).

as many PCT member countries as they designate. Applicants will then have at least an additional eight months in which to furnish translations and pay the national fees for the countries designated. Furthermore, prior to the time for paying national fees and furnishing translations, the applicants will receive an international search report to aid them in evaluating whether to continue to seek protection in the designated countries.

FUELS AND ENERGY
(U.S. *Digest*, Ch. 10, §8)

On November 15, 1977, the United States and Canada concluded an interim agreement concerning the civil uses of atomic energy, which implements a number of the nuclear policy announcements made by President Carter on April 7 and 27, 1977. The agreement ensures that, pending renegotiation of the 1955 Cooperation Agreement between the United States and Canada, as amended,¹ U.S.-Canadian cooperation will conform to the requirements of applicable export conditions contained in pending non-proliferation legislation. It provides in substance that nuclear material and equipment transferred by one party to the other and special nuclear material produced therefrom will not be retransferred without the prior approval of the transferor party. Also, the agreement establishes that nuclear material transferred by one party to the other and special nuclear material produced through its use will not be reprocessed without the prior approval of the transferor party.

In addition, this 1977 interim agreement extends the term of the 1976 Interim Arrangement relating to Safeguards on Uranium Imported by the United States from Canada.² The 1977 interim agreement permits material subject to that agreement, previously required to be held at the Energy Research and Development Administration (ERDA) facilities now under the aegis of the Department of Energy, to be transferred to fuel fabrication, conversion, reactor, and spent fuel storage facilities in the United States.

The 1977 interim agreement also eases the problems created by multiple supplier controls by providing that, if a U.S. recipient country notifies the United States that Canada has rights of approval equivalent to those of the United States over the same nuclear items, the United States will obtain Canadian agreement before granting U.S. approval. In such an event, Canada may authorize the recipient country to check only with the United States, while Canada preserves the substance of its veto rights. If the recipient country does not give such a notification, the United States is required only to consult Canada prior to granting approval.

¹ The United States and Canada entered into the Agreement for Cooperation on Civil Uses of Atomic Energy (TIAS No. 3304; 6 UST 2595; 235 UNTS 175; entered into force July 21, 1955) on June 15, 1955. This agreement was extended and amended on the following dates: June 26, 1956 (TIAS No. 3771; 8 UST 275; 279 UNTS 318); May 22, 1959 (TIAS No. 4271; 10 UST 1293; 354 UNTS 63); June 11, 1960 (TIAS No. 4518; 11 UST 1780; 377 UNTS 412); May 25, 1962 (TIAS No. 5102; 13 UST 1400; 453 UNTS 362).

² TIAS No. 8287, entered into by an exchange of notes of March 18 and 25, 1976.

Set forth below are portions of the November 15, 1977, note sent by Thomas O. Enders, U.S. Ambassador to Canada, to Donald G. Jamieson, Canadian Secretary of State for External Affairs, who responded with a note of acceptance on the same date:

I wish to acknowledge Canada's leadership role in the field of preventing nuclear proliferation. Both Canada and the United States are parties to the Treaty on the Non-Proliferation of Nuclear Weapons. Both countries have committed themselves to ensure that any source materials, special nuclear materials, equipment or heavy water transferred pursuant to the 1955 Cooperation Agreement, including all materials transferred pursuant to the Agreement embodied in the Exchange of Notes which entered into force on March 25, 1976, and including such items subsequently retransferred pursuant to agreements for cooperation between the United States and other nations, and any special nuclear materials produced therefrom, including subsequent generations derived from the above-mentioned special nuclear materials shall not be used for research on or development of any nuclear explosive device or for any other military purpose. They have also committed themselves to ensure that such materials and equipment are subject to the application of IAEA [International Atomic Energy Agency] safeguards. While such materials and equipment are within the United States, the United States intends to implement this commitment pursuant to an agreement with the IAEA for the application of safeguards in the United States. Further, both have committed themselves to ensure that adequate physical protection is applied to all such materials or equipment, taking into account the measures set forth in INFCIRC/225 (Revised). These are enduring commitments.

The United States is prepared to begin renegotiation of the 1955 Cooperation Agreement with Canada immediately, with a view to prompt conclusion of a new agreement. The United States proposes that the Agreement embodied in the Exchange of Notes between the United States and Canada, which entered into force on March 25, 1976, as complemented by this Exchange of Notes, remain in force until the renegotiated agreement for cooperation enters into force. During this period, source materials and special nuclear materials transferred pursuant to the 1955 Cooperation Agreement, including all materials transferred pursuant to the Agreement embodied in the Exchange of Notes which entered into force on March 25, 1976, and any special nuclear material produced therefrom, including subsequent generations derived from such special nuclear materials, may be transferred only to fuel fabrication, conversion, reactor and spent fuel storage facilities in the United States, provided that such material shall not be transferred beyond the jurisdiction of the United States nor shall any such materials be reprocessed, unless the parties agree to such retransfer or reprocessing. While such material is held at such facilities, arrangements of a mutually satisfactory nature shall be made between Canada and the United States to ensure compliance with the provisions of these Exchanges of Notes.

Pending the entry into force of a renegotiated agreement for cooperation, the United States proposes the following understandings, in addition to the agreements set forth in the 1955 Cooperation Agreement and that which came into force on March 25, 1976, pursuant to the Exchange of Notes:

(1) Source materials, special nuclear materials, production facilities, utilization facilities, equipment and devices, and heavy water, hereafter transferred pursuant to the 1955 Cooperation Agreement, and all materials transferred pursuant to the Agreement embodied in the Exchange of Notes which entered into force on March 25, 1976, or as may otherwise be agreed and any special nuclear materials produced therefrom including subsequent generations derived from such special nuclear materials shall not be transferred to unauthorized persons and shall not be transferred beyond the jurisdiction of either party to the Agreement, unless the prior approval of the other party is obtained;

(2) The United States shall not exercise any rights it has to approve the further retransfer or enrichment of such materials, equipment, and heavy water and shall not exercise any rights it has to approve the further retransfer, reprocessing or other alteration in form or content, of irradiated fuel elements containing special nuclear materials produced through the use of such materials, equipment, and heavy water so transferred beyond its jurisdiction including subsequent generations derived from such special nuclear materials, unless Canadian approval is obtained in advance. This applies only where the country requesting approval has notified the United States that Canada has this right or its equivalent. In the event that the United States is not so notified, the United States shall consult with Canada prior to granting such approval;

(3) Source materials and special nuclear materials transferred hereafter pursuant to the 1955 Cooperation Agreement, and all materials transferred pursuant to the Agreement embodied in the Exchange of Notes which entered into force on March 25, 1976, or as may otherwise be agreed, and special nuclear materials produced through the use of such materials shall not be reprocessed, and irradiated fuel elements containing the foregoing special nuclear materials removed from a reactor shall not be altered in form or in content by either party, unless the prior approval of the other party is obtained for such reprocessing or alteration.

In addition to the foregoing, it is the understanding of the United States that neither party shall enrich materials referred to above after transfer to greater than twenty percent in the uranium isotope 235 or 233 unless prior approval of the other party is obtained.

The United States is aware that, in addition to the sensitive technologies subject to the guidelines of the Nuclear Suppliers Group to which both countries have subscribed, the Canadian Government will not export from Canada nuclear reactor and certain other technologies and certain items of equipment without safeguards and controls and that appropriate provisions dealing with such technology and equipment will accordingly form part of the negotiation of the new Agreement for Cooperation between Canada and the United States.

I have the honor to propose that this Note and your reply confirming the foregoing, which complements the Agreement embodied in the Exchange of Notes which entered into force on March 25, 1976, . . . shall constitute an Agreement between our two Governments and shall enter into force on the date of your reply and shall remain in force thereafter until a new Agreement for Cooperation Concerning Civil Uses of Atomic Energy enters into force.³

³ Dept. of State File No. P77 179-1193.

THE LAWS OF WAR
(U.S. *Digest*, Ch. 14, §2)

On September 8, 1977, George H. Aldrich, Deputy Legal Adviser, Department of State, and U.S. Representative to the Fourth Session of the Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, submitted to the Secretary of State the report of the U.S. Delegation describing the background, organization, and work of the Conference. The report indicated that the Conference drew up and adopted on June 8, 1977, the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Annexes I and II;¹ and the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).²

Set forth below is the portion of the conclusion of the report summarizing the substantive achievements of the Conference in codifying and developing the law applicable in armed conflict:

Protocol I includes some provisions we were most pleased to see. These include the articles providing for identification and protection of medical aircraft—articles which will for the first time provide real immunity to these aircraft. Considering the dramatic decrease in fatalities that result from quick removal of wounded personnel to hospitals, the granting of immunity from attack to medical evacuation helicopters may well prove to be the most significant humanitarian accomplishment of the Conference.

For reasons flowing from our experience in Vietnam, the United States Delegation proposed the articles on missing in action and the dead (Articles 32–34), and we welcome their adoption. Similarly, we welcome the clear statement in the Preamble that no person protected by the Geneva Conventions or the Protocol could be denied those protections on the basis of charges of aggression and the statement in Article 44 that a combatant may not be deprived of his status as a prisoner of war by allegations of war crimes. Although this latter provision does not, by itself, undo the communist reservation to Article 85 of the Third Convention, it does make it clear that the interpretation given it by the Vietnamese (*i.e.*, that it was the basis for denying PW [Prisoner of War] status merely upon charges of war crimes and prior to conviction and exhaustion of rights of appeal) is untenable.

Although the provision on appointment of protecting powers falls short of our desires by failing to provide for a specific substitute, like the ICRC [International Committee of the Red Cross], in the event agreement between the belligerents is not reached, it is an improvement on the 1949 Conventions and, by establishing required procedures, will make the appointment of a protecting power more likely. It will make it more difficult and embarrassing for a State to refuse to permit outside observation of the manner in which it treats its prisoners.

¹ For the text of Protocol I, see *Official Documents* section, *infra* p. 457.

² *Id.* p. 502.

In its adoption of a number of provisions dealing with the relations between combatants and the protection of civilians in the territory of the adversary, the Protocol marks the first significant development of the laws of war since 1907. Of these new provisions the United States Delegation welcomes particularly the prohibition of indiscriminate attacks, including target area bombardment of cities (Article 51), the prohibition of the starvation of civilians as a method of warfare and of the destruction of crops and food supplies (Article 54), and the special protection (with reasonable exceptions) accorded to dams, dikes, and nuclear power stations (Article 56). We take satisfaction from the first codification of the customary rule of proportionality (Article 57), from a good definition of mercenaries which should not be open to abuse (Article 47), and from the minimum humanitarian standards (Article 75) that must be accorded to anyone not entitled to better treatment.

During the course of the Conference there was no consideration of the issues raised by the use of nuclear weapons. Although there are several articles that could seem to raise questions with respect to the use of nuclear weapons, most clearly, Article 55 on the protection of the natural environment, it was the understanding of the United States Delegation throughout the Conference that the rules to be developed were designed with a view to conventional weapons and their effects and that the new rules established by the Protocol were not intended to have any effect on, and do not regulate or prohibit the use of nuclear weapons. We made this understanding several times during the Conference, and it was also stated explicitly by the French and British Delegations. It was not contradicted by any Delegation so far as we are aware. Despite this clear record, however, the United States may wish to make a formal statement of understanding on this subject, given its importance, at the times of signature and ratification.

It is less clear whether we should make a reservation with respect to the right of reprisal. A number of articles (e.g., 51, 52 and 56) have gone far toward limiting the right of reprisal to the use of unlawful weapons. Among most delegates to the Conference, "reprisal" seemed to be a dirty word. Certainly, it is true that the right of reprisal has been abused, and some prohibition of reprisals clearly makes sense, but the United States Delegation believes that the Conference has gone unreasonably far in its prohibition of this right in Article 51. It is unreasonable to think that massive and continuing attacks directed against a nation's civilian population could be absorbed without a response in kind. By denying the possibility of response and not offering any workable substitute, Article 51 is unrealistic and cannot be expected to withstand the test of future conflicts. On the other hand, it will not be easy for any country to reserve, explicitly, the right of reprisal against an enemy's civilian population, and we shall have to consider carefully whether such a reservation is indispensable for us.

Protocol II is clearly a useful instrument to which the United States should become a party, but it remains to be seen how successful it will be in practice. It develops the very slim body of war presently applicable to non-international armed conflicts (today essentially limited to common Article 3 of the 1949 Geneva Convention), but its achilles heel is found in Article 1, the scope of application of the Protocol. For the Protocol to apply, this article requires that dissident armed forces or groups exercise sufficient control over part of the territory of

the state "to enable them to carry out sustained and concerted military operations and to implement this Protocol." The article also states that the Protocol does *not* apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature. . . ." Given all of these qualifications, it will be a dull and unimaginative government that will be unable to find an excuse not to apply the Protocol to its own international armed conflict.

Given the easy availability of "outs" under Article 1, the Protocol nevertheless accomplishes much in developing the law—which is really more a matter of human rights than of the laws of war. In particular, Article 4 on fundamental guarantees, Article 5 on persons whose liberty has been restricted, and Article 6 on guarantees during penal prosecutions provide an important safety net of basic protection for all victims of civil wars.

With respect to conventional weapons the Conference did relatively little, but it did succeed in laying a basis for one or more agreements on the prohibition or restriction of use of certain conventional weapons, particularly, incendiary weapons, land mines, booby traps, and weapons using ingredients not detectable by x-ray. This work will clearly be pursued through some type of international conference, and it is not unreasonable to hope that it will result in agreements acceptable to most countries. This may be less than many States hoped for on this subject, but it strikes the United States Delegation as a decent accomplishment in a field that had not had its way prepared and in many respects raises novel problems.

On December 10, 1977, Warren Christopher, Acting Secretary of State, invested Marvin L. Warner, U.S. Ambassador to the Swiss Confederation, or Ambassador George H. Aldrich to sign on behalf of the United States.³ Subject to the following understandings, Protocols I and II were signed by the United States on December 12, 1977.

A. Protocol I

1. It is the understanding of the United States of America that the rules established by this Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons.

2. It is the understanding of the United States of America that the phrase "military deployment preceding the launching of an attack" in article 44, paragraph 3, means any movement towards a place from which an attack is to be launched.

B. Protocol II

It is the understanding of the United States of America that the terms used in Part III of this Protocol which are the same as the terms defined in article 8 of Protocol I shall so far as relevant be construed in the same sense of those definitions.

MILITARY SANCTIONS
(U.S. *Digest*, Ch. 14, §6)

Arms Embargo—South Africa

On November 4, 1977, the UN Security Council voted unanimously in Resolution 418 to impose a mandatory arms embargo against South Africa

³ Dept. of State telegram 295654 (Jan. 4, 1978).

under Chapter VII of the UN Charter. Ambassador Andrew Young, U.S. Permanent Representative to the United Nations, made a statement in the Security Council during the session in which the resolution was adopted, pointing out the precedent established by this resolution and the actions that the South African Government could take to remove the stigma attached to it.

Portions of Ambassador Young's statement follow:

This is the first time that Chapter VII sanctions have been adopted against a member of this Organization. We have just sent a very clear message to the Government of South Africa that the measures which were announced on October 19 have created a new situation in South Africa's relationship with the rest of the world. There should be no further doubt in Pretoria today that the continuation of the course on which the Government of South Africa is now embarked can only lead to further strains on ties between South Africa and the other members of the international community.

At the same time, however, we must stress the other side of the picture and make clear to the Government of South Africa our desire for reconciliation provided South Africa is willing to begin progress toward the end of *apartheid* and full participation for all South Africans in the political and economic life of their country.

As far as the United States is concerned, we look forward to the day when progress in South Africa will make it possible for this Council to remove the stigma which this resolution places on South Africa. We look forward to early South African adherence to the Nuclear Non-Proliferation Treaty and a decision to put all its facilities under international safeguards. . . .¹

Resolution 418 reads in part as follows:

The Security Council,

Recalling its resolution 392 (1976) strongly condemning the South African Government for its resort to massive violence against and killings of the African people, including schoolchildren and students and others opposing racial discrimination, and calling upon that Government urgently to end violence against the African people and take urgent steps to eliminate *apartheid* and racial discrimination.

Recognizing that the military build-up and persistent acts of aggression by South Africa against the neighbouring States seriously disturb the security of those States,

Further recognizing that the existing arms embargo must be strengthened and universally applied, without any reservations or qualifications whatsoever, in order to prevent a further aggravation of the grave situation in South Africa,

Taking note of the Lagos Declaration for Action against *Apartheid* (S/12426)

Gravely concerned that South Africa is at the threshold of producing nuclear weapons,

¹ Press Release USUN-101(77) (Nov. 4, 1977).

Strongly condemning the South African Government for its acts of repression its defiant continuance of the system of *apartheid* and its attacks against neighbouring independent States.

Considering that the policies and acts of the South African Government are fraught with danger to international peace and security,

Recalling its resolution 181 (1963) and other resolutions concerning a voluntary arms embargo against South Africa,

Convinced that a mandatory arms embargo needs to be universally applied against South Africa in the first instance,

Acting therefore under Chapter VII of the Charter of the United Nations,

1. *Determines*, having regard to the policies and acts of the South African Government, that the acquisition by South Africa of arms and related material constitutes a threat to the maintenance of international peace and security;

2. *Decides* that all States shall cease forthwith any provision to South Africa of arms and related material of all types, including the sale or transfer of weapons and ammunition, military vehicles and equipment, paramilitary police equipment, and spare parts for the aforementioned, and shall cease as well the provision of all types of equipment and supplies, and grants of licensing arrangements, for the manufacture or maintenance of the aforementioned;

3. *Calls* on all States to review, having regard to the objectives of this resolution, all existing contractual arrangements with and licences granted to South Africa relating to the manufacture and maintenance of arms, ammunition of all types and military equipment and vehicles, with a view to terminating them;

4. *Further decides* that all States shall refrain from any co-operation with South Africa in the manufacture and development of nuclear weapons;

5. *Calls upon* all States, including States non-members of the United Nations, to act strictly in accordance with the provisions of this resolution. . . .²

During his news conference of November 2, 1977, Secretary Vance outlined U.S. policy with respect to South Africa in view of the UN mandatory arms embargo in part as follows:

. . . [A]t the United Nations we have supported a mandatory arms embargo to reflect the international consensus that the supply of arms threatens the peace. Consistent with this, we will prohibit all export of items for police and military in South Africa. In addition, there will be no more exports of spares and maintenance shipments for items whose exports would be prohibited. In addition, we are withdrawing our naval attaché from Pretoria, and in addition to that we are recalling the commercial officer in Johannesburg. The latter recall is being done in connection with our review of our economic relationships with South Africa.³

² UN Doc. S/Res./418 (1977), Nov. 4, 1977.

³ 77 DEPT. STATE BULL. 716 (1977).

JUDICIAL DECISIONS

Alona E. Evans

Jurisdiction—Calvo Clause—act of state doctrine—distribution of compensation for nationalized Venezuelan oil concessions

REAVIS V. EXXON CORPORATION. 396 N.Y.S. 2d 774.

Supreme Court, Special Term, New York County, Part I, June 28, 1977.

Plaintiff was a holder of a fractional share of a royalty interest in defendants' oil concessions which had been nationalized by the Government of Venezuela. In a class action, plaintiff sought damages on the grounds that defendants had failed to share with the royalty holders any of the compensation which the Venezuelan Government had paid to defendants following the nationalization of the concessions and that, in negotiating with the Venezuelan Government for compensation without considering the interests of the royalty holders, defendants had committed a breach of trust and had broken a confidential relationship. Defendants moved to dismiss the complaint for want of subject-matter jurisdiction, lack of standing on the part of plaintiff, and because the act of state doctrine barred the Court from inquiring into the acts of the Venezuelan Government. The Court denied these motions.

In arguing that the action could be tried only under Venezuelan law in Venezuela, defendants invoked the Calvo Clause in the Venezuelan Constitution. Justice Gellinoff found no merit in this argument because the royalty agreements were private agreements between defendants and third parties and did not engage the interests of the Venezuelan Government. This interpretation was supported by Article 102(7) of the Venezuelan Hydrocarbons Law of 1943. Furthermore, no definitive proof was offered by defendants to show that under Venezuelan law Venezuelan courts had exclusive jurisdiction over this type of controversy. As far as the argument of *forum non conveniens* was concerned, the Court pointed out that the parties had closer ties to New York than to Caracas.

With regard to plaintiff's standing, defendants tried to show that plaintiff had designated Caracas Petroleum, S.A. as his representative in matters concerning the royalties and, hence, that he could not bring this action on his own behalf. The Court found, however, upon examination of the documents and relevant facts, that Caracas Petroleum, S.A. had only been appointed as collection agent for the concessionaire and had not been designated as plaintiff's representative in any litigation concerning the payment of the royalties; consequently, plaintiff had standing to maintain this action.

Defendants argued that under Venezuelan law they were compensated only for the physical assets of the concession but not for their rights in the concession. They asserted that, if the Court inquired into plaintiff's de-

mand for royalties based upon his alleged rights in the concession, the Court would be sitting in judgment on the terms of the Venezuelan Government's grant of compensation to defendants and, hence, violating the act of state doctrine. After examining several recent cases concerning the act of state doctrine, Justice Gellinoff said:

If, then, the instant complaint questions the validity of an act of the Venezuelan government, or seeks to go behind such governmental act to determine its underlying reasons and motivations, then the act of state doctrine precludes this Court from passing upon such allegation. However, the allegations of the complaint before the Court do not require inquiry into the legality of, or motivation behind, the enactment or enforcement of the Nationalization Law. The complaint merely recites certain objective acts allegedly performed by the Venezuelan government—without challenging their propriety—and contends that those acts affect the contractual relationship between the private parties now before the Court. Unlike the *Sabbatino*, *French* and *Hunt* cases,¹ the complaint here does not accuse the Venezuelan government of acting beyond its authority, or out of ill motive. It seeks no "redress of grievances by reason of such acts"² nor does it "call for a judgment on the sovereign acts"³ of Venezuela. Accordingly, the act of state doctrine is inapplicable.⁴

The Court found that the applicable Venezuelan law did not bar the payment of compensation for concessionary rights.

Jurisdiction—sovereign immunity—arbitration of maritime claim—Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958

B. V. BUREAU WIJSMULLER v. UNITED STATES. No. 76 Civ. 2494-CSH.
U.S. District Court, Southern District, New York, Dec. 21, 1976.*

Plaintiff, a leading maritime salvage company, sought an order under Section 1, 84 Stat. 692, 9 U.S.C. §906, directing defendant to submit to the arbitration of plaintiff's claim for salvage services to defendant's warship, *The Julius A. Furer*. Plaintiff argued that defendant was bound to the arbitral proceedings by the terms of Lloyd's Standard Form of Salvage Agreement (LOF) which had been signed by the Captain of the warship. The agreement provided, *inter alia*, that arbitration was to be held in London pursuant to English law and that, until security had been provided by the owner, the salvor would have a maritime lien on the ship which could only be moved with salvor's consent pending the provision of security. Defendant, refusing to be bound by the terms of the LOF, argued that plaintiff's salvage claim should be adjudicated in a federal court sitting in admiralty. (Public Vessels Act, 46 U.S.C. §781 *et seq.*)

¹ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), 58 AJIL 779 (1964); *French v. Banco Nacional de Cuba*, 242 N.E.2d 704 (Ct.App.N.Y. 1968), 63 AJIL 640 (1969); *Hunt v. Mobil Oil Corp.*, 550 F.2d 69 (2d Cir. 1977), 71 AJIL 780 (1977).

² *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964) (quoted by Court).

³ *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 72-73 (2d Cir. 1977) (quoted by Court).

⁴ 396 N.Y.S.2d 774, 780.

* Text of opinion provided by Peter D. Trooboff, Esq.

The District Court denied plaintiff's motion and ordered that the case be heard in admiralty proceedings.

District Judge Haight observed that the Public Vessels Act was one of several statutes passed by Congress with a view to lifting the barrier of sovereign immunity from the initiation of private suits against the federal government. The question here was whether the legislative intent extended to putting the United States in the position of having to be party to a foreign arbitration pursuant to an agreement such as the LOF. In the opinion of the Court, such an interpretation was "entirely inconsistent with the statutory scheme"¹ which included the Public Vessels Act. Moreover, the terms of the LOF regarding security contravened the Act's provisions that a lien could not be asserted against a public vessel of the United States. (46 U.S.C. §788). The Court pointed out that plaintiff could derive no support for his motion from the fact that the ship's commanding officer had signed the LOF because "only the Congress can remove or tailor the armor of the sovereign's immunity from suit; no officer or representative, regardless of rank, good intentions, or innocent misapprehension of his powers, has the requisite authority."² Plaintiff also asserted that, according to the Public Vessels Act, the Attorney General was "authorized to arbitrate" claims involving a libel or cross-libel.³ The Court took the view, however, that this provision was only intended to permit arbitration in federal courts and that it could not be read as authority for submitting the United States to foreign commercial arbitration.

Plaintiff argued that the acceptance by the United States of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (21 UST 2517, TIAS No. 6997, 330 UNTS 3) had changed the position of the United States with regard to commercial arbitration. Haight, D. J., observed, however, that "it does not follow that by adhering to the Convention, the United States agreed to do away with limitations upon the waiver of sovereign immunity contained in other statutes. Certainly, neither the Convention nor the implementing statute [84 Stat. 692, 9 U.S.C. §201 *et seq.*] contain express provisions to that effect; the argument must therefore be one of necessary implication."⁴ An examination of the text of the Convention did not support plaintiff's contention, in the opinion of the Court. Moreover, according to Article II(3), a court could refuse to enforce an arbitral agreement if it were found to be null and void. The Court concluded that the sovereign immunity of the United States from suit rendered the arbitral provision of the LOF null and void.

Extradition—whether new evidence entitled accused to new hearing.

PEROFF V. HYLTON. 563 F.2d 1099.

U.S. Court of Appeals, 4th Cir., Sept. 14, 1977.

Sweden requested the extradition of petitioner on a charge of stock fraud pursuant to the Extradition Treaty of 1961 (14 UST 1845, TIAS No. 5496,

¹ No. 76 Civ. 2494-CSH, at 5 (unpublished opinion).

² *Id.* 6.

³ *Id.* 8.

⁴ *Id.* 9-10.

494 UNTS 141). After the extradition request was granted, the accused petitioned unsuccessfully for a writ of habeas corpus. The Court of Appeals affirmed the District Court's denial of this petition; the Supreme Court denied his petition for a writ of certiorari and his motion for a rehearing.¹ The accused then sought to reopen the case by petitioning for habeas relief on the ground that he had new evidence which would impeach the testimony of some witnesses to his alleged fraudulent schemes. The District Court denied this petition. On appeal, the Court of Appeals affirmed this decision.

In a per curiam opinion, the Court of Appeals took the view that a new hearing was not necessarily warranted by the production of new evidence by petitioner, especially as the extradition request contained sufficient proof of the charges against him. Petitioner challenged the validity of the extradition proceedings on the ground that the Swedish authorities had concealed the fact that under Swedish law Swedish nationals could not be extradited and hence the treaty was not reciprocal. The Court pointed out that Swedish law regarding the extradition of its own nationals had no relevance in a hearing under 18 U.S.C. §3184, which was, moreover, only a preliminary hearing for the purpose of determining whether there was probable cause for extraditing the accused. The Court added that "[e]ven if the claimed lack of reciprocity were construed to be a violation of treaty obligations, it would be for the Executive alone to determine whether to waive such violations or to renounce the extradition agreement."²

To petitioner's contention that he had been denied due process of law because the Secretary of State had refused him a hearing, the Court replied that such a hearing was a matter of administrative discretion and noted that he was not complaining that the denial was arbitrary or capricious. As petitioner had already had one extradition hearing and two hearings on his petitions for habeas corpus, he could hardly complain of denial of due process of law.

Aliens—naturalization—loss of nationality by residence abroad

UNITED STATES V. LUCIENNE D'HOTELLE DE BENITEZ REXACH. 558 F.2d 37. U.S. Court of Appeals, 1st Cir., June 20, 1977.

This action was the latest in a number of suits which had been brought by the United States in order to recover income taxes allegedly owed by decedent and her husband on income received in the 1940's and 1950's.¹ Decedent, a French national, married in 1928 and became an American citizen in 1942. From 1946 until 1952, she maintained a residence in France. According to the Nationality Act of 1940, a naturalized citizen forfeited her American citizenship by three years of residence in the state

¹ 542 F.2d 1247 (4th Cir. 1976), *cert. denied* 429 U.S. 1062 (1977), *rehearing denied* 429 U.S. 1124 (1977), 71 AJIL 356 (1977).

² 563 F.2d 1099, 1102, *citing* *Charlton v. Kelly*, 229 U.S. 447 (1913).

¹ Among the previous cases is *United States v. Rexach*, 331 F. Supp. 524 (D.P.R. 1971), *vacated and remanded*, 482 F.2d 10 (1st Cir. 1973), *cert. denied* 414 U.S. 1039 (1973); 66 AJIL 407 (1972).

of origin. (Section 404(b), 54 Stat. 1170; 8 U.S.C. §804(b).) In 1947, decedent received a U.S. passport which was good for two years and which was renewed in 1950. In 1952, her application for renewal was denied on the ground that she had been divested of citizenship under Section 404(b) by reason of her continuous residence in France. While decedent did not try thereafter to reassert her claim to citizenship, neither did she execute a formal renunciation of it. In 1952, decedent was granted citizenship in the Dominican Republic which was revoked in 1962 following the termination of the Trujillo regime. In this same year, she received a French passport. In 1964, the Supreme Court held that it was unconstitutional to deprive a naturalized citizen of his nationality by reason of his residence abroad. (*Schneider v. Rusk*, 377 U.S. 163 (1964).)² In 1965, decedent was notified that her citizenship had been restored; however, she refused to accept this change. Nonetheless, the United States asserted the right to tax her share of her husband's income in addition to maintaining a claim for taxes on one-half of her husband's income from construction work in the Dominican Republic.

Following the death of decedent in 1968, her husband, who was her sole beneficiary, maintained control of the community property and did not return decedent's share to the estate. In proceedings to recover the taxes due, the District Court held that decedent was liable for taxes due on her half of her husband's income between 1944 and 1949 and that her husband would have to pay this amount as administrator of their community property. (411 F.Supp. 1288 (D.P.R. 1976).) The Court held that decedent was not liable for taxes due between 1949 and 1952. The United States appealed this latter holding. The Court of Appeals reversed this holding and remanded the case.

With regard to the citizenship status of decedent, the United States argued that the Supreme Court's decisions in *Schneider* and in *Afroyim v. Rusk* (387 U.S. 253 (1967), 62 AJIL 189 (1968)) had retroactive effect, so that the denaturalization of decedent under Section 404(b) was invalidated for the whole period at issue. Circuit Judge Ingraham agreed with this proposition in general but pointed out in the present case the concern was not the prospective status of the individual but rather the effect of retroactivity upon the past status of the individual as regards her tax liability. American citizenship carried with it both rights and duties, the latter including the payment of taxes. The Court said:

We do think that the balance of the equities mandates that back income taxes be collectible for periods during which the involuntarily expatriated persons affirmatively exercised a specific right of citizenship. This is precisely the position taken by the Internal Revenue Service. As to such periods, neither the government nor the expatriate can be said to have relied upon the constitutionality of §404. Since the expatriate in fact received benefits of citizenship, the equities favor the imposition of federal income tax liability.³

It followed that decedent was liable for taxes between 1944 and 1949.

² This case invalidated §352(a), Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C. §1484(a) which was a restatement of §404(b).

³ 558 F.2d 37, 42.

The question remained, however, as to her status between 1949 and 1952. It was shown that, although decedent had been automatically denaturalized under Section 404(b) during that period, she was unaware of this fact and was not so notified by the Department of State until mid-1952. Yet, she traveled on a U.S. passport, applied for a renewal of it in 1952, and indicated in her application in 1952 that she paid taxes to the United States. The Court concluded that as decedent regarded herself as a U.S. national during the period in question, the government was justified in requiring that she pay taxes for that period. Decedent had no tax liability, however, after she acknowledged the notification of denaturalization, as that act constituted voluntary expatriation.

Treaties—General Agreement on Tariffs and Trade—effect of state “Buy American” statutes—the law of New Jersey

K. S. B. TECHNICAL SALES CORP. v. NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION OF THE STATE OF NEW JERSEY. 151 N.J.Super. 218, 376 A.2d 960.

Superior Court, Appellate Division, New Jersey, June 30, 1977.

Plaintiffs, a wholly owned subsidiary of a West German manufacturer of pumps and pumping equipment and an American national, sought a judgment declaring the New Jersey “Buy American” statutes (N.J.S.A. 40A:11-18, 52:32-1, 52:33-2) violated Article VI, paragraph 2, of the Constitution (Supremacy Clause), an order striking a “Buy American” addendum¹ from the specifications for equipment for a filtration plant for which plaintiffs were submitting bids, and an order enjoining the North Jersey District Water Supply Commission (Commission) from opening any of the bids which had been submitted. The Superior Court, Chancery Division, held that while the “Buy American” statutes did not violate Article I, Section VIII, clause 3 of the Constitution (Commerce Clause), they did violate the Supremacy Clause because they conflicted with the provisions of the General Agreement on Tariffs and Trade of 1947 (GATT) (TIAS No. 1700, 55-61 UNTS). With a view to “balancing the equities,”² however, the Court held that the Commission was bound to receive and open the bids which had been submitted. On appeal, the Superior Court, Appellate Division, reversed the judgment of the trial court with regard to the binding character of the bids and affirmed its finding as to the unconstitutionality of the “Buy American” statutes.

Judge Michels agreed with the Chancery Division that the “Buy American” statutes did not violate the Commerce Clause but that they did violate the Supremacy Clause because they violated the terms of the GATT. The Commission had contended that the provision for national treatment

¹ The addendum provided:

USE OF AMERICAN MANUFACTURED PRODUCTS:

Only manufactured products of the United States, wherever available, shall be used in the work in accordance with municipalities and counties Local Public Contracts Law N.J. 40A:11-18.

Quoted by Court; footnotes by Court omitted.

² 376 A.2d 960, 962.

of products imported from member states of GATT (Pt. II, Art. III, para. 2) did not bind government agencies which were importing these products for their own use and not for commercial purposes (Pt. II, Art. III, para. 5), so that the GATT could not be invoked in the present situation. In the alternative, the Commission argued that, if the GATT did apply, it did not supersede the power of the state to regulate a public utility. The Court pointed out that, while water supply systems serve the public, they are, nevertheless, proprietary enterprises and that the fact that there was some state regulation of such systems did not transform them from commercial enterprises into government agencies. Consequently, pumping equipment purchased from abroad by the filtration plant would be used for commercial purposes within the meaning of Article III, paragraph 2, of the GATT.

Pointing out that "[a] treaty will be recognized as supreme, even when local conditions seemingly justify a local enactment,"³ Judge Michels said:

The New Jersey "Buy American" statute incorporated in the specifications for the materials to be furnished and installed in connection with the Wanaque project required the bidders to use only products of the United States, whenever available, thereby excluding products of other signatories to the 1947 GATT treaty. This statutory requirement imposed an unlawful burden on products of foreign countries, which violates the 1947 GATT agreement and is clearly unconstitutional under the Supremacy Clause of the United States Constitution. The declaration that N.J.S.A. 52:33-2 is unconstitutional in this context accords with the decision of the California District Court of Appeals in *Bethlehem Steel Corp. v. Board of Comm'rs of Dept. of W. & P.*, 276 Cal. App. 2d 21, 80 Cal. Rptr. 800, 803-806 (1969) [65 AJIL 609 (1971)], which held the California "Buy American" act to be "an unconstitutional intrusion into an exclusive federal domain." *Id.* 80 Cal. Rptr. at 806.⁴

With regard to the bids which had been submitted, the Court observed that "[t]he policy of permitting no deviation from accepted bidding standards is firmly established in New Jersey."⁵ Where a condition for submission of bids has been found to be unconstitutional, as in the present case, the equity court could not compel bidders to comply with it; consequently, the Commission would have to return all bids received and advertise for new bids.

Treaties—Convention with United Kingdom Relating to the Tenure and Disposition of Real and Personal Property of 1899—state succession—Jamaican currency control law

BARTON V. NATIONAL LIFE ASSURANCE COMPANY OF CANADA. 398 N.Y.S. 2d 941.

Civil Court, City of New York, Kings County, Oct. 12, 1977.

The administrator of decedent's estate brought an action to recover the proceeds of a life insurance policy which had been issued to decedent in Jamaica. The policy had been issued to the decedent in 1965; prior to

³ *Id.* 964.

⁴ *Id.* 964-65.

⁵ *Id.* 965.

1969, the decedent had moved to New York and had resided there until her death.

Plaintiff sought payment in U.S. currency in the United States. Defendant, a Canadian company which was authorized to do business in New York and in Jamaica, argued that the policy was payable in Jamaican currency in Jamaica. Following notification of the death of the insured, defendant had sent a check for \$4327.47 in Jamaican dollars to plaintiff; however, the check was returned unpaid as no authorization had been received for the transfer of these funds under the Jamaican exchange control law. After having no success in obtaining a currency permit, defendant notified plaintiff that the funds would be added to plaintiff's restricted assets in Jamaica. Plaintiff then brought the present action. The Civil Court found for plaintiff.

Judge Klieger pointed out that the insurer had an obligation to pay the beneficiary the proceeds of a policy when due, which obligation was not fulfilled by an offer to credit the proceeds to the restricted assets of the beneficiary. As for the Jamaican currency control law, the Court observed that Jamaica, upon attaining independence in 1962, had accepted the obligation of the United Kingdom to interpose no obstacles to the transfer of such property. (Convention between the United States and the United Kingdom Relating to the Tenure and Disposition of Real and Personal Property, 1899, 31 Stat. 1939, TS No. 146, 12 BEVANS 246.) As one of the beneficiaries was an infant, hence a ward of the Court, the Court was particularly concerned that no conflict existed between the terms of the Convention and relevant New York law. Pointing out that "New York construes treaties as it does contracts and written instruments generally in order to effectuate the purpose and intent of the makers . . ." and that "[s]tate law must yield and adjust itself to the spirit and intent of a treaty . . .,"¹ the Court found that the Convention and New York law were in accord on the point "that the beneficiaries of estates shall receive the property of their ancestors free of added conditions."² Defendant's proposal constituted just such an added condition upon the estate. The Court had no authority to change the terms of a contract so as to encompass new conditions.

UNITED KINGDOM CASE NOTES

Jurisdiction—sovereign immunity—Central Bank of Nigeria—relation of international law to municipal law

TRENDTEX TRADING CORPORATION, LTD. v. CENTRAL BANK OF NIGERIA.

[1977] 1 All E.R. 881.

United Kingdom, Court of Appeal, Civil Division, Jan. 13, 1977.

Plaintiffs, a Swiss corporation, sought a writ compelling the Central Bank of Nigeria (Bank) to pay demurrage, the price of concrete shipped to

¹ 398 N.Y.S.2d 941, 944.

² *Id.*

Nigeria under an agreement with the Bank, and damages for the Bank's refusal to accept the balance of the shipment. The Bank, which was established in 1958 on the model of the Bank of England, engaged primarily in the handling of banking activities for the Government of Nigeria and only to a limited extent in private banking. It could sue and be sued in its own name. The policies of the Bank were subject to government control. Acting through a correspondent bank in London in 1975, the Bank issued a letter of credit for \$14,280,000, in favor of plaintiffs to cover the price of cement to be supplied to an English company which had a contract to build army barracks in Nigeria. Delays in unloading some of the cement at Nigerian ports caused plaintiffs to incur demurrage. These same delays led the Nigerian Government to institute import controls on shipments of cement and to order the Bank to refuse payment for any shipments which had not been authorized under these controls. When plaintiffs sought to recover under the letter of credit and also for the demurrage, the Bank refused to meet these demands. Plaintiffs then brought the present action. The Bank moved to set the writ aside on the ground of sovereign immunity. The High Court of Justice granted the Bank's motion. On appeal, the Court of Appeal reversed this decision and authorized the continuation of an injunction compelling the Bank to maintain sufficient funds to meet plaintiffs' claims pending trial on the merits.

Lord Denning, M.R., pointed out that the doctrine of sovereign immunity has been subject to marked changes in recent years. The question was how these changes were to be effected in English law. Observing that there were two theories regarding the relation of international law to municipal law, the doctrine of incorporation which treated rules of international law as part of English municipal law unless they were in conflict with an Act of Parliament and the more recent doctrine of transformation whereby rules of international law would be effective as municipal law only if they were adopted by Act of Parliament, by the courts, or represented long-standing custom, Lord Denning considered that the doctrine of incorporation was the correct theory because it admitted change in international law. He said:

Seeing that the rules of international law have changed—and do change—and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this court, as to what was the ruling of international law 50 or 60 years ago, is not binding on this court today. International law knows no rule of stare decisis. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change, and apply the change in our English law, without waiting for the House of Lords to do it.¹

Examining the changing views of courts and jurists respecting the doctrines of absolute sovereign immunity and restrictive sovereign immunity, the Court concluded that the restrictive theory was becoming

¹ [1977] 1 All E.R. 881, 889-90, 16 ILM 471 (1977).

generally accepted. The Court pointed out that the Privy Council had adopted the restrictive theory with respect to actions *in rem* in *The Philippine Admiral (Owners) v. Wallem Shipping (Hong Kong), Ltd.*,² but had not extended this theory to actions *in personam*. In Lord Denning's opinion, the restrictive theory applied to the latter actions as well. He said:

In . . . [*in personam*] actions, too, the restrictive theory is more consonant with justice. So it should be applied to them. It should not be retained as an indefensible anomaly.

I see no reason why we should wait for the House of Lords to make the change. After all, we are not considering here the rules of English law on which the House has the final say. We are considering the rules of international law. We can and should state our view as to those rules and apply them as we think best, leaving it to the House to reverse us if we are wrong.³

As he put the rule in *Thai-Europe Tapioca Service, Ltd. v. Government of Pakistan*:

. . . a foreign sovereign has no immunity when it enters into a commercial transaction with a trader here and a dispute arises which is properly within the territorial jurisdiction of our courts. If a foreign government incorporates a legal entity which buys commodities on the London market, or if it has a state department which chartered ships on the Baltic Exchange, it thereby enters into the market places of the world, and international comity requires that it should abide by the rules of the market.⁴

The Court pointed out that this view was consonant with the holdings of the Privy Council in *The Philippine Admiral* and the United States Supreme Court in *Alfred Dunhill of London, Inc. v. Republic of Cuba*.⁵

With regard to the status of the transaction at issue, Lord Denning found no merit in the argument that, as the cement was intended for a public purpose, the building of army barracks, the case was controlled by the doctrine of absolute sovereign immunity. He said:

If a government department goes into the market places of the world and buys boots or cement—as a commercial transaction—that government department should be subject to all the rules of the market place. The seller is not concerned with the purpose to which the purchaser intends to put the goods.

There is another answer. The plaintiffs here are not suing on the contracts of purchase. They are claiming on the letter of credit which is an entirely separate contract. It was a straightforward commercial transaction. The letter of credit was issued in London through a London bank in the ordinary course of commercial dealings. It is completely within the territorial jurisdiction of our courts. I do not think it is open to the government of Nigeria to claim sovereign immunity in respect of it.⁶

² [1976] 1 All E.R. 78 at 95, 96, [1976] 2 W.L.R. 214 at 233 (footnotes by Court), 70 AJIL 364 (1976).

³ [1977] 1 All E.R. 881, 891-92.

⁴ *Id.*, 892, quoting [1975] 3 All E.R. 961 at 966, [1975] 1 W.L.R. 1485 at 1491 (footnote by Court).

⁵ *The Philippine Admiral*, note 2 *supra*; 425 U.S. 682 (1976), 70 AJIL 828 (1976).

⁶ [1977] 1 All E.R. 881, 893.

The Court noted that in a similar situation involving the shipment of cement to Nigeria, a West German court had taken the same view.⁷ The status of the Central Bank of Nigeria, as an independent entity or a department of the government, was more difficult to resolve. In Lord Denning's opinion, it was sounder to rest the case on denial of immunity to commercial transactions by government agencies than to attempt to determine the exact legal status of the Bank.

Treaties—enforcement in municipal law—Treaty Establishing the European Economic Community—interpretation—"enforceable Community rights"

AMIES v. INNER LONDON EDUCATION AUTHORITY. [1977] 2 All E.R. 100. United Kingdom, Employment Appeal Tribunal, Dec. 2, 1976.

Complainant, a woman who had been deputy head of a school art department since 1971, had applied for the post of head of the department in 1975; however, the Inner London Education Authority (ILEA) appointed a man to the position. She then filed a complaint with the Industrial Tribunal in London, charging the ILEA with sex discrimination in violation of Sections 6(1)(c) and 2(a) of the Sex Discrimination Act 1975,¹ Article 119 of the Treaty Establishing the European Economic Community (EEC Treaty),² and Section 2(1) of the European Communities Act 1972.³ She also contended that her rights were protected by the UN Charter, the Universal Declaration of Human Rights of 1948, the UN Declaration on the Elimination of Discrimination against Women of 1967, and the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. The Industrial Tribunal dismissed the complaint for want of jurisdiction over the case. On appeal, the Employment Appeal Tribunal dismissed the complaint for want of jurisdiction and also held that Article 119 of the EEC Treaty did not confer a right upon complainant which could be enforced by an industrial tribunal.

Bristow, J., pointed out that in the first place the failure of the ILEA to appoint complainant to the post in question could not be ascribed to a continuing policy of sex discrimination on the part of the Authority. Turning to the allegation that complainant's rights founded in international law had been infringed upon, the Tribunal observed that only international instruments which have been incorporated into English municipal law are binding upon the courts and administrative tribunals. The EEC Treaty was incorporated into English law through the European Communities Act of 1972. According to Section 2(1) of that Act, rights granted under the treaty, and known as "enforceable Community rights," could be invoked by private persons without further legislative implementation. It was necessary, however, to examine an asserted right to see whether it

⁷ Youssef M. Nada Establishment v. Central Bank of Nigeria (District Court Frankfurt/M, File No. 2/8 to 14/76, announced 25th August 1976) (footnote by Court).

¹ 45 Halsbury's Statutes 227, 229 (3d ed.).

² 42A Halsbury's Statutes 779 (3d ed.); 298 UNTS 11.

³ 42 Halsbury's Statutes 80 (3d ed.).

could be categorized as an "enforceable Community right." Article 119 of the EEC Treaty provided for equal pay for equal work by men and women. Observing that in interpreting the EEC Treaty a court of a member state must be guided by principles laid down by the European Court, the Tribunal found that the European Court had decided in the Belgian case of *De Frenne v. Sabena* ([1976] I.C.R. 547) that Article 119 created what could be termed an "enforceable Community right" under the 1972 Act but only with regard to claims made after April 8, 1976. Complainant's action was brought on January 1, 1976.

Complainant contended that Article 119 would be binding as municipal law regardless of the effective date of the Sex Discrimination Act and that the article's terms reached beyond discrimination with respect to wages to sex discrimination generally. Bristow, J., pointed out, however, that to be binding on the courts, an "enforceable Community right" would have to be specifically worded. He said:

Counsel for the ILEA drew our attention to Council Directive of 9th February 1976 of the EEC Council on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions. After reciting that the treaty does not confer the necessary specific powers for this purpose, the directive by art 6 imposes an obligation on member states to introduce into their national legal systems the appropriate measures to enable individuals to claim redress if wronged by failure to apply the principle of equal treatment as set out in arts 3, 4 and 5. Those principles are not contained in the treaty and so cannot be "enforceable Community rights" within s 2(1) of the 1972 Act.⁴

The right sought by complainant did not come into existence in England until the Sex Discrimination Act 1975 went into effect. The Industrial Tribunal as a statutory tribunal had jurisdiction only over matters covered by statute, or here, over discriminatory acts which were covered by the 1975 law. As the matter giving rise to the complaint occurred before the 1975 Act went into effect, the Industrial Tribunal had no jurisdiction over the case.

⁴ [1977] 2 All E.R. 100, 104.

BOOK REVIEWS AND NOTES

EDITED BY LEO GROSS

The Future of the International Court of Justice. Edited by Leo Gross, with a preface by Philip C. Jessup and Edvard Hambro. Dobbs Ferry: Oceana Publications, Inc., 1976. 2 Vols.: I, Pp. x, 441; II, 445-482. Index. \$25 per volume.

In nigh on a third of a century of existence, the International Court of Justice has given 38 judgments in 27 separate cases and 15 advisory opinions. Of the judgments, at least five have upheld preliminary objections and have not been followed by any substantive consideration of the merits. In 1977, no new proceedings were commenced in the ICJ; in 1976, none were; nor in 1975 either. At least two cases suitable for the ICJ have recently been the subject of arbitral proceedings (the *Beagle Channel* case and the *Anglo-French Continental Shelf* case). In the proposals for dispute settlement under consideration at the Law of the Sea Conference, recourse to the ICJ is permitted as one of four options open to the parties. In addition, provision is made for the establishment of a new specialist Law of the Sea Tribunal. The ICJ is accorded no preferred or appellate status. All those factors reflect if not a disenchantment, at any rate an unconcern, with the ICJ which merits attention.

The elements in this "atrophy" (to use the word of the two distinguished publicists, Philip Jessup and the late and much lamented Edvard Hambro, who contributed the preface to this study) and the bases and prospects for overcoming it are the subject of comprehensive and detailed examination in these two volumes. They are not books to be read straight through from cover to cover, though anyone who chooses to do so will be well rewarded and much stimulated by the 18 essays which they contain. All of them are first class and some are outstanding. They are presented in four parts. In the first, on the role of the ICJ in the peaceful settlement of disputes, there are contributions by R. P. Anand on the "Role of International Adjudication," Leo Gross on the "Requirements for Enhancing the Role" of the ICJ, and Richard Kearney on the Court's function in the settlement of disputes under treaties entitled "Amid the Encircling Gloom." The second part is entitled "The Place of the International Court of Justice in the United Nations System." It consists of essays by Guenter Weissberg, who writes in important detail of the functioning of the Court from 1947 to 1972; Dan Ciobanu, who has written an essay of particular interest to those involved in the law of international organizations, on the relative roles of the ICJ and the political organs of the United Nations; Ernest Kerley on compliance with judgments of the Court; and the late Salo Engel (who was an early and acute observer of the relationship between the Court and international organizations) on states as parties to the Statute of the Court. The third part examines the attitudes of states towards the

Court. Arthur Rovine writes of "National Interest"; Edward Gordon of "Changing Attitudes towards Courts"; Edvard Hambro of the effect of the revision of the Rules of the Court; and Shabtai Rosenne of its composition. The fourth part, on the actual and potential use of the Court, contains articles by the late Sture Petré on the process of drawing up judgments, by Sir Gerald Fitzmaurice on the enlargement of the Court's contentious jurisdiction, by Paul Szasz on the enhancement of its advisory competence, by John Miller on intervention in proceedings, by Lucius Cafilisch on the Court as a body to which other tribunals, national and international, may refer matters and, lastly, a second essay by Richard Kearney on the sources of law applied by the Court. The collection ends with a substantial chapter of Conclusions written by the editor, Leo Gross.

It is necessary, though it may not be enterprising, for this review to reproduce the table of contents, for there is no other way of conveying the scope or depth of the volumes and the high order of talent which has contributed to them. Considerations of space exclude the possibility of commenting on each article to the extent that the subject matter and the stimulating treatment warrant. At the best, comment must be limited to two major issues.

Interest in a work of this nature is bound to be dominated by two closely related questions. The first is, why do states not submit disputes to the ICJ? The second is, is this nonuse of the Court something peculiar to the Court or does it affect recourse to all international tribunals?

It is easier to approach the second question first. We know that other international tribunals exist and that they are used. In each case, however, they are specialist bodies—the Court of the European Communities, the European Commission and Court of Human Rights, and the system of arbitration under the World Bank Convention for the Settlement of Investment Disputes Between States and Nationals of Other States. In each instance, there is a specific reason why the ICJ is not used. An obvious one is that in each of these fora nonstate entities have the right of direct access from which they are precluded by Article 34 of the Statute of the Court. But this reason is perhaps not so operative as the fact that, at any rate in the first two instances, the tribunals are specialist bodies operating within a relatively closely integrated regional framework. And the consideration of specialization, though not of regionalism, has been to the fore in the minds of many who have pressed so strongly for the establishment of a new Law of the Sea Tribunal.

At the same time, as mentioned earlier, cases to which such considerations do not apply and which would have been appropriate for the Court have been referred to arbitral bodies instead. In the *Beagle Channel* dispute, recourse was had to arbitration because, at the time of the institution of proceedings, arbitration was the only method of compulsory dispute settlement open to the parties. Subsequently, it may be noted, they replaced their arbitration agreement, which dated back to 1902, by an agreement providing for the settlement of disputes by the ICJ. In any event, as is pointed out by both Guenter Weissberg and Edvard Hambro,

the arbitral tribunal consisted of five members of the ICJ and was effectively comparable to a chamber of the Court. The explanation of the use in the *Anglo-French Continental Shelf* dispute of a five-member arbitral tribunal, of which three members were not judges of the ICJ, lies, at least in part, in the marked reluctance of one of the parties to be involved in litigation before the ICJ as such. But the fact remains that though we may mention, and explain, the use of bodies other than the ICJ in some cases, what we are failing to do is to mention the *nonuse* of such other bodies in other cases which would have been suitable for settlement either by such bodies or by the ICJ. That there are several such cases is helpfully demonstrated by Guenter Weissberg (pp. 174-79). So what, then, is the explanation of why such cases are not referred either to the Court or to arbitration?

Clearly no one comprehensive answer can be provided. But one element no doubt looms large in the consideration given to such problems by those involved in them. That is the unpredictability of international litigation. It is on this point that these two volumes contain some observations of particular interest. Sir Gerald Fitzmaurice very convincingly identifies and rejects two elements which have a bearing on the matter (pp. 465-70) when he says both that "someone has got to lose or be disappointed" and that the answer to uncertainty in the law is "codification, more codification, and yet more." Both these points are, of course, correct. But by themselves they are not a sufficient answer to the concern with unpredictability. And that is where Richard Kearney's essay on "Sources" is so important. As Leo Gross says in his Conclusions (p. 746), "the question of the law applied by the Court . . . is central to the whole problem of the future role of the Court." What Kearney does is to analyze in detail some early decisions of the Permanent Court of International Justice and some more recent ones of the ICJ. It is on the latter that we should concentrate. He demonstrates repeatedly that in reaching its conclusion the Court stated, without establishing, the very rules of international law whose existence and content were in controversy. His point is a vital one. Repeatedly one finds oneself asking, upon coming to a statement by the Court of some controlling rule: "Where did they get that? Where is the proof of its existence?" And it is the realization that what the Court may do in one case, in terms of unexplained and unexpected resolution of a much controverted proposition, it may do in another that generates and maintains an aura of crippling uncertainty. Moreover, as is now apparent from the Award of the Arbitral Tribunal in the *Anglo-French Continental Shelf* case, the practice is not peculiar to the Court. Here, then, is what appears at any rate to this reviewer, partly from his reading of these essays and partly from study of the decisions and from experience, to be a limitation upon the judicial process which, if not remedied, will render progress in the future haphazard and spasmodic.

In these two volumes, we have a work of immense erudition and value. It provides a formidable illustration of the possibilities inherent in a "collective" approach to the preparation of studies on major segments of inter-

national law, for the days when a single scholar (like Shabtai Rosenne in relation to the ICJ) could alone cover in great detail a significant subject are fast disappearing. The American Society of International Law is to be congratulated on its foresight in selecting this subject for study by a panel; for its wisdom in choosing Philip Jessup and, after him, Edvard Hambro, to be Chairman of the Panel; for having recruited so distinguished a group of authors, each of whom has a solid and worthwhile contribution to make; and last, but by no means least, for its good fortune in having involved Leo Gross as rapporteur and as editor of these volumes. He, his colleagues in authorship, and the Society should be well proud of their fine product on a theme so central to the future of the international community.

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Dispute Settlement through the United Nations. Edited by K. Venkata Raman. Dobbs Ferry: Oceana Publications, Inc., 1977. Pp. xix, 749. Index. \$50.

Rosalyn Higgins introduces this sparkling, provocative, and inevitably uneven volume with a graceful intellectual history of that volatile and astonishingly productive state of mind known as Oscar Schachter, perceiving its subtle and creative interplay of idealism and realism, "is-orientation" and "ought-orientation." This introductory chapter, alone, validates the volume.

So, however, do other arresting pieces. A surprisingly social science-informed chapter by the distinguished Czech international legal scholar and former ambassador, Vratislav Pechota, contains an analysis of "complementary structures of third-party settlement of international disputes." Pechota begins with the valid assumption that "there seems to be a definite relationship between the availability of suitable adjustment structures and the emergence of third parties, acceptable as mediators, conciliators or arbitrators" and identifies the principal types of third-party adjustment structures currently in use or on the drawing boards. He examines and classifies their main elements, the role of the third party, the source of its authority, the means and instruments available to it, and the "properties imparted to the settlement by the respective adjustment structure." It is interaction between form and process, process and outcome, which is explored in this seminal section.

In a related chapter, Judge Manfred Lachs of the International Court of Justice proposes structural and procedural changes to improve both the productivity and the product of the Court. Thus: "[O]ne may visualize greater possibilities in States referring to it only one aspect of a continuous case, one with a legal theme, requesting that the state of law be clarified. This request would leave the resolution of the controversy as a whole to the State concerned, and thus allay their fears that the case would be out of their control. Once the Court had given its answer, they would be free to arrive at their own decision, one which, in the last resort,

would be based not necessarily on legal but on any other consideration which they may agree to take into account." Judge Lachs discusses new uses the Court might make of this kind of "reference" procedure, as well as of variations on the advisory opinion.

Proving that one can be more than a passive presence at one's own festschrift, Oscar Schachter has himself written the meaty central chapter of the book. Discussing the practice of the United Nations in the resolution of "domestic" conflict, Schachter reminds us that the "primary objective of the United Nations . . . does not include the elimination of internal conflicts per se." He adds that there is "little reason to obscure the distinction between international and internal peace by introducing a still more general notion of minimum order or a general aim of 'persuasion over coercion' in relations between citizen and citizen, as opposed to government and government. Indeed, Schachter maintains that the UN Charter's distinction between "domestic" and "international" disputes should be retained "so that an appropriate criterion can be applied to cases of internal conflict." The real question is: at what point does a "domestic dispute" cross the threshold endangering international peace? The essay provides a tight schematic analysis of the five kinds of domestic conflicts that the United Nations has "internationalized" as well as of the political and institutional factors responsible for that selective and, usually, self-serving perception by the voting majority.

For the scholar, most detailed and, in part, new information is contained in the book-within-a-book, approximately 150 pages, written by Venkata Raman, the editor. This is a case-by-case analysis of procedures and practices of UN intermediaries in dispute settlement. In all, the work contains an unusual mixture of broad conceptualization, paradigmatic schemes, and data analysis. It does not invariably sound as if the contributors listened to each other, but most are well worth the listening.

THOMAS M. FRANCK
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The United Nations Secretariat. The Rules and the Practice. By Theodor Meron. Lexington and Toronto: Lexington Books, D. C. Heath and Co., 1977. Pp. xvii, 208. Index. \$19.00.

In his introduction, the author observes that problems relating to the professional staff of the Secretariat "are usually considered in political, administrative, and budgetary terms" and that he feels the time has come "to discuss them in legal terms too or, rather, in the light of the purposes and requirements of the Charter." The conclusions he comes to after a careful and detailed analysis of practice and dominant trends are not encouraging to those who had entertained hopes that the Secretariat would develop into a truly international administrative service. To quote his words: "The Secretariat of the future is therefore likely to resemble more a multinational, rather than an international, body. It is likely that, as less and less heed is paid to merit both by the Secretariat and by Member

States, the staff will be technically less efficient and that, with the increasing politicization, Secretariat officials will be less independent of their governments and less impartial."

The trends that support this prognosis are the result, in the author's judgement, of pressures brought to bear by member governments and cannot be reversed unless these governments change their attitudes and come to recognize that an international administrative service based on the principles of "efficiency, competence, and integrity" is in the long run in their common interest. Expressing the thought that was very much in the mind of Dag Hammarskjöld when the Secretary-General was under attack, the author asserts that the great majority of new members which have of late been most insistent on the equitable participation of their nationals in the Secretariat will be the principal sufferers from its loss of independence and efficiency.

In separate chapters, the author discusses in detail the ways in which Charter principles have been loosely applied in practice, if not disregarded. He rightly emphasizes that the subordination of the merit principle to wide geographical distribution and the manner in which the latter has been interpreted and applied have been chiefly responsible for the politicization of the Secretariat. Closely related and an important independent factor has been the excessive use of fixed-term appointments, often taking the form of secondment. This practice has also been detrimental to the realization of a career service, a goal difficult to attain in any case because of the limited number of Secretariat posts and the highly specialized character of their duties. The author considers the appointment and promotion process to be of central importance and that the protection of its integrity requires safeguards, checks, and balances, which at present are weak and ineffective. He devotes a valuable chapter to the critique of the process.

In conclusion, this is a study which deserves the serious attention of students and practitioners alike. It is to be hoped that this study will persuade member governments that there should be a return to basic Charter principles in the recruitment and operations of the Secretariat, since it is only through changes in attitudes of members that this can take place.

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Digest of United States Practice in International Law 1975. Edited by Eleanor C. McDowell (Dept. of State Pub. No. 8865.) Washington, D.C.: U.S. Govt. Printing Office, 1976. Pp. xxiii, 947. Index. \$11.00.

Once again we have in our hands a treasure trove full of interesting items which shed constantly helpful, and sometimes important, light on the changing content of international law.

In the chapter on recognition, we find a striking illustration of the essentially political character of even the recognition of states with the Secretary of State saying that "if the Soviet Union or the People's Republic [of

China] were prepared to recognize South Korea, we would be prepared to recognize North Korea" (p. 29). No suggestion there that either North or South Korea is not a state or that recognition is being withheld for reasons of law. Recognition is treated as a purely political act. In the same chapter, there is helpful guidance to foreign investors as to what to do when one governmental authority to which payments are due under a concession ceases to exist but is not yet replaced by another authority possessing control of the territory and population (p. 34). The lack of connection between recognition and political facts is further demonstrated by the express statement (p. 255) that the performance by U.S. consular officers in the Soviet Union of certain notarial functions with regard to legal documents originating in Lithuania did not constitute recognition of the incorporation of Lithuania into the Soviet Union.

To those who are concerned with the definition of the proper limits of extraterritorial governmental behavior, items relating to the activities in foreign states of United States government instrumentalities, such as the CIA (p. 17) and the forces based in Thailand involved in the *Mayaguez* incident (p. 14), will be helpful; as will an episode illustrating the other side of the coin, a United States note to the Organization of African Unity protesting against interference by the Organization in a matter of internal domestic concern to the United States, namely, the nomination of the U.S. Assistant Secretary of State for African Affairs (p. 19).

Examples are generally rare of protests by one government to another as a result of activities of the judicial arm of the latter which the former believes to be incompatible with international law. But this volume of DUSPIL contains one. At pages 172-75, the United States Government expresses to the French Government its "serious concern" over the rejection by a French court of a request for the extradition of the two hijackers of an American aircraft on the ground that the act was a "political offense."

Despite the formal qualification that the Final Act of the Helsinki Conference is a political statement of intent and does not constitute a legally binding international engagement (p. 7), the volume prints the main parts of the text under appropriate headings and thus provides those who are jurisprudentially minded with a splendid focus for a discussion of the nature of international law and legal obligation. On questions of title to territory, there will be some who will be exercised to reconcile United States views on the occupation of Howland, Baker, and Jarvis Islands in the Pacific Ocean (p. 92) with the same government's views on Antarctica (pp. 108-09). The law of international organizations is touched on at a number of points, but particular mention may be made of the statement on the effect of General Assembly resolutions (p. 85) and of the grounds on which the United States gave notice of withdrawal from the International Labour Organisation (pp. 71-73).

These are a few of many examples of the value of the present volume and it is unnecessary to multiply them. As one turns over the pages of a volume which is 150 pages longer than its predecessor and 50 percent larger than the one before that, one is bound to ask whether there is too

much material in the volume and whether there could not usefully be some pruning. But it is difficult to know where to cut. The fact is that the field is a wide one and constantly growing wider. International law is no longer what the structure of the traditional textbooks would have us think it is, even if the illustrations given above are just the kind to fit into such works. Who could properly say today that subjects like international trade, international economic assistance and development, or fuel and energy are beyond the concern of international law, any more than that the domestic aspects of such activities are not appropriate subjects for domestic law? Moreover, the size of the volume does not diminish its utility. It is greatly eased by a detailed index. So we should not cavil at the wealth of riches placed before us, but should tender our thanks to the new editor, Eleanor McDowell, for maintaining the high standard of selection, reproduction and speed of publication set by Arthur Rovine.

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Release and Repatriation of Prisoners of War at the End of Active Hostilities. A Study of Article 118, Paragraph 1 of the Third Geneva Convention Relative to the Treatment of Prisoners of War. By Christiane Shields Delessert. Zurich: Schulthess Polygraphischer Verlag, 1977. Pp. xiv, 225. Sw. Fr.38.

This brief volume is the first comprehensive study of the history and policy pertaining to the legal, political, economic, and cultural problems associated with the repatriation of prisoners of war at the conclusion of hostilities.

Mrs. Shields Delessert ably surveys the historical practices with respect to war captives from early times, when they were deemed to be the property of their captors until the standard was recognized, in the 18th century, that captured combatants were in the custody of the state only for the purpose of preventing their further participation in the war. A principle derived from that standard is that prisoners must be repatriated when their return no longer threatens to increase the military potential of the enemy.

In an era when armed conflicts were quickly terminated by a peace treaty shortly after the conclusion of military operations, satisfactory implementation was found in Article 20 of the Hague Regulations of 1907: "After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible." Infirmities in the application of this rule developed when the World War I peace treaties were long delayed following the armistice agreements which halted military operations. It broke down completely when hostilities in World War II were concluded by unconditional surrenders with no prospect of a peace treaty in sight for many years. As there was no possibility for Germany or Japan to resume hostilities, the prolonged retention of prisoners of war by the USSR and others and their exploitation for the rehabilitation of the Detaining Powers' economies clearly violated the underlying principle, but

it did not result in a technical violation of the conventional rule which tied repatriation to the conclusion of a peace treaty. To correct this abuse, Article 118 of the Geneva Prisoners of War Convention of 1949 provided that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities."

The study illustrates that a rule devised to correct the abuses of a unique situation is difficult to apply when circumstances change. The author construes the term "cessation of active hostilities," in the context of its negotiation, to imply a condition where there is no probability of resumption of hostilities in the near future. As the history of Arab-Israeli conflicts and those involving India and Pakistan shows, cease-fires and truces imposed by UN or other external pressures tend to be unstable intervals between periods of renewed military operations. They halt the bloodshed before there is a military decision of the underlying issues, but they also relax the pressures for reaching a political settlement. If an obligation does not arise under Article 118 when there is an unstable truce, an opportunity is afforded to exploit the repatriation of prisoners as a bargaining chip in the truce negotiations to gain a political or military advantage. Unfortunately, the party whose cultural values include humanitarian concern for the return of prisoners is at a disadvantage in such negotiations.

This comprehensive survey sheds new light on a troublesome corner of international humanitarian law and thus improves the chances that humanitarian obligations will be respected. It is a valuable addition to the library of all who are interested in international humanitarian law.

WALDEMAR A. SOLF

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Types of International Society. By Evan Luard. New York: The Free Press, 1976. Pp. vii, 389. Index. \$14.95.

Luard's thesis is simple and almost beyond controversy: that the behavior of states as evidence of their convictions of law reflects value and interest judgments of elites; that an analysis of the structure of society both within states (or analogous units) and among them in different historical periods and geographic areas, what the author calls a "sociological" approach to the analysis of international legal order, can enlighten us as to the nature of our own legal order and its current trends. Seven legal order models are identified as particularly illuminating or historically important: (1) The ancient Chinese multistate system (771-221 B.C.); (2) The Greek city-states (510-338 B.C.); (3) The European age of dynasties (1300-1559); (4) The age of religions (1559-1648); (5) The age of sovereignty (1648-1789); (6) The age of nationalism (1789-1914); and (7) The age of ideology (1914-1974). Nine key factors in social analysis are set out and compared "age" by "age": (1) Ideology, meaning the prevailing social values; (2) Elites, particularly the social and economic classes from which statesmen were drawn; (3) Motives, including terri-

torial expansion, ideological purity, dynastic security, etc.; (4) Means, *i.e.*, the relative merits, seen in each age, of military, economic, cultural, or other ways to accomplish the ends of policy; (5) Stratification among states, such as the social rank order among rulers and the special position in religious Europe of the "Defender of the Faith"; (6) Structure of communication within the system, such as the practice of legation as distinguished from primary mercantile contacts; (7) Roles, including protection and patronage obligations of dominant powers; (8) Norms, in the sense of major substantive doctrines like "just war" or "chivalry"; and (9) Institutions such as the nominal Chou league, the Holy Roman Empire, the Pan-Hellenic oath and alliance system, the League of Nations, and the United Nations.

Since Luard believes that the age of ideology had run its course by 1974, five conceivable models for its replacement are postulated and examined: (1) The transnational society, where freedom of movement across borders encourages the flow of capital and goods, but also permits the easy flow of terrorists; (2) The international society, a sort of apotheosis of functional organizations possibly tending towards peace with sterility and bureaucratization; (3) The sphere of influence society, a modified view of Orwell's vision of the 1984 struggle between superpowers; (4) A world of regions, with superpowers being replaced by regional organizations with general powers; and (5) The rich-poor society where the main divisions would be neither geographical, as in spheres of influence or regional societies, nor ideological, as in the eroding ideological society, but economic, with continuance of or even increase in the current destabilizing disparities of wealth among nations.

Luard's writing style is simple and superbly clear. It is impossible to condense his thesis further without doing even more violence to the generality and elegance of his presentation. Judging by the footnotes (there is no bibliography), the sources are few and more or less standard but supplemented by interesting references to primary works.

No doubt many scholars would quarrel with the selection of "ages" and their oversimple categorization. No doubt, also, many would quarrel with the basic methodology or the entire idea that the tools of modern sociology can illuminate the nature of international society. Many also may dispute the assumption that the relationship between state behavior and the underlying conviction of law on the one hand and the nine factors discussed by Luard on the other are related in any meaningful way to each other.

Let them dissent after reading the book. Even where there is room for disagreement, the force of Luard's presentation demands a scholarly response and not a mere dismissal. It may be confidently predicted that this book will find its way to many university reading lists and will color the perceptions of a generation of students and scholars. It is a major work of compelling insight.

ALFRED P. RUBIN

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Frühe Völkerrechtliche Ordnungen der Aussereuropäischen Welt. Ein Beitrag zur Geschichte des Völkerrechts. By Wolfgang Preiser. Wiesbaden: Franz Steiner Verlag, GMBH, 1976. Pp. 272. DM 48.

This stimulating work examines the premodern records of several non-Western cultures in order to determine whether any of them had brought forth an indigenous system of international law before experiencing the impact of the West and the European law of nations. By way of unifying the separate historical inquiries, most of them greatly impeded by the absence or inadequacy of written sources, Preiser asks the following questions of each of the societies: (1) Is there historical evidence of the existence of "states" or comparable political organisms? (2) Did these units maintain regular relations with each other? and (3) Were these relations subject to a law that originated in the culture's own thought world?

Studies of Maya, Inca, and Aztec realms convince Preiser that interstate systems existed during brief periods, notably in Aztec history, and that communities were then at one in complying with certain norms of warfare. However, evidence for his assumption that Central America's well developed "law of war" must have had a counterpart in an equally persuasive "law of peace" (pp. 138-43) is, to say the least, minimal.

Preiser rightly prefaces his findings regarding the Polynesian island world and Black Africa with the reminder that we deal here with non-literate societies. The data available for the Polynesian states and empires converge on the theme of war and expansionism, he writes, but they also show that resort to war had to be justified in terms of religion and such shared cults as appropriate human sacrifices. The concluding suggestion that these customs testify to respect for law and to the prevalence of "law-minded thought" ("rechtstreue Gesinnung") is somewhat controversial. Preiser gives no definitive answers to the three questions when it comes to Africa south of the Sahara. After drawing attention to certain widespread political institutions such as Sacred Kingship in East Africa which indicate the existence of an operational regional system and to the records of skillful diplomacy in some of the great West African nations, he expresses the hope and expectation that closer research will soon yield convincing evidence of law consciousness.

The chapter on pre-Islamic India is the most interesting as well as the most persuasive of the surveys. It begins by noting traditional India's indifference to history as this concept is understood in the West. After extensive comments on the Hindu epics, the *arthasastras* and other political treatises, Preiser focuses on the Maurya period and finds that states had come into existence; that they were despotisms rather than law states; that their royal governments were committed by Hindu ethics to seek aggrandizement through large and petty wars; and that no law-centered interstate order was allowed to develop.

A different conclusion is reached in respect of ancient China where a fully developed state system had come into being ca. 500 B.C. to endure until 221 B.C. During that period, viewed by Preiser as China's classical

era, autonomous and like-minded states persisted in waging war against each other until one of the contending kings subdued the rest and thus initiated a unified Chinese empire. Alliances and treaties were as easily made as they were broken in this period (p. 59), and in the author's view it is thus doubtful whether the ruthlessness of power politics was ever overcome by the striving for law. Trends in that direction—and they were certainly faint in the Period of the Warring States—were decisively frustrated within the Chinese realm by the establishment of the Middle Kingdom and the propagation of the ruler's Heavenly Mandate. Relations between the Empire and the so-called barbarian societies on the realm's periphery were, by contrast, frequently subjected to contractual relations, albeit in full recognition of China's superiority over its neighbors.

The question that intrigued Preiser as it did Alfred Verdross to whom this volume is dedicated, namely whether the Western law of nations is merely one of numerous different but comparable systems of law, receives here (p. 272) an affirmative answer in so far as precolonial Central America and China are concerned. The evidence contained in the substantive sections of the book does not sufficiently support this concluding statement.

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International Space Law. Edited by A. S. Piradov. Translated from the Russian by Boris Belitsky. Moscow: Progress Publishers; Chicago: Imported Publications, Inc., 1976. Pp. 271. Index. \$3.50.

In this volume unnamed Soviet experts on the international law of the space environment, namely outer space, the moon, and other celestial bodies, summarize in eight chapters Soviet views on this subject. They accept international space law as one aspect of general international law. They focus on the development and application of the law to space activities. Emphasis is placed on Soviet policies and historic appraisals of special Soviet contributions to the development of this part of international law.

Central attention is given to the interpretation of the Treaty of 1967 on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. Here the authors frequently engage in supplying gloss to the plain language of the treaty. Since this is a common practice of international lawyers throughout the world, there is no need to take exception to such an approach. However, on more than one occasion the authors substitute new words for textual language, which could if accepted, possibly constitute a rewriting of the treaty. For example, in a section dealing with "celestial bodies," the authors refer to the "nearer planets." While it is possible that this change in terminology was merely a literary choice by the authors, yet it also raises the question which of the nearer planets, or all, are celestial bodies, and if there are in fact two or more classes of such objects. If such is the purpose, then it would seem appropriate to identify with some care why one such body might be considered to be a nearer planet and why another

might be treated as either being or not being a celestial body. On another occasion reference is made to "outer space proper." This raises the question as to the respective legal consequences to be associated with "space proper" and "space."

Quite possibly a more serious departure from treaty terms is the effort to make a distinction between partial and total demilitarization, concepts that are not employed in the treaty. Thus, the authors suggest that "demilitarization of outer space and celestial bodies implies the banning of activities that pursue military aims in peace time, and may be partial or total" (p. 91). The authors appear content to rely exclusively on Article 4 in assessing the limitations imposed on military uses of the environment and to neglect Article 13, the preamble, and other relevant provisions. Since the meaning of Article 4 is of vast importance to the entire world, the Soviet interpretation suggests the need for further inquiry into its true meaning. An appropriate international body might clarify views concerning the relation of military uses of the environment to the wider need to establish the difference between peaceful as opposed not to military but to aggressive uses. General Assembly Resolution 1884, the principal antecedent of Article 4, is regarded by the authors as having confirmed the earlier US-USSR agreement affecting the nondeployment of mass destruction weapons. Interestingly, the resolution is described as constituting "a specific form of international agreement" (p. 92).

Through an understanding of the Soviet view of international space law, it is possible to comprehend better their more general outlook on international law. Thus, for this reviewer, it is illuminating to observe how these writers address themselves to the logic and the values of law and how they arrive at their ultimate positions.

This book deserves careful reading by all who have a concern for the orderly development of an international law for space environment activities. It provides insights into Soviet outlooks as to general international law and world politics. While many of the positions offer no basis for substantial concern, there are suggestions that indicate the need for continuing consultations among the space-resource states as to the meaning of existing commitments and the future direction of this branch of international law.

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Patent and Know-how Licensing in Japan and the United States. Edited by Teruo Doi and Warren L. Shattuck. Seattle and London: University of Washington Press, 1977. Pp. x, 430. Index. \$27.50.

This book treats in depth for the first time a problem of both public and private significance—technology transfers between Japan and the U.S. The rebuilding of much of Japanese industry since World War II has depended upon massive transfers of American technology to Japan and now much technology is flowing both ways. Yet in a twenty-five year period (1950–

1974) the total Japanese bill for foreign technology was \$5 billion (against receipts of royalties by Japanese of 0.57 billion). This is a minor cost, however, compared to the presumed cost of R and D to produce the same technology. Indeed, Japanese R and D costs were as high in one year (1974) as the entire royalties of the past twenty-five years. Consequently, it is clear that Japan will be importing even more technology in the future, while at the same time exporting their own technology in increasing volume. Such a future flow of technology both ways will continue to be dominated in the next decade by U.S. licensors and licensees and will continue to generate its volume of legal problems of the kind covered by this thoroughly bilateral, comparative book.

Foreign licensing of patents and know-how involves the law of two countries—licensors and licensees—and nice choices-of-law dependent on working level comparisons. But, when the laws and languages of the two nations differ as much as those of Japan and the United States, it is rare that the parties and their lawyers have an adequate grasp of both sides of the business and legal context to make such choices with confidence. This situation prevails because legal training has normally been limited to one side, and there is precious little reliable literature comparing legal differences as they specifically affect licensing transactions and the diverse contract, property, tax, and antitrust questions involved. Since bilingual experts qualified in both Japanese and U.S. law are scarce, this book has addressed the bilingal scope of the problem by pairing off specialists one from each country, and having them write parallel articles addressed to the same selected topic, or in other cases to write together a comparative article. In this fashion comparative treatment of both Japanese and U.S. law was possible, or at least the material was presented in parallel for comparison by the reader.

The seven subjects covered are: (1) comparison of patents in both countries; (2) substantive protection of know-how; (3) patent office procedures; (4) contract drafting problems in licensing between the two countries; (5) remedies for breach of licensing agreements; (6) antitrust problems; and (7) tax problems. Topics 3, 6, and 7 were handled by parallel articles, one by a Japanese expert and one by an American expert; the other four topics are covered by single articles co-authored by an American and a Japanese. There are separate lists of Japanese and American cases and a detailed index.

One area, antitrust, will illustrate the value of this book. In 1976 over 1,400 licensing agreements were filed with the FTC, of which one out of every five (289) was "faulty" and was changed by FTC administrative guidance. To anticipate such problems is but one of the things this book will help to do. Like virtually all books of multiple authorship, some parts are better than others, and there are omissions, such as consideration of the basic alternative types of civil code contracts that might be used for varying Japanese effects. But on the whole, the result is successful and a very useful handbook for industrial property teachers and for students of comparative law. For practitioners with licensing work between Japan and

the United States, no other bilateral guide approaches it in breadth of coverage and utility of detail.

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Kommentar zum Einheitlichen Kaufrecht. Die Haager Kaufrechtsübereinkommen vom 1. Juli 1964. Edited by Hans Döle. Munich: C. H. Beck'sche Verlagsbuchhandlung, 1976. Pp. xxxix, 840. Index.

In 1929 Ernst Rabel suggested the unification of international sales law to the Rome Institute (UNIDROIT). The project ultimately resulted in the Convention Relating to a Uniform Law on the International Sale of Goods of 1964, accompanied by a Uniform Law on the Formation of Contracts for such sales. Belgium, Gambia, Germany, Italy, the Netherlands, and the United Kingdom, among others, have ratified the Convention.

Reaction in the United States was sharply critical, both on substantive grounds and because of the intended far-reaching application of the new sales law. With respect to the former, detailed studies by Professor Honnold¹ and others² identified significant differences from the approach taken by the UCC, both in substantive details³ and in the overall orientation, which seems unduly seller-oriented. Professor Nadelmann⁴ criticized the Convention's provision which makes it applicable to all litigation involving international sales contracts arising in a contracting state, regardless of whether the parties resided or had their business establishment in contracting states or whether the contract bore a relation to the forum. European comment⁵ dismissed this objection as unlikely to be consequential in practice and supported the provision on the ground that it furthered the Uniform Law's objective to provide a simplified sales law free of differences in national law, thus enhancing predictability.⁶ It is interesting to note, how-

¹ *A Comparison of National and Regional Unifications of the Law of Sales and Avenues Toward Their Harmonization: Prospects and Problems*, International Association of Legal Science, Unification of the Law Governing International Sales of Goods 3-37 (Honnold ed. 1966); Honnold, *The Uniform Law for the International Sale of Goods: The Hague Convention of 1964*, 30 LAW & CONTEMP. PROB. 326 (1965).

² E.g., Berman, *The Uniform Law on International Sale of Goods: A Constructive Critique*, 30 LAW & CONTEMP. PROB. 354 (1965).

³ Compare, e.g., UCC §2-207 (that a contract may be formed despite a material alteration in the acceptance) with Art. 7 of the Uniform Law on Formation; UCC §1-105 (reasonable relation of the law chosen by the parties to their contract) with Arts. 3 and 4 of the Uniform Law on Sales (no limits). It is interesting to note that the new German law on General Conditions now requires a showing of an "appropriate interest" for the validity of the choice of an unrelated law. See Ulmer, Brandner, Hensen, KOMMENTAR ZUM AGB-GESETZ, Annot. 7 to §10, No. 8 (1977). One German commentator now advocates this limitation for choice-of-law clauses generally: G. KEGEL, INTERNATIONALES PRIVATRECHT 290 (4th ed. 1977).

⁴ Nadelmann, *The Uniform Law on the International Sale of Goods: A Conflict of Laws Imbroglia*, 74 YALE L. J. 449, 456 *et seq.* (1965).

⁵ Döle in the Introduction to the commentary under review at xxxii.

⁶ One may wonder, however, how predictable the application of the Convention really is short of worldwide adoption. As long as relatively few states participate, the plaintiff has his choice of Convention Law or the national law of a nonmember state simply

ever, that so far all contracting states have adopted the Uniform Laws subject to reservations⁷ which exclude such a wide applicability but instead focus on the relation of the parties to a contracting state.

The commentary edited by Professor Dölle presents a superb analysis of the provisions of the Uniform Laws, fully documented in each section with respect to the literature (mainly German, but also international). The appendix reproduces the Convention and Uniform Laws in the English and French originals and in German translation; a detailed index facilitates access to relevant sections. The individual comments and analyses are prepared by some of Germany's leading scholars and practitioners in the field,⁸ assuring great reliability but, at times, also resulting in the presentation of divergent views.⁹

The commentary is a much needed contribution both for those countries that have adopted the Convention and Uniform Laws as well as for the "outside world." It is important to note, however, that work with respect to the unification of international sales law has not ended. The Convention and the Uniform Laws are not yet the final word. Thus, since 1969, UNCITRAL has studied possible modifications and alternatives, and the Working Group established for that purpose presented a new Draft Convention on the International Sale of Goods to UNCITRAL in 1976.¹⁰ Similarly, a new draft law covering both the formation and the validity of contracts for the international sale of goods is under consideration.¹¹

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by selecting his forum. Furthermore, as Dölle himself acknowledges (*supra* n. 5, at xxxvi), even courts of contracting states will still resort to national law notions for the purpose of filling gaps. Article 17 of the Uniform Sales Law, which provides that a court shall be guided by the general principles of the Uniform Law, is of much less help than the similar provision of UCC §1-102(1) given the greater diversity of legal systems which furnish the background. The author of the comments to Article 1 of the Uniform Sales Law (Prof. Herber) also disagrees with the editor and endorses the American objection: Annot. 7 preceding Arts. 1-8 of the Uniform Sales Law.

⁷ Article III of the Sales Convention permits contracting states to limit the application of the Convention to contracts between parties having their habitual residence or place of business in contracting states. Gambia, Germany, the Netherlands, San Marino, and the United Kingdom invoked this provision. Article IV of the Sales Convention permits contracting states to exclude the application of Article 2 of the Uniform Sales Law which provides that the rules of private international law of contracting states shall not be applied to international sales contracts if they participate in other international agreements providing (different) choice-of-law rules. The intended reference is to the Hague Conference Convention of 1955 on the law applicable to international sale of goods. Belgium and Italy invoked Article IV.

⁸ E. von Caemmerer, H. H. Eberstein, R. Herber, U. Huber, W. Junge, H. G. Leser, K. H. Neumayer, G. Reinhart, P. Schlechtriem, H. Stoll, H. Stumpf, E. Wahl, and H. Weitnauer.

⁹ See *supra* n. 5 and 6.

¹⁰ 7 UNCITRAL Y.B. 89 *et seq.* (1977). ¹¹ *Id.*, at 88-89.

BRIEFER NOTICES

Uganda & Human Rights. Reports to the UN Commission on Human Rights. By the International Commission of Jurists. (Geneva: International Commission of Jurists, 1977. Pp. xv, 167.) This small yet essential book tells almost all there is to say about the cynicism and indifference of a large part of the world community, as represented on the UN Commission on Human Rights, to the ongoing degradation of human life in Uganda. The International Commission of Jurists submitted five communications between 1974 and 1976 to the Secretary-General of the United Nations which document horrifying violations of human rights in Uganda since General Amin's accession to power in 1971. These communications were received and reviewed by the Commission, after referral to it by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, but nothing other than delay and a decision to take no action has resulted.

The Commission, after investigation of the facts and interviews with scores of eye witnesses who fled the Amin terror, concluded that the Ugandan Government either suspended or violated most of the fundamental human rights and that there was a total breakdown in the rule of law in that country. All political freedoms are in abeyance; the armed forces have been put beyond the reach of law with unlimited powers over human life; the independence of the judiciary has been undermined by the arrest and murder of the chief justice and the transfer of much of its civilian jurisdiction to a Military Tribunal. A reign of terror exists, directed first against the Asians who were expelled in violation of their basic rights, including Asian Ugandan citizens who were banished to remote parts and thence out of the country, and then against the general citizenry by acts of torture and individual and mass killings.

When these charges came before the Human Rights Commission at its 1976 session, after some obvious delay the Commission decided to take no action. And in 1977, at the very moment the Commission was meeting, students, professors and then Archbishop Luvum were killed. The Commission deliberated and decided only to keep the matter "under review."

What can one say in the face of this tragedy, particularly as to the lack of courage on the part of other African states to condemn publicly the madman in their midst? For many, including this reviewer, it is difficult to find a sympathetic response to African human rights concerns when the failure to deal with the Ugandan situation is so blatant and indeed revolting to the reader of the Commission's Reports. Only slightly less troubling is the naked lack of concern by other states for the hapless victims of Amin's brutality and lunacy, which this book documents in detail.

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Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights. Vol. III: Committee of Experts, 2 February-10 March 1950. By the Council of Europe. (The Hague: Martinus Nijhoff, 1976. Pp. xvii, 339. Index. Gld. 130.) This book, the third of eight volumes, consists of two parts: the working papers prepared by the Secretariat General of the Council of Europe for the Committee of Experts and the proceedings of that committee held in February and March 1950. The working papers include (1) the preparatory report by the Secretariat General concerning a preliminary draft convention and (2) assembled

documents relating to exhaustion of domestic remedies (diplomatic protection of nationals abroad) and relating to the denial of justice by state judicial organs.

Volume III covers the establishment of the Committee of Experts which was formed at the invitation of the Secretary-General. Although all the representatives on the committee clearly favored a European convention, the proceedings reveal a division of the committee into two camps. One held that a precise definition of rights should be set forth; the other, that a specific delineation of those rights would be nearly impossible. Finally, the committee chose to examine the draft proposed by the Consultative Assembly, while permitting other proposals to be brought forward. The volume concludes with the committee's final version which incorporated a specific enumeration of rights.

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Bürgerkrieg und Völkerrecht. Die Anwendbarkeit völkerrechtlicher Normen in nicht-zwischenstaatlichen bewaffneten Konflikten. By Aldo Virgilio Lombardi. (Berlin: Duncker & Humblot, 1976. Pp. 146. Index. DM 96.) This is the expanded version of a perceptive and mature Basle doctoral thesis on a complex and topical subject—civil war and international law. Commendably, the author examines the issue from an interdisciplinary angle in its sociological, military, and normative aspects. He is also aware of the need for any writer in so controversial a field to submit his own metalegal assumptions and commitments to searching self-analysis.

From these promising starting points, Lombardi reaches the conclusion that the rules of traditional international law—based as they are on those underlying the principles of sovereignty and recognition, extended by common consent to any armed force which complies with the requirements of Article 1 of the Hague Regulations on Land Warfare of 1907, and incorporating elements of the minimum standard of civilization—should be replaced by an objectivist determination of the existence of civil war: the intensity of an internal armed conflict and, if the test should be positive, application of, at least, the humanitarian rules of international law.

The author declares his commitment to the intentions of the UN Charter but appears to be less conscious of the questionable character of a number of other "with it" assumptions and clichés, such as the distinction between bourgeois and socialist authors; the classification as socialist of totalitarian one-party regimes; the identification of the United Nations with the framework of an organized international community; the equation with the practice of the United Nations of partisan and, in any case, purely recommendatory resolutions, adopted by pragmatic voting coalitions in the General Assembly; the interpretation of extorted support of armed gangs by terrorized civilian populations as evidence of active cooperation, and the interpretation as an innovation of the reassertion of the standard of civilization in Article 3 of the Geneva Convention of 1949.

Like other "progressive" writers, Lombardi has to wield mercilessly the axe of desuetude against inconvenient rules of traditional international law. Yet, irrespective of whether these tests or that of intensity of armed conflicts (also implied in Article 1 of the Additional Protocol II to the 1949 Geneva Conventions) are applied makes little difference. To judge by earlier and more recent armed conflicts of an internal character from Cambodia via Ethiopia, Angola, and the Western Sahara, to Northern Ireland, the members of the United Nations make their self-interpretations of the situations

concerned, as of old, according to their own assessments of interest and ideological involvement, without being unduly restrained by any relevant considerations of good faith.

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Le Droit des Peuples à Disposer d'Eux-mêmes. By Jean-François Guilhaudis. (Grenoble: Presses Universitaires de Grenoble, 1976. Pp. 226.) In this rather difficult book, the author tackles a subject of often frustrating complexity: the right of self-determination. Through an analysis of state and UN practice, as well as classical and modern writings, he attempts to present some ordered conclusions to perhaps insoluble questions, such as what constitutes a "people," when and how the right of self-determination is exercised, and whether that right includes the right of secession.

The author adopts a conservative approach to international law, giving rather less weight to certain General Assembly resolutions than they might deserve, and he reaches a conservative conclusion: the right to self-determination does not appertain to "people," apart, perhaps, from colonial situations, but is a function and right of statehood. In this context, the author presents efforts to achieve a new world economic order as an aspect in the development of the right of self-determination. Much of the difficulty in the book stems from an attempt to analyze theory and practice, to reconcile, with regard to secession, international support for anticolonial liberation movements with indifference or opposition to independence efforts in such breakaway areas as Biafra, Bangladesh, and Kurdistan.

For the English-speaking reader, the multiplicity of terms used to express the single English term "self-determination" presents a problem. In the space of two pages, the author uses "autodetermination," "libre disposition," and "libre détermination" in addition to the title phrase, the last being the French phrase adopted in the UN Charter for the English "self-determination." In a brief early footnote, the author states, without further discussion, that the terms are used interchangeably. This is difficult to accept given the precision of the language and the care used in drafting international instruments. In this, as in the book in general, the reader sees the beginnings of a discussion, but is left wanting a more penetrating treatment of this very complex subject. Perhaps the most persuasive conclusion in the book is that the right of secession does not exist and has never developed because states are not prone to suicide.

DINAH SHELTON

Canadian Conflict of Laws. Vol. II: Choice of Law. By J.-G. Castel. (Toronto: Butterworths, 1977. Pp. xxvi, 791. Index.) This is the second volume in the series. The first volume of this series, which appeared some years ago, was concerned with general principles of jurisdiction and with the recognition and enforcement of foreign judgments. Both volumes make copious mention of Canadian and British cases and secondary authorities and pay relatively little attention to those of the United States. This is entirely understandable and makes the books of particular value to the American reader who, while familiar with his own law, does not have extensive knowledge of the law of our northern neighbor.

This book covers a wide range. The relatively brief introduction is directed to the history and the theories and methods of the conflict of laws. Part One, entitled "The Law of Persons," covers not only the ordinary family law subjects, such as marriage, divorce, separation, annulment, and

support, but foreign corporations as well. Part Two is concerned with the conflict-of-laws problems involving property, both immovable and movable, while Part Three deals with contracts, torts, and workmen's compensation. The book is of high quality throughout, as is only to be expected from a writer of Castel's scholarship, diligence, and intelligence. Perhaps the only real criticism that can be made is that it attempts to compress the subject into too small a space with the results that some aspects must necessarily be slighted. This reviewer, by way of example, was disappointed by the relatively brief discussion of the limitations imposed upon the power of a Canadian Province to apply its law extraterritorially. This is an important, though relatively unexplored, subject and one in the development of which Castel is well equipped to lead the way. Relatively short shrift is also given, for example, to foreign corporations, trusts, and workmen's compensation. Likewise this reviewer could not escape the impression that throughout the book Castel felt constrained by limitations of space to avoid extensive critical commentary and exposition. This seems unfortunate. Conflict of laws is today in a state of flux with the result that much that is law today may be changed tomorrow. As a result, criticism of current doctrine and discussion of what should be the guiding principles by a person of Castel's caliber could prove as valuable as an exposition of the law as it now appears in the books.

All this should not be taken as a criticism of anything said in the book but rather as an expression of regret that it is not of considerably greater length. The book is warmly recommended to all American students and scholars of conflict of laws.

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Konventionskonflikte im internationalen Privatrecht. By Paul Volken. (Zurich: Schulthess Polygraphischer Verlag, 1977. Pp. xxvii, 329.) The volume deals with the problems which arise when conventions in the private international law field conflict. Potential conflicts between conventions dealing with public international law topics are well known. The Vienna Convention on the Law of Treaties has a provision on the subject. In the case of treaties dealing with matters in the private law field, the problem is relatively new. The proliferation of such treaties on the unification of parts of substantive law or of the rules of private international law is largely a postwar phenomenon. Nowadays treaties on judicial assistance, recognition of judgments, or choice of law, bilateral or multilateral, are turned out by the dozen. Conflicts between such treaties are unavoidable. On occasion, provisions for the regulation of anticipated conflicts are found in the treaties. Agencies working on unification of law, such as UNCITRAL or the Hague Conference on Private International Law, or regional bodies, such as the Council of Europe or the European Economic Community, are alive to the problem.

The author, a young Swiss lawyer, whose study appears in the publication series of the Swiss Society of International Law, is attracted by the problem of a conflict between treaties that create an obligation between nations but where the substance of the conflict involves regulation of private rights of private parties. One treaty may say that the law of the seller or that of the buyer shall govern international sales contracts and the other, between the same nations, may deal with choice of law governing contracts in general, the rules seeming to be or being in conflict. The author examines rules in public international law and any other type of law that might assist in the resolution of such conflicts.

Even in domestic law proper, principles exist for the resolution of conflicts between rules. An entire set of rules deals with the resolution of conflicts between domestic and foreign law. Public international law has looked for principles for resolving conflicts between conventions. After discussing the nature of these different types of norms, the author takes up the examination of potential conflicts in conventions on private international law. First, attention is given to treaties to which Switzerland is a party and to the Hague Conventions on Private International Law. The conventions on international procedure, on recognition of judgments, and on choice of law for the different private law fields, are successively analysed. Suggestions are made on how to deal with conflicts in the different areas. Thereafter, consideration is given in more general terms to approaches available to meet the problems. The rules developed in public international law are examined critically for their applicability and usefulness in the case of conventions in the sector of private law.

The author has an excellent command of private international law treaties. He shows considerable skill in the treatment of the public and private international law aspects. As the first comprehensive study of this kind, the book will be helpful to the professionals working on codification of rules of private international law on the international level and should assist in work on actual conflicts. The author concludes that the rules in conflict or seeming conflict should be examined closely before recourse is had to the general rules developed in public international law for conflicts between conventions. The recommendation is in line with modern approach to the resolution of conflicts, true or false, in the field of private international law.

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Lehrbuch des Völkerrechts. Band III: Streiterledigung, Kriegsverhütung, Integration. By Friedrich Berber. (Munich: C. H. Beck, 1977. Pp. xix, 358. Index. DM 48.) Volume III, covering the settlement of disputes, the prevention of conflicts, and what Berber terms international integration, represents the final part of the second and revised edition of a well-known German text in international law. The volume constitutes more than an updating of its contents as published in 1965; much has been rewritten (Chapters 6 and 7 by Rainer Goerdeler) and has been aimed at the author's main concern: the concept of "integration."

The text starts with a summary (the word is used advisedly) treatment of state responsibility for violations of norms of international law. All the usual topics are covered, but regrettably in abbreviated form, with few examples or case citations supplied. The following sections of the work deal with the peaceful settlement of disputes and with the sanctions of international law, including self-help short of war. All of the foregoing take up only 114 pages. Only then emerges the proclaimed main subject matter of Volume III: the prevention of war. Such standard topics as the outlawry of war, collective security measures, disarmament, and peaceful change are discussed briefly, followed by a section devoted to political measures (hegemony, balance of power, alliances, neutrality, peaceful coexistence).

Berber believes, however, that the key aspect of war prevention is the development of what he terms integration. Almost half of the volume is devoted to this subject, defined in a beautifully Germanic paragraph (too long to be reproduced: a single sentence of 86 words) as, approximately,

a universal just order in which the member states would be able to fulfill their own tasks through the union. Undoubtedly this condensation does an injustice to Berber's convoluted definition. Berber then proceeds to describe the League of Nations, the United Nations (main flaw: lack of ideological homogeneity), the agencies of the latter, and then, in summary form, a multitude of regional agencies created since 1945, with emphasis on European organizations. Ultimately the conclusion of this effort is reached: the achievement of comprehensive integration represents a gigantic task, one that has not yet really been approached. And international law can guarantee peace on earth only when true justice has been realized not only among states but also within states, always and everywhere.

On the whole, this is a disappointing book. Much would have been gained if the sections on state responsibility and on the prevention of war had been expanded. The entire portion on integration would have been more appropriate, with considerable expansion, in a separate work on that subject. Its inclusion in a three-volume work on international law makes it appear to be tacked on, and its treatment is quite incomplete.

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University of Minnesota

Lezioni di Diritto Internazionale. By Giuseppe Barile. (Padua: CEDAM, 1977. Pp. 180. L. 6,000.) This book includes selected lectures on the sources of international law. The author indicates that the origin of *jus gentium* has its roots in the ecclesiastical glossators of the 12th century, who had forged the first norms based on natural law then adopted by the Roman church in its diplomatic and international relations with foreign courts. Ultimately Grotius and subsequent writers on international law adopted a substantial part of these norms in their treatises on international relations.

The author then proceeds to explain the sources of modern international law, mentioning briefly the endeavors of the League of Nations and the United Nations for the codification of certain portions of international law. He emphasizes the importance of the treaties as a major source of the law and describes in detail the Vienna Convention on the Law of Treaties of 1969. It is the opinion of the author that many past judicial and arbitral decisions are based on treaties, agreements, and diplomatic understandings which reflect the intentions of the parties. The decisions of these international tribunals are in many cases an interpretation of these treaties, and the principles of international law are therefore subject to the prevailing views of the parties to the treaties at specified periods of time. Obviously, the author tends to suggest that the norms of international law are by no means part of a rigid legal system, but quite flexible and subject to accommodation in view of political and social circumstances.

ZVONKO R. RODE
District of Columbia Bar

International Air Transport: Law, Organization and Policies for the Future. Proceedings of the Air and Space Law Institute 25th Anniversary Conference, November 17-19, 1976. Edited by Nicolas Mateesco Matte. (Toronto: The Carswell Co.; Paris: Editions A. Pedone, 1977. Pp. xi, 172.) The Air and Space Law Institute, founded by a distinguished American legal practitioner, John Cobb Cooper, in Montreal, has published this slim volume of papers delivered at a conference held in commemoration of its

25th anniversary. The overall intellectual design involves a retrospective view of some major national policies towards air transport by France, Great Britain, the United States, the African countries, and Canada; a survey of the achievements of both the International Civil Aviation Organization and the International Air Transport Association; an examination of the nature and scope of bilateral air transport agreements between different countries which is scientifically the most substantial part of the volume, with valuable papers by scholars like Bin Cheng, Lowenfeld, and Guldinmann; and a rather episodic look at problems of safety in flight. The broad scope of the design and the limited space for its coverage necessitated somewhat light or general treatment at times. This situation was not helped by the editorial decision to include after-dinner speeches which, while no doubt topical and witty at the time of delivery, read rather flatly more than a year after the event. The international lawyer will note, with passing interest, that in a conference held at an English language institution located in predominantly French-speaking Quebec, and opening two days after the election of the separation *Parti Québécois* Government of Premier Lévesque, only three of the sixteen formal papers presented were by French-speaking jurists—two by Frenchmen and one by a Francophonic African, and none at all by French-Canadians.

EDWARD MCWHINNEY
Simon Fraser University

International Human Rights and International Education. By Thomas Buergenthal and Judith V. Torney. (Washington, D.C.: US National Commission for UNESCO, Department of State, 1976. Pp. xvii, 211.) This is a perplexing publication. It is directed to the problems of education in human rights as raised by the UNESCO recommendation of 1974 entitled: "Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms." The authors hail the adoption of the recommendation, declaring that: "The recognition that, from the point of view of education, there is an interdependence between international understanding, cooperation, peace and respect for human rights is a major breakthrough represented by this Recommendation (p. 9)."¹

Yet, the above title clearly differentiates between education for peace and education in human rights and fundamental freedoms. The former is declared (Section I (b)) to be "based on the principle of friendly relations between peoples and States having different social and political systems," whereas the latter is assumed to be universal and of uniform relevancy regardless of the diversity of those systems. In their enthusiasm for developing programs of education in human rights, the authors have ignored the pervasive clash between the empirical, the political, and the diverse, on the one hand, and the natural law, universalist approach on the other, disregarding, in effect, the political and social diversities to which these universal norms would be applied. Although they recognize that concern for basic rights of the individual and for his fundamental liberties is shared by "countries having a long libertarian tradition . . ." (p. 71), they fail to discuss the states of the Third World where, in the vast majority of cases, the individual is thoroughly digested by collectivities and where the concept of individual rights is incomprehensible. Conversely, the authors pretermit the parochial, political, economic, and strategic motives which, on occasion, have impaired the universal and norma-

¹ Recent developments might suggest that that interdependence, as postulated, might be operating more in favor of human rights than of "international understanding."

tive quality of declarations of human rights, as with the Declaration of the Rights of Man of 1789 and the Helsinki Final Act of 1975, neither of which is mentioned in the study.

The volume provides an extensive (pp. 102-49) and illuminating discussion of teaching methods, practices, materials, and bibliographies for human rights studies in primary and secondary schools, essentially in the United States. Yet, one must inevitably question the priority of such undertakings at a time when secondary schools are finding it difficult to inculcate skills in reading and mathematics at a primary level.

JOHN H. SPENCER

Human Rights and Environment: The Need for International Co-operation. By W. Paul Gormley. (Leiden: A. W. Sijthoff, 1976. Pp. xviii, 255. Index. \$23.25; Dfl.58.) Gormley must take great pleasure in reading a recent Trilateral Commission report calling for trilateral support of the UN environmental program. The position responds, in part, to the basic appeal voiced in his book, which is for greater international cooperation in the recognition of the human right of individuals to be guaranteed a pure, healthful, and decent environment.

Discussions of the real need for recognition of the human right to a decent environment and the legal evolution of the right are comingled in the first two chapters. The author uses the next two chapters to describe the successes, failures, and future of the Council of Europe in developing the recognition and assertion of the right at a regional level. Chapter five lifts the reader to a global perspective by examining the UN Environmental Programme. As if to confirm the problems facing UNEP, the two chapters that follow offer a comprehensive review of the environmental jurisprudence emanating from the *Nuclear Test* cases and the *Icelandic Fisheries* cases.

The last chapter summarizes the conclusions and recommendations tendered by the author in the preceding chapters. Pointing out that there is a corpus of international environmental law, phases of which may be deemed *jus cogens*, Gormley states that the real problem to be faced is the implementation of the law. He submits that implementation can be facilitated by applying the *jus cogens* principle adapted by McDougal and the law of international cooperation proffered by Friedmann. Gormley also suggests that the law be codified along the lines of the International Labor Code. Among other final observations, he notes that regional solutions are currently superior to international attempts to protect environmental rights.

The author covers a remarkable amount of subject matter in a short and readable fashion. Brevity, however, may be the major deficiency of the work. For example, despite the emphasis placed on regional implementation and development of international environmental law, the book gives short shrift to the law of international drainage basins and the equitable utilization principle—significant manifestations of international cooperation and legal precedent regarding international water resources. More important, however, is the fact that those subjects upon which the author concentrates are given scholarly, thought-provoking treatment which clearly defines and contributes to the direction of an emerging area of international law.

CHARLES R. JOHNSTON, JR.
U.S. International Trade Commission

Praesidium Libertatis. Opstellen over het thema vrijheid en recht, uitgegeven ter gelegenheid van het 400-jarig bestaan der Rijksuniversiteit te Leiden. (Deventer: Kluwer, 1975. Pp. vii, 348. Dfl. 57.25.) The law faculty of the renowned University of Leiden (often called *praesidium libertatis*, citadel of liberty) in commemoration of the 400th anniversary of its founding by William the Silent in 1575 brought together this series of twenty-eight papers on the theme "freedom and law." They comprise seven sections, treating the areas of legal history, private law, public law, criminal law, tax law, labor law, and public international law. The three papers on international law deal with problems arising from colonialism. P. J. Kuyper discusses the enforcement of individual rights of freedom by the Security Council in the case of Rhodesia; Machteld Schmidt recounts the vicissitudes of decolonization in New Guinea; and R. Siekmann describes the international law aspects of colonialism through the end of World War II in 1945.

EDWARD DUMBAULD
Judge, U.S. Court

The Future of International Economic Organizations. Edited by Don Wallace, Jr. and Helga Escobar. (New York and London: Praeger Publishers, 1977. Pp. xii, 184. Index.) This book consists of "edited versions of papers and portions of the proceedings of a Colloquium on the Future of International Economic Organizations" held in the fall of 1975. Dealing broadly with the state of affairs internationally, institutionally, and substantively, in food, natural resources, and international trade regulation, as seen by former middle-level officials of the U.S. Government, it is, unsurprisingly, not outdated by the events of the past few years. This is because nothing much has happened, apart from the persistence of the quadrupling of the price of oil, to alter the perspectives then observed. Pessimism had indeed set in much earlier. The major events governing both substance and form had been set in motion at least by the mid-1960's. Growing protectionism all over, increased efforts by developing countries to control their economic destinies, greater attention to problems of internal distributive justice, a general increased inwardness—all these have been a part of the scene throughout the 1970's, perhaps particularly since the economic difficulties began in 1974, but quite apparent earlier as well.

Accordingly, what we find in these papers and commentaries is in no sense surprising or novel. The future of international economic cooperation, substantively and organizationally, according to the participants, if not utterly bleak is not very hopeful in the relatively short term of ten years. Not much will happen to improve materially the economic welfare of the peoples of the world through international cooperative action. The system of regulating international trade in the direction of freer trade (the GATT) will continue to struggle to stay alive, not being able to achieve higher levels of freer trade through substantive or procedural reforms. Efforts to achieve producer cartels (like OPEC) fortunately also look difficult, and producer-consumer "respectable" cartels (commodity agreements) also seem difficult to envision as a major factor. International food reserves still will be more an idea than a reality.

If in all this, one seems to be receiving a rehash of what the ordinarily perceptive observer already knows, the appearance is the reality. The papers break no new ground, sensibly size up the present and the probable near future, and do so briefly and relatively succinctly.

STANLEY D. METZGER
Georgetown University Law Center

Der diplomatische Schutz der Aktionäre im Völkerrecht. Eine Untersuchung zur Schutzbefugnis des Heimatstaates im allgemeinen Völkerrecht und in Kapitalschutzverträgen (The Diplomatic Protection of Shareholders in Public International Law. An Analysis of the Right of Protection of the Home State under General International Law and in virtue of Investment Protection Treaties). By Sigurd Beyer. Vol. 25 of Series *Völkerrecht und Außenpolitik* (Baden-Baden: Nomos-Verlagsgesellschaft, 1977. Pp. 214. DM54.) The author tries to refute the widespread criticism of the ICJ's decision in the *Barcelona Traction* case. He goes even further than the ICJ. According to Beyer, international law would not grant the home state of the shareholders a right of protection even if the corporation was practically defunct or if it were a national of the taking state. Beyer nevertheless succeeds in finding positive aspects for capital-exporting countries in this decision. According to the ICJ,¹ the home state of the shareholders is authorized to protect the shareholders concerned if the foreign state interferes with any right belonging to the shareholders. No doubt any nationalization interferes with these rights. The home state's right to protect shareholders in such cases is rendered problematical by the fact that this rule at first glance appears to refer only to nationalizations properly so called. However, the *Barcelona Traction* judgment explicitly approved the conclusion of investment protection treaties. As a rule these treaties extend the notion of nationalization so as to include not only formal nationalizations but also "creeping nationalization." The right of the home state of the shareholders is thereby extended to cases where the corporation merely was the victim of a creeping nationalization. Beyer compares the model treaties used by the United States and by the Federal Republic of Germany for concluding investment protection treaties. He prefers the German model to the American one, yet he would like to improve the German model by extending the present definition of creeping nationalization. Such extension ought to be acceptable to the capital-importing countries since the German model treaty seeks to protect only investments that were explicitly approved by the capital-importing country. Beyer raises the question whether the original government draft concerning a law on equal participation of workers and owners in German enterprises would be compatible with the property guarantee included in the German-American Treaty of Friendship, Commerce and Navigation. Beyer believes, as do Wengler and I, that the original draft was incompatible with this treaty. He shares, however, my view that the law as it now stands is compatible with the treaty, since in case of a tie the right of final decision rests with the owners.

I. SEIDL-HOHENVELDERN

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Preservación del Medio Ambiente Marino. Edited by Francisco Orrego-Vicuña. (Santiago: Editorial Universidad Técnica del Estado, 1976. Pp. 363. List of Participants.) This volume includes twenty papers, some in English, some in Spanish, presented at a seminar in Chile in 1975. The concern is obviously the Chilean marine environment. The scope of the seminar was ambitious, including the dynamics of ecological stability and factors causing deterioration, maritime accidents with impacts on Chile's coastline, and international as well as national institutional efforts to protect the marine environment. The actual focus of the individual papers varies, however, some dealing with Chile in detail, others with U.S. practice

¹ [1970] ICJ REP. par. 90.

or more general matters. With the exception of specific material about Chile, most of the material is available in the oceanographic literature in English; hence the primary value of the book will be for those in the locale in which it was produced.

W. MICHAEL REISMAN
Yale Law School

Legal Regime of the Sea-Bed and the Developing Countries. By R. P. Anand. (Leiden: A. W. Sijthoff, 1976. Pp. xi, 287. Index.) Most of the books appearing since the beginning of the 1970's dealing with aspects of the Law of the Sea have largely been in the form of analytical reports evaluating the work of the UN Sea-Bed Committee and that of the Third United Nations Conference on the Law of the Sea (UNCLOS III), which is presently attempting to produce a comprehensive Convention on the Law of the Sea. This approach has often included an analysis of past efforts to conclude such a convention, identification of the problem areas, and the author's assessment, speculation, or vision about the possible outcome of the work of UNCLOS III. Anand's book, published in 1976, is no exception. But it is limited in one important aspect. While its treatment of the past efforts is adequate, the book covers only the work of the UN Sea-Bed Committee up to 1970, and it does not cover the additional three years of that Committee's work which ended in 1973, nor the material produced by UNCLOS III since its first substantive session in 1974. Nevertheless, the seven chapters of the book dealing with such topics as the ocean as a storehouse of vast resources, the legal definition of the continental shelf as part of the problem of delimitation of the limits of national jurisdiction, the concept of the common heritage of mankind, and the interest of the developing countries in the Law of the Sea Convention, all provide some detailed background material which is of value to anyone interested in the development in this important area of international law.

A. O. ADEDE
United Nations Secretariat
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Układ PRL-NRF z 7 grudnia 1970 r.: Analiza prawna (The Treaty between the Polish People's Republic and the Federal Republic of Germany of 7 December 1970: Legal Analysis). By Ludwik Gelberg. (Wrocław: Zakład Narodowy Imienia Ossolińskich-Wydawnictwo Polskiej Akademii Nauk, 1974. Pp. 120. Documents. Bibliography. Zł. 28.) This slender monograph, authored by a leading Polish international jurist, analyzes from the point of view of international law the Treaty of December 7, 1970 between the Federal Republic of Germany and Poland concerning the basis for normalizing their mutual relations. The treaty, a major step in détente in central Europe and in the new *Ostpolitik* of West Germany, constitutes a turning point in the relations between the two countries, especially in view of the fact that the controversial Oder-Neisse line was accepted in that treaty as the West state frontier of the Polish People's Republic.

The nine chapters of the book can be divided into three parts: three chapters deal with general and historical background; four chapters analyze the four substantive articles of the extremely brief treaty; and two final chapters review legal matters connected with the subject matter of the agreement. Of particular interest is the discussion of the events leading to the conclusion of the treaty and the protracted struggle for the

ratification in West Germany of the highly political agreement. Chapter III deals with the structure and contents of the treaty which, in the author's view, does not fit into any category of international agreement. As Gelberg correctly stresses, however, it is not a *modus vivendi* but a fundamental basis for normalizing the relations between the two countries. The crucial issue of the Oder-Neisse boundary and the inviolability of the existing frontiers is analyzed at length in Chapter IV. The author interprets this article as the definitive legal settlement of the Polish-German border, believing that any future peace treaty would only formalize the legal recognition of the Oder-Neisse line, effected first by the German Democratic Republic in 1950 and by the Federal Republic of Germany in 1970. Chapters V and VI deal with the renunciation of the use of force and the normalization of relations respectively. The author's hope that the treaty would create the prerequisites for a comprehensive development of Polish-West German relations has been at least partially fulfilled with the conclusion in 1975 of agreements on pensions, loans to Poland, and the "reunification of families." Following a brief discussion of the validity of previously concluded agreements, the author devotes the two last chapters to the analysis of some problems which are not dealt with in the treaty but are most relevant politically and legally, such as the compatibility of the treaty with the rights and responsibilities of the four great powers toward Germany and the question of the peace treaty. The population problem is also reviewed. The book has a brief documents section which includes excerpts from the Potsdam Agreement and the Treaty of 1950 with the German Democratic Republic on the delimitation of the existing state frontier. A short bibliography relies mostly on Polish and German sources, which is quite understandable in view of the subject matter. The study has a coherent outline and, in general, deals with the major legal issues raised by the treaty. It deserves attention of legal scholars interested in the international legal aspects of the situation that prevails in the relations between West Germany and Poland.

BOLESŁAW A. BOCZEK
Kent State University

Der Rechtsstatus des Landes Berlin. By Ernst R. Zivier. (Berlin: Berlin Verlag, Arno Spitz, 1977. Pp. 399. Bibliography. DM 36.) This third edition of a scholarly analysis of the complexities of the legal situation of Berlin¹ includes revisions and expansion sufficient to warrant the attention of those who have found the first edition useful. The author's stated object in rewriting substantial parts of the book and expanding the text by more than half (from 164 to 273 pages) was to bring to light and analyze new legal developments and to clarify long-standing legal problems that have been significant in practice under the Four-Power Treaty of September 3, 1971. New problems discussed include questions about the participation of the people of West Berlin in the voting for a European Parliament within the European Community and significant practice involving relations between the Berlin Senate and the Government of the Democratic Republic of Germany. The major developments requiring expanded analysis and shedding light on the practice were the Treaty of December 21, 1972 between the Federal Republic and the Democratic Republic of Germany concerning the bases of relations between them and the entry of both into the United Nations. The essential documents are reproduced in the appendix to the book. The exposition is clear and logical and the table of con-

¹ The first edition was reviewed in 68 AJIL 365 (1974).

tents broken down into small sections. Therefore, the lack of an index is not significant.

ALFRED P. RUBIN

The Fletcher School of Law and Diplomacy

Problemy Prawne Współpracy Państw Bałtyckich. By Ludwik Gelberg. (Wrocław, Warsaw, Cracow, Gdańsk: Zakład Narodowy Imienia Ossolińskich, 1976. Pp. 150.) As its title indicates (Legal Problems of Cooperation among Baltic States), the purpose of this book is to present legal aspects of that cooperation. The author quite properly places these problems within the framework of geographical, economic, political, and historical aspects of the regime of the Baltic Sea. That sea is characterized by its rather small depth and its separation from the North Sea and the Atlantic Ocean by the narrow and shallow Danish Straits and the Kiel Canal.

The author expresses the wish that non-Baltic men-of-war be either excluded from access to the Baltic or at least be subjected to severe restrictions (p. 111) and also that the Baltic states conclude a convention which would internationalize the Danish Straits and the Kiel Canal (p. 40).

The depth of the Baltic Sea usually does not exceed 200 meters, and hence almost its whole bottom forms a continental shelf. The possibility of future discoveries of underground oil and natural gas would pose the problem of mutually agreed delimitations of the continental shelf. On October 23, 1968, the USSR, Poland, and the GDR signed in Moscow a declaration which excluded the participation of non-Baltic states, corporations, and citizens in research, exploitation, or any other use of the Baltic shelf. However, the author hopes that the current atmosphere of international détente will allow the socialist states to cancel that declaration and permit a useful cooperation with non-Baltic states and corporations (p. 64). The Baltic states concluded on September 13, 1973, a convention for the protection of fisheries and on March 22, 1974, another convention on the protection of Baltic maritime environment against the threat of pollution. The texts of both conventions are reproduced in the book.

This valuable monograph is of general interest for the Baltic as well as non-Baltic states whose ships ply the Baltic. The publisher would be well advised to publish an English edition.

W. W. KULSKI

Duke University

Die Ostbeziehungen der Europäischen Gemeinschaft. Von national-staatlicher Politik zu gemeinsamer Verantwortung. Edited by Eberhard Schulz. (Munich & Vienna: R. Oldenbourg Verlag, 1977. Pp. 270. Index.) This work on "The Relations of the European Economic Community with Eastern Europe," is a collection of papers by a number of West European and American authorities. The editor, Eberhard Schulz, is Deputy Director of the Research Institute at the German Society for Foreign Policy, in Bonn, Germany. In the foreword Schulz explains that since 1966 a study group at the Society has done research on the relations between the East and West European countries; it has also conducted an exchange of ideas between scholars and professionals, including parliamentary representatives, ministerial officials, and journalists on the same topic. A special project of the group, which resulted in the publication of this symposium, was the preparation of papers on various aspects of the relations of the European Economic Community and its member states with the East European countries.

The work centers around four major topics: (a) integration within the Common Market and its external relations; (b) the changes in the posture of the countries, including those in Eastern Europe, within the world economy; (c) the particular reactions of the Common Market countries (especially Germany, France, Great Britain, and Italy) to these changes; and (d) the requirements and the possibilities for the formation and development of relations between the Common Market and Eastern Europe. The last topic is the major one and occupies much of the space in the entire work.

The Common Market is treated in the symposium as a "superstate" ("Superstaat") and as a "transnational structure" ("transnationales Gebilde") which currently enjoys economic-political relations with Eastern Europe that have a limited influence on world affairs. However, in its concluding chapters, the work emphasizes the point that this relationship between the EEC and East Europe does not permit one of the "superpowers" ("Supermächte")—the United States and the USSR—to gain a more influential position in Europe than the other.

The symposium is perhaps the first major study on the relations of the EEC with East European countries and represents an outstanding contribution to the understanding of their impact on European affairs.

IVAN SIPKOV

Library of Congress, Law Library

A Socialist Approach to Comparative Law. Edited by I. Szabo and Z. Peteri. (Leiden: A. W. Sijthoff; Budapest: Akademiai Kiadó, 1977. Pp. 235.) Seven Hungarian comparativists contribute essays on various aspects of comparative legal research in the socialist countries in this useful collection. In a complex examination of "Theoretical Questions of Comparative Law," which posed great difficulties for the translators, Szabo sets forth 41 theses about the types of comparison of law and legal institutions. He acknowledges the utility of comparison, properly used, in treating the laws of different social systems, denying that socialist jurisprudence had ever pretended that such comparison was precluded. The predominant Anglo-American view of comparison as a method or technique is eschewed in favor of comparison as a special auxiliary branch of the legal sciences. It will be interesting to see how Hungarian jurists extend this notion to the realm of international law.

In an elegant and polished contribution, Eorsi inquires into the concept of "convergence" in bourgeois and socialist civil law, both within each and between the two. He believes there is evidence of convergence, that bourgeois law is increasingly receptive to solutions used in social ownership legal systems and that socialist legal systems may well adapt bourgeois experience in economic relations as appropriate. Students of international law and relations will find much of relevance in this essay to the larger issues of convergence in the international domain.

Peteri pleads for greater balance in comparative legal studies, which in his view have been dominated by civil law theory and methodology. Public law, he argues, is an appropriate object of comparative study in a sociological-juristic framework. Ferenc Madl posits a theory of comparative private international law, and, more modestly, Jozsef Halasz makes a case for the comparative study of public administration. A. Harmathy deals with methodological questions arising in the comparison of economic contracts between socialist organizations. A. Szabo describes the statistical

results of a joint Polish-French-Yugoslav criminological research project investigating the relative incidence of juvenile delinquency in industrial and nonindustrial areas of the three countries.

W. E. BUTLER
University College London

The International Regulation of Pharmaceutical Drugs. A Report to the National Science Foundation on the Application of International Regulatory Techniques to Scientific/Technical Problems. (No. 14 in the ASIL Studies in Transnational Legal Policy.) By David A. Kay. (St. Paul: West Publishing Co., 1976. Pp. vii, 98. \$4.50.) The International Organization Research Project (under the auspices of the ASIL) is examining the techniques of international regulation employed in six technology related problem areas. Ultimately the object is to construct a paradigm of international regulatory activity of use to the policymaker and scholar (p. vi).

This report is concerned with international trade in pharmaceuticals (some \$4.5 billion in 1974). The main regulator is the market, but the "invisible hand" requires supplementation in three respects—as regards the quality, safety and efficacy of drugs; the monitoring of adverse reactions; and the registration of new drugs. Pursuit of these ends has brought about authoritative intervention in the market at the national level. Fortunately, there is considerable spillover internationally, for to deal with these matters authoritatively through allocation of rights and duties at the international level would require so complex an international law and so huge a bureaucracy as to be impracticable. The absence of treaties concerned with the transnational dimensions of the pharmaceutical industry is therefore understandable.

The main regulatory technique in the international domain, aside from a small amount of technical assistance (p. 40), is the gathering and dissemination of information needed by the industry and by governments to cope with the indicated problems. Important exchanges undoubtedly occur in the proceedings of the eleven pharmaceutically related international professional organizations (pp. 33–34). At the official level, WHO has been very much involved. However, added to the frustrations inherent in such a complex matter is a voting majority of developing states that so skews WHO's preoccupations as to cause the drug manufacturing countries to consider using OECD to deal with some of their concerns (pp. 51–52, 65).

One looks forward with great interest to the reports yet to be made on earth resources satellites, food reserve systems, marine transport, and regional fishing arrangements.

EDWARD H. BUEHRIG
Indiana University

The International Regulation of Pesticide Residues in Food. (No. 13 in the ASIL Studies in Transnational Legal Policy.) By David A. Kay. (St. Paul: West Publishing Co., 1976. Pp. vii, 172. \$5.50.) This study was conducted for the National Science Foundation in order "to select, survey, and explore the possibilities of actively applying the spectrum of existing international management and regulatory techniques" toward practical resolution of the problems associated with pesticide residues in food. To this end, Kay's analysis provides a significant contribution to the literature.

For purposes of identification, according to the report, a pesticide is "any substance . . . intended for preventing or controlling any pest [including]

substances intended for use as a plant growth regulator, defoliant or desiccant" (note, p. 2). Having designated the substances in question, the study then undertakes examination of various regulatory efforts which have been made by international organizations. Indeed, as the author correctly notes, salience of the global dimensions concerning pesticide regulation has been underscored by the realization that over thirty governmental and non-governmental international organizations, including specialized agencies in United Nations, the European Economic Community, the Council of Europe, and even the Council for Mutual Economic Assistance (COMECON), are currently involved in studying the problem. The substantive part of this terse volume is devoted to a critical analysis of the Codex Alimentarius Commission and the procedures for standard setting adopted by its Committee on Pesticide Residues (CCPR). Major weaknesses of the CCPR are identified and assessed, thereby providing insight into the nature of the impediments that must be overcome if effective coordination of national and international pesticide tolerance policies is to be accomplished. Finally, the analyses is supplemented by three annexes: a glossary, the list of participants in the FAO-WHO Meeting on Pesticide Residues (through 1974), and a 100-page summary list of the maximum limits set by Codex in 1974 for pesticide residues. A useful bibliography is also appended.

International lawyers concerned with the transnational regulation of pesticides in food will find this study a valuable contribution toward delimiting the relevant issue areas of pesticide concern and for clarifying the minimum worldwide policies required for maintaining safe health standards. In short, the problem of and need for curtailing pesticide residues in food produce which is traded internationally has long been pressing, albeit in large measure underpublicized. Kay's treatment goes far in remedying this deficiency.

CHRISTOPHER C. JOYNER
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* Mention here neither assures nor precludes later review.

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OFFICIAL DOCUMENTS

DIPLOMATIC CONFERENCE ON REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS

Protocols I and II * to the Geneva Conventions **

PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I)

PREAMBLE

The High Contracting Parties,

Proclaiming their earnest wish to see peace prevail among peoples,
Recalling that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

Believing it necessary nevertheless to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application,

Expressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations,

Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict,

Have agreed on the following:

PART I

GENERAL PROVISIONS

Article 1—General principles and scope of application

1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.

* The Conference adopted the Protocols by consensus on June 8, 1977. They were submitted to governments for consideration and were opened to signature on December 12, 1977, at Berne, for a period of twelve months.

** Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, dated at Geneva, Aug. 12, 1949, 6 UST 3114, TIAS No. 3362, 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, dated at Geneva, Aug. 12, 1949, 6 UST 3217, TIAS No. 3363, 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War, dated at Geneva, Aug. 12, 1949, 6 UST 3316, TIAS No. 3364, 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War, dated at Geneva, Aug. 12, 1949, 6 UST 3516, TIAS No. 3365, 75 UNTS 287.

2. In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.

4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Article 2—Definitions

For the purposes of this Protocol:

(a) "First Convention," "Second Convention," "Third Convention" and "Fourth Convention" mean, respectively, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea of 12 August 1949; the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949; the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949; "the Conventions" means the four Geneva Conventions of 12 August 1949 for the protection of war victims;

(b) "rules of international law applicable in armed conflict" means the rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law which are applicable to armed conflict;

(c) "Protecting Power" means a neutral or other State not a Party to the conflict which has been designated by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and this Protocol;

(d) "substitute" means an organization acting in place of a Protecting Power in accordance with Article 5.

Article 3—Beginning and end of application

Without prejudice to the provisions which are applicable at all times:

(a) the Conventions and this Protocol shall apply from the beginning of any situation referred to in Article 1 of this Protocol;

(b) the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment.

Article 4—Legal status of the Parties to the conflict

The application of the Conventions and of this Protocol, as well as the conclusion of the agreements provided for therein, shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.

Article 5—Appointment of Protecting Powers and of their substitute

1. It is the duty of the Parties to a conflict from the beginning of that conflict to secure the supervision and implementation of the Conventions and of this Protocol by the application of the system of Protecting Powers, including *inter alia* the designation and acceptance of those Powers, in accordance with the following paragraphs. Protecting Powers shall have the duty of safeguarding the interests of the Parties to the conflict.

2. From the beginning of a situation referred to in Article 1, each Party to the conflict shall without delay designate a Protecting Power for the purpose of applying the Conventions and this Protocol and shall, likewise without delay and for the same purpose, permit the activities of a Protecting Power which has been accepted by it as such after designation by the adverse Party.

3. If a Protecting Power has not been designated or accepted from the beginning of a situation referred to in Article 1, the International Committee of the Red Cross, without prejudice to the right of any other impartial humanitarian organization to do likewise, shall offer its good offices to the Parties to the conflict with a view to the designation without delay of a Protecting Power to which the Parties to the conflict consent. For that purpose it may *inter alia*, ask each Party to provide it with a list of at least five States which that Party considers acceptable to act as Protecting Power on its behalf in relation to an adverse Party and ask each adverse Party to provide a list of at least five States which it would accept as the Protecting Power of the first Party; these lists shall be communicated to the Committee within two weeks after the receipt of the request; it shall compare them and seek the agreement of any proposed State named on both lists.

4. If, despite the foregoing, there is no Protecting Power, the Parties to the conflict shall accept without delay an offer which may be made by the International Committee of the Red Cross or by any other organization which offers all guarantees of impartiality and efficacy, after due consultations with the said Parties and taking into account the result of these consultations, to act as a substitute. The functioning of such a substitute is subject to the consent of the Parties to the conflict; every effort shall be made by the Parties to the conflict to facilitate the operations of the substitute in the performance of its tasks under the Conventions and this Protocol.

5. In accordance with Article 4, the designation and acceptance of Protecting Powers for the purpose of applying the Conventions and this Protocol shall not affect the legal status of the Parties to the conflict or of any territory, including occupied territory.

6. The maintenance of diplomatic relations between Parties to the conflict or the entrusting of the protection of a Party's interests and those of its nationals to a third State in accordance with the rules of international law relating to diplomatic relations is no obstacle to the designation of Pro-

protecting Powers for the purpose of applying the Conventions and this Protocol.

7. Any subsequent mention in this Protocol of a Protecting Power includes also a substitute.

Article 6—Qualified persons

1. The High Contracting Parties shall, also in peacetime, endeavour, with the assistance of the national Red Cross (Red Crescent, Red Lion and Sun) Societies, to train qualified personnel to facilitate the application of the Conventions and of this Protocol, and in particular the activities of the Protecting Powers.

2. The recruitment and training of such personnel are within domestic jurisdiction.

3. The International Committee of the Red Cross shall hold at the disposal of the High Contracting Parties the lists of persons so trained which the High Contracting Parties may have established and may have transmitted to it for that purpose.

4. The conditions governing the employment of such personnel outside the national territory shall, in each case, be the subject of special agreements between the Parties concerned.

Article 7—Meetings

The depositary of this Protocol shall convene a meeting of the High Contracting Parties, at the request of one or more of the said Parties and upon the approval of the majority of the said Parties, to consider general problems concerning the application of the Conventions and of the Protocol.

PART II

WOUNDED, SICK AND SHIPWRECKED

SECTION I

GENERAL PROTECTION

Article 8—Terminology

For the purposes of this Protocol:

(a) "wounded" and "sick" mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility;

(b) "shipwrecked" means persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility. These persons, provided that they continue to refrain from any act of hostility, shall continue to be considered shipwrecked during their rescue until they acquire another status under the Conventions or this Protocol;

(c) "medical personnel" means those persons assigned, by a Party to the conflict, exclusively to the medical purposes enumerated under sub-para-

graph (e) or to the administration of medical units or to the operation or administration of medical transports. Such assignments may be either permanent or temporary. The term includes:

(i) medical personnel of a Party to the conflict, whether military or civilian, including those described in the First and Second Conventions, and those assigned to civil defence organizations;

(ii) medical personnel of national Red Cross (Red Crescent, Red Lion and Sun) Societies and other national voluntary aid societies duly recognized and authorized by a Party to the conflict;

(iii) medical personnel of medical units or medical transports described in Article 9, paragraph 2;

(d) "religious personnel" means military or civilian persons such as chaplains, who are exclusively engaged in the work of their ministry and attached:

(i) to the armed forces of a Party to the conflict;

(ii) to medical units or medical transports of a Party to the conflict;

(iii) to medical units or medical transports described in Article 9, paragraph 2; or

(iv) to civil defence organizations of a Party to the conflict.

The attachment of religious personnel may be either permanent or temporary, and the relevant provisions mentioned under subparagraph (k) apply to them;

(e) "medical units" means establishments and other units, whether military or civilian, organized for medical purposes, namely the search for, collection, transportation, diagnosis or treatment—including first-aid treatment—of the wounded, sick and shipwrecked, or for the prevention of disease. The term includes, for example, hospitals and other similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units. Medical units may be fixed or mobile, permanent or temporary;

(f) "medical transportation" means the conveyance by land, water or air of the wounded, sick, shipwrecked, medical personnel, religious personnel, medical equipment or medical supplies protected by the Conventions and by this Protocol;

(g) "medical transports" means any means of transportation, whether military or civilian, permanent or temporary, assigned exclusively to medical transportation and under the control of a competent authority of a Party to the conflict;

(h) "medical vehicles" means any medical transports by land;

(i) "medical ships and craft" means any medical transports by water;

(j) "medical aircraft" means any medical transports by air;

(k) "permanent medical personnel," "permanent medical units" and "permanent medical transports" mean those assigned exclusively to medical purposes for an indeterminate period. "Temporary medical personnel," "temporary medical units" and "temporary medical transports" mean those devoted exclusively to medical purposes for limited periods during the whole of such periods. Unless otherwise specified, the terms "medical personnel," "medical units" and "medical transports" cover both permanent and temporary categories;

(l) "distinctive emblem" means the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground when used for the protection of medical units and transports, or medical and religious personnel, equipment or supplies;

(m) "distinctive signal" means any signal or message specified for the identification exclusively of medical units or transports in Chapter III of Annex I to this Protocol.

Article 9—Field of application

1. This Part, the provisions of which are intended to ameliorate the condition of the wounded, sick and shipwrecked, shall apply to all those affected by a situation referred to in Article 1, without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.

2. The relevant provisions of Article 27 and 32 of the First Convention shall apply to permanent medical units and transports (other than hospital ships, to which Article 25 of the Second Convention applies) and their personnel made available to a Party to the conflict for humanitarian purposes:

- (a) by a neutral or other State which is not a Party to that conflict;
- (b) by a recognized and authorized aid society of such a State;
- (c) by an impartial international humanitarian organization.

Article 10—Protection and care

1. All the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected.

2. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

Article 11—Protection of persons

1. The physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1 shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.

2. It is, in particular, prohibited to carry out on such persons, even with their consent:

- (a) physical mutilations;
- (b) medical or scientific experiments;
- (c) removal of tissue or organs for transplantation,

except where these acts are justified in conformity with the conditions provided for in paragraph 1.

3. Exceptions to the prohibition in paragraph 2(c) may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent

with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.

4. Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.

5. The persons described in paragraph 1 have the right to refuse any surgical operation. In case of refusal, medical personnel shall endeavour to obtain a written statement to that effect, signed or acknowledged by the patient.

6. Each Party to the conflict shall keep a medical record for every donation of blood for transfusion or skin for grafting by persons referred to in paragraph 1, if that donation is made under the responsibility of that Party. In addition, each Party to the conflict shall endeavour to keep a record of all medical procedures undertaken with respect to any person who is interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1. These records shall be available at all times for inspection by the Protecting Power.

Article 12—Protection of medical units

1. Medical units shall be respected and protected at all times and shall not be the object of attack.

2. Paragraph 1 shall apply to civilian medical units, provided that they:

- (a) belong to one of the Parties to the conflict;
- (b) are recognized and authorized by the competent authority of one of the Parties to the conflict; or
- (c) are authorized in conformity with Article 9, paragraph 2, of this Protocol or Article 27 of the First Convention.

3. The Parties to the conflict are invited to notify each other of the location of their fixed medical units. The absence of such notification shall not exempt any of the Parties from the obligation to comply with the provisions of paragraph 1.

4. Under no circumstances shall medical units be used in an attempt to shield military objectives from attack. Whenever possible, the Parties to the conflict shall ensure that medical units are so sited that attacks against military objectives do not imperil their safety.

Article 13—Discontinuance of protection of civilian medical units

1. The protection to which civilian medical units are entitled shall not cease unless they are used to commit, outside their humanitarian function, acts harmful to the enemy. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

2. The following shall not be considered as acts harmful to the enemy:

- (a) that the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge;
- (b) that the unit is guarded by a picket or by sentries or by an escort;

(c) that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units;

(d) that members of the armed forces or other combatants are in the unit for medical reasons.

Article 14—Limitations on requisition of civilian medical units

1. The Occupying Power has the duty to ensure that the medical needs of the civilian population in occupied territory continue to be satisfied.

2. The Occupying Power shall not, therefore, requisition civilian medical units, their equipment, their *matériel* or the services of their personnel, so long as these resources are necessary for the provision of adequate medical services for the civilian population and for the continuing medical care of any wounded and sick already under treatment.

3. Provided that the general rule in paragraph 2 continues to be observed, the Occupying Power may requisition the said resources, subject to the following particular conditions:

(a) that the resources are necessary for the adequate and immediate medical treatment of the wounded and sick members of the armed forces of the Occupying Power or of prisoners of war;

(b) that the requisition continues only while such necessity exists; and

(c) that immediate arrangements are made to ensure that the medical needs of the civilian population, as well as those of any wounded and sick under treatment who are affected by the requisition, continue to be satisfied.

Article 15—Protection of civilian medical and religious personnel

1. Civilian medical personnel shall be respected and protected.

2. If needed, all available help shall be afforded to civilian medical personnel in an area where civilian medical services are disrupted by reason of combat activity.

3. The Occupying Power shall afford civilian medical personnel in occupied territories every assistance to enable them to perform, to the best of their ability, their humanitarian functions. The Occupying Power may not require that, in the performance of those functions, such personnel shall give priority to the treatment of any person except on medical grounds. They shall not be compelled to carry out tasks which are not compatible with their humanitarian mission.

4. Civilian medical personnel shall have access to any place where their services are essential, subject to such supervisory and safety measures as the relevant Party to the conflict may deem necessary.

5. Civilian religious personnel shall be respected and protected. The provisions of the Conventions and of this Protocol concerning the protection and identification of medical personnel shall apply equally to such persons.

Article 16—General protection of medical duties

1. Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.

2. Persons engaged in medical activities shall not be compelled to perform acts or to carry out work contrary to the rules of medical ethics or to other

medical rules designed for the benefit of the wounded and sick or to the provisions of the Conventions or of this Protocol, or to refrain from performing acts or from carrying out work required by those rules and provisions.

3. No person engaged in medical activities shall be compelled to give to anyone belonging either to an adverse Party, or to his own Party except as required by the law of the latter Party, any information concerning the wounded and sick who are, or who have been, under his care, if such information would, in his opinion, prove harmful to the patients concerned or to their families. Regulations for the compulsory notification of communicable diseases shall, however, be respected.

Article 17—Role of the civilian population and of aid societies

1. The civilian population shall respect the wounded, sick and shipwrecked, even if they belong to the adverse Party, and shall commit no act of violence against them. The civilian population and aid societies, such as national Red Cross (Red Crescent, Red Lion and Sun) Societies, shall be permitted, even on their own initiative, to collect and care for the wounded, sick and shipwrecked, even in invaded or occupied areas. No one shall be harmed, prosecuted, convicted or punished for such humanitarian acts.

2. The Parties to the conflict may appeal to the civilian population and the aid societies referred to in paragraph 1 to collect and care for the wounded, sick and shipwrecked, and to search for the dead and report their location; they shall grant both protection and the necessary facilities to those who respond to this appeal. If the adverse Party gains or regains control of the area, that Party also shall afford the same protection and facilities for so long as they are needed.

Article 18—Identification

1. Each Party to the conflict shall endeavour to ensure that medical and religious personnel and medical units and transports are identifiable.

2. Each Party to the conflict shall also endeavour to adopt and to implement methods and procedures which will make it possible to recognize medical units and transports which use the distinctive emblem and distinctive signals.

3. In occupied territory and in areas where fighting is taking place or is likely to take place, civilian medical personnel and civilian religious personnel should be recognizable by the distinctive emblem and an identity card certifying their status.

4. With the consent of the competent authority, medical units and transports shall be marked by the distinctive emblem. The ships and craft referred to in Article 22 of this Protocol shall be marked in accordance with the provisions of the Second Convention.

5. In addition to the distinctive emblem, a Party to the conflict may, as provided in Chapter III of Annex I to this Protocol,^{***} authorize the use of distinctive signals to identify medical units and transports. Exceptionally, in the special cases covered in that Chapter, medical transports may use distinctive signals without displaying the distinctive emblem.

6. The application of the provisions of paragraphs 1 to 5 of this Article is governed by Chapters I to III of Annex I to this Protocol. Signals desig-

^{***} Not reprinted here. For the text, see 16 ILM 1433 (1977).

nated in Chapter III of the Annex for the exclusive use of medical units and transports shall not, except as provided therein, be used for any purpose other than to identify the medical units and transports specified in that Chapter.

7. This Article does not authorize any wider use of the distinctive emblem in peacetime than is prescribed in Article 44 of the First Convention.

8. The provisions of the Conventions and of this Protocol relating to supervision of the use of the distinctive emblem and to the prevention and repression of any misuse thereof shall be applicable to distinctive signals.

Article 19—Neutral and other States not Parties to the conflict

Neutral and other States not Parties to the conflict shall apply the relevant provisions of this Protocol to persons protected by this Part who may be received or interned within their territory, and to any dead of the Parties to that conflict whom they may find.

Article 20—Prohibition of reprisals

Reprisals against the persons and objects protected by this Part are prohibited.

SECTION II

MEDICAL TRANSPORTATION

Article 21—Medical vehicles

Medical vehicles shall be respected and protected in the same way as mobile medical units under the Conventions and this Protocol.

Article 22—Hospital ships and coastal rescue craft

1. The provisions of the Conventions relating to:

- (a) vessels described in Articles 22, 24, 25 and 27 of the Second Convention,
- (b) their lifeboats and small craft,
- (c) their personnel and crews, and
- (d) the wounded, sick and shipwrecked on board,

shall also apply where these vessels carry civilian wounded, sick and shipwrecked who do not belong to any of the categories mentioned in Article 13 of the Second Convention. Such civilians shall not, however, be subject to surrender to any Party which is not their own, or to capture at sea. If they find themselves in the power of a Party to the conflict other than their own they shall be covered by the Fourth Convention and by this Protocol.

2. The protection provided by the Conventions to vessels described in Article 25 of the Second Convention shall extend to hospital ships made available for humanitarian purposes to a Party to the conflict:

- (a) by a neutral or other State which is not a Party to that conflict; or
- (b) by an impartial international humanitarian organization,

provided that, in either case, the requirements set out in that Article are complied with.

3. Small craft described in Article 27 of the Second Convention shall be protected even if the notification envisaged by that Article has not been made. The Parties to the conflict are, nevertheless, invited to inform each other of any details of such craft which will facilitate their identification and recognition.

Article 23—Other medical ships and craft

1. Medical ships and craft other than those referred to in Article 22 of this Protocol and Article 38 of the Second Convention shall, whether at sea or in other waters, be respected and protected in the same way as mobile medical units under the Conventions and this Protocol. Since this protection can only be effective if they can be identified and recognized as medical ships or craft, such vessels should be marked with the distinctive emblem and as far as possible comply with the second paragraph of Article 43 of the Second Convention.

2. The ships and craft referred to in paragraph 1 shall remain subject to the laws of war. Any warship on the surface able immediately to enforce its command may order them to stop, order them off, or make them take a certain course, and they shall obey every such command. Such ships and craft may not in any other way be diverted from their medical mission so long as they are needed for the wounded, sick and shipwrecked on board.

3. The protection provided in paragraph 1 shall cease only under the conditions set out in Articles 34 and 35 of the Second Convention. A clear refusal to obey a command given in accordance with paragraph 2 shall be an act harmful to the enemy under Article 34 of the Second Convention.

4. A Party to the conflict may notify any adverse Party as far in advance of sailing as possible of the name, description, expected time of sailing, course and estimated speed of the medical ship or craft, particularly in the case of ships of over 2,000 gross tons, and may provide any other information which would facilitate identification and recognition. The adverse Party shall acknowledge receipt of such information.

5. The provisions of Article 37 of the Second Convention shall apply to medical and religious personnel in such ships and craft.

6. The provisions of the Second Convention shall apply to the wounded, sick and shipwrecked belonging to the categories referred to in Article 13 of the Second Convention and in Article 44 of this Protocol who may be on board such medical ships and craft. Wounded, sick and shipwrecked civilians who do not belong to any of the categories mentioned in Article 13 of the Second Convention shall not be subject, at sea, either to surrender to any Party which is not their own, or to removal from such ships or craft; if they find themselves in the power of a Party to the conflict other than their own, they shall be covered by the Fourth Convention and by this Protocol.

Article 24—Protection of medical aircraft

Medical aircraft shall be respected and protected, subject to the provisions of this Part.

Article 25—Medical aircraft in areas not controlled by an adverse Party

In and over land areas physically controlled by friendly forces, or in and over sea areas not physically controlled by an adverse Party, the respect and protection of medical aircraft of a Party to the conflict is not dependent

on any agreement with an adverse Party. For greater safety, however, a Party to the conflict operating its medical aircraft in these areas may notify the adverse Party, as provided in Article 29, in particular when such aircraft are making flights bringing them within range of surface-to-air weapons systems of the adverse Party.

Article 26—Medical aircraft in contact or similar zones

1. In and over those parts of the contact zone which are physically controlled by friendly forces and in and over those areas the physical control of which is not clearly established, protection for medical aircraft can be fully effective only by prior agreement between the competent military authorities of the Parties to the conflict, as provided for in Article 29. Although, in the absence of such an agreement, medical aircraft operate at their own risk, they shall nevertheless be respected after they have been recognized as such.

2. "Contact zone" means any area on land where the forward elements of opposing forces are in contact with each other, especially where they are exposed to direct fire from the ground.

Article 27—Medical aircraft in areas controlled by an adverse Party

1. The medical aircraft of a Party to the conflict shall continue to be protected while flying over land or sea areas physically controlled by an adverse Party, provided that prior agreement to such flights has been obtained from the competent authority of that adverse Party.

2. A medical aircraft which flies over an area physically controlled by an adverse Party without, or in deviation from the terms of, an agreement provided for in paragraph 1, either through navigational error or because of an emergency affecting the safety of the flight, shall make every effort to identify itself and to inform the adverse Party of the circumstances. As soon as such medical aircraft has been recognized by the adverse Party, that Party shall make all reasonable efforts to give the order to land or to alight on water, referred to in Article 30, paragraph 1, or to take other measures to safeguard its own interests, and, in either case, to allow the aircraft time for compliance, before resorting to an attack against the aircraft.

Article 28—Restrictions on operations of medical aircraft

1. The Parties to the conflict are prohibited from using their medical aircraft to attempt to acquire any military advantage over an adverse Party. The presence of medical aircraft shall not be used in an attempt to render military objectives immune from attack.

2. Medical aircraft shall not be used to collect or transmit intelligence data and shall not carry any equipment intended for such purposes. They are prohibited from carrying any persons or cargo not included within the definition in Article 8, sub-paragraph (f). The carrying on board of the personal effects of the occupants or of equipment intended solely to facilitate

navigation, communication or identification shall not be considered as prohibited.

3. Medical aircraft shall not carry any armament except small arms and ammunition taken from the wounded, sick and shipwrecked on board and not yet handed to the proper service, and such light individual weapons as may be necessary to enable the medical personnel on board to defend themselves and the wounded, sick and shipwrecked in their charge.

4. While carrying out the flights referred to in Articles 26 and 27, medical aircraft shall not, except by prior agreement with the adverse Party, be used to search for the wounded, sick and shipwrecked.

Article 29—Notifications and agreements concerning medical aircraft

1. Notifications under Article 25, or requests, for prior agreement under Articles 26, 27, 28 (paragraph 4), or 31 shall state the proposed number of medical aircraft, their flight plans and means of identification, and shall be understood to mean that every flight will be carried out in compliance with Article 28.

2. A Party which receives a notification given under Article 25 shall at once acknowledge receipt of such notification.

3. A Party which receives a request for prior agreement under Articles 26, 27, 28 (paragraph 4), or 31 shall, as rapidly as possible, notify the requesting Party:

- (a) that the request is agreed to;
- (b) that the request is denied; or
- (c) of reasonable alternative proposals to the request. It may also propose a prohibition or restriction of other flights in the area during the time involved. If the Party which submitted the request accepts the alternative proposals, it shall notify the other Party of such acceptance.

4. The Parties shall take the necessary measures to ensure that notifications and agreements can be made rapidly.

5. The Parties shall also take the necessary measures to disseminate rapidly the substance of any such notifications and agreements to the military units concerned and shall instruct those units regarding the means of identification that will be used by the medical aircraft in question.

Article 30—Landing and inspection of medical aircraft

1. Medical aircraft flying over areas which are physically controlled by an adverse Party, or over areas the physical control of which is not clearly established, may be ordered to land or to alight on water, as appropriate, to permit inspection in accordance with the following paragraphs. Medical aircraft shall obey any such order.

2. If such an aircraft lands or alights on water, whether ordered to do so or for other reasons, it may be subjected to inspection solely to determine

the matters referred to in paragraphs 3 and 4. Any such inspection shall be commenced without delay and shall be conducted expeditiously. The inspecting Party shall not require the wounded and sick to be removed from the aircraft unless their removal is essential for the inspection. That Party shall in any event ensure that the condition of the wounded and sick is not adversely affected by the inspection or by the removal.

3. If the inspection discloses that the aircraft:

- (a) is a medical aircraft within the meaning of Article 8, sub-paragraph (j),
- (b) is not in violation of the conditions prescribed in Article 28, and
- (c) has not flown without or in breach of a prior agreement where such agreement is required,

the aircraft and those of its occupants who belong to the adverse Party or to a neutral or other State not a Party to the conflict shall be authorized to continue the flight without delay.

4. If the inspection discloses that the aircraft:

- (a) is not a medical aircraft within the meaning of Article 8, sub-paragraph (f),
- (b) is in violation of the conditions prescribed in Article 28, or
- (c) has flown without or in breach of a prior agreement where such agreement is required,

the aircraft may be seized. Its occupants shall be treated in conformity with the relevant provisions of the Conventions and of this Protocol. Any aircraft seized which had been assigned as a permanent medical aircraft may be used thereafter only as a medical aircraft.

Article 31—Neutral or other States not Parties to the conflict

1. Except by prior agreement, medical aircraft shall not fly over or land in the territory of a neutral or other State not a Party to the conflict. However, with such an agreement, they shall be respected throughout their flight and also for the duration of any calls in the territory. Nevertheless they shall obey any summons to land or to alight on water, as appropriate.

2. Should a medical aircraft, in the absence of an agreement or in deviation from the terms of an agreement, fly over the territory of a neutral or other State not a Party to the conflict, either through navigational error or because of an emergency affecting the safety of the flight, it shall make every effort to give notice of the flight and to identify itself. As soon as such medical aircraft is recognized, that State shall make all reasonable efforts to give the order to land or to alight on water referred to in Article 30, paragraph 1, or to take other measures to safeguard its own interests, and, in either case, to allow the aircraft time for compliance, before resorting to an attack against the aircraft.

3. If a medical aircraft, either by agreement or in the circumstances mentioned in paragraph 2, lands or alights on water in the territory of a neutral or other State not a Party to the conflict, whether ordered to do so or for other reasons, the aircraft shall be subject to inspection for the purposes of determining whether it is in fact a medical aircraft. The inspection shall be commenced without delay and shall be conducted expeditiously. The inspecting Party shall not require the wounded and sick of the Party operating the aircraft to be removed from it unless their removal is essential for the

inspection. The inspecting Party shall in any event ensure that the condition of the wounded and sick is not adversely affected by the inspection or the removal. If the inspection discloses that the aircraft is in fact a medical aircraft, the aircraft with its occupants, other than those who must be detained in accordance with the rules of international law applicable in armed conflict, shall be allowed to resume its flight, and reasonable facilities shall be given for the continuation of the flight. If the inspection discloses that the aircraft is not a medical aircraft, it shall be seized and the occupants treated in accordance with paragraph 4.

4. The wounded, sick and shipwrecked disembarked, otherwise than temporarily, from a medical aircraft with the consent of the local authorities in the territory of a neutral or other State not a Party to the conflict shall, unless agreed otherwise between that State and the Parties to the conflict, be detained by that State where so required by the rules of international law applicable in armed conflict, in such a manner that they cannot again take part in the hostilities. The cost of hospital treatment and internment shall be borne by the State to which those persons belong.

5. Neutral or other States not Parties to the conflict shall apply any conditions and restrictions on the passage of medical aircraft over, or on the landing of medical aircraft in, their territory equally to all Parties to the conflict.

SECTION III

MISSING AND DEAD PERSONS

Article 32—General principle

In the implementation of this Section, the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of families to know the fate of their relatives.

Article 33—Missing persons

1. As soon as circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall search for the persons who have been reported missing by an adverse Party. Such adverse Party shall transmit all relevant information concerning such persons in order to facilitate such searches.

2. In order to facilitate the gathering of information pursuant to the preceding paragraph, each Party to the conflict shall, with respect to persons who would not receive more favourable consideration under the Conventions and this Protocol:

(a) record the information specified in Article 138 of the Fourth Convention in respect of such persons who have been detained, imprisoned or otherwise held in captivity for more than two weeks as a result of hostilities or occupation, or who have died during any period of detention;

(b) to the fullest extent possible, facilitate and, if need be, carry out the search for and the recording of information concerning such persons if they have died in the circumstances as a result of hostilities or occupation.

3. Information concerning persons reported missing pursuant to paragraph 1 and requests for such information shall be transmitted either directly or

through the Protecting Power or the Central Tracing Agency of the International Committee of the Red Cross or national Red Cross (Red Crescent, Red Lion and Sun) Societies. Where the information is not transmitted through the International Committee of the Red Cross and its Central Tracing Agency, each Party to the conflict shall ensure that such information is also supplied to the Central Tracing Agency.

4. The Parties to the conflict shall endeavour to agree on arrangements for teams to search for, identify and recover the dead from battlefield areas, including arrangements, if appropriate, for such teams to be accompanied by personnel of the adverse Party while carrying out these missions in areas controlled by the adverse Party. Personnel of such teams shall be respected and protected while exclusively carrying out these duties.

Article 34—Remains of deceased

1. The remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities and those of persons not nationals of the country in which they have died as a result of hostilities shall be respected, and the gravesites of all such persons shall be respected, maintained and marked as provided for in Article 130 of the Fourth Convention, where their remains or gravesites would not receive more favourable consideration under the Conventions and this Protocol.

2. As soon as circumstances and the relations between the adverse Parties permit, the High Contracting Parties in whose territories graves and, as the case may be, other locations of the remains of persons who have died as a result of hostilities or during occupation or in detention are situated, shall conclude agreements in order:

(a) to facilitate access to the gravesites by relatives of the deceased and by representatives of official graves registration services and to regulate the practical arrangements for such access;

(b) to protect and maintain such gravesites permanently;

(c) to facilitate the return of the remains of the deceased and of personal effects to the home country upon its request or, unless that country objects, upon the request of the next of kin.

3. In the absence of the agreements provided for in paragraph 2 (b) or (c) and if the home country of such deceased is not willing to arrange at its expense for the maintenance of such gravesites, the High Contracting Party in whose territory the gravesites are situated may offer to facilitate the return of the remains of the deceased to the home country. Where such an offer has not been accepted the High Contracting Party may, after the expiry of five years from the date of the offer and upon due notice to the home country, adopt the arrangements laid down in its own laws relating to cemeteries and graves.

4. A High Contracting Party in whose territory the gravesites referred to in this Article are situated shall be permitted to exhume the remains only:

(a) in accordance with paragraphs 2(c) and 3, or

(b) where exhumation is a matter of overriding public necessity, including cases of medical and investigative necessity, in which case the High Contracting Party shall at all times respect the remains, and shall give notice to the home country of its intention to exhume the remains together with details of the intended place of reinterment.

PART III

METHODS AND MEANS OF WARFARE

COMBATANT AND PRISONER-OF-WAR STATUS

SECTION I

METHODS AND MEANS OF WARFARE

Article 35—Basic rules

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

Article 36—New weapons

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

Article 37—Prohibition of perfidy

1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:

(a) the feigning of an intent to negotiate under a flag of true or of a surrender;

(b) the feigning of an incapacitation by wounds or sickness;

(c) the feigning of civilian, non-combatant status; and

(d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.

2. Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.

Article 38—Recognized emblems

1. It is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or

signals provided for by the Conventions or by this Protocol. It is also prohibited to misuse deliberately in an armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property.

2. It is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization.

Article 39—Emblems of nationality

1. It is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict.

2. It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations.

3. Nothing in this Article or in Article 37, paragraph 1 (d), shall affect the existing generally recognized rules of international law applicable to espionage or to the use of flags in the conduct of armed conflict at sea.

Article 40—Quarter

It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.

Article 41—Safeguard of an enemy hors de combat

1. A person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack.

2. A person is *hors de combat* if:

- (a) he is in the power of an adverse Party,
- (b) he clearly expresses an intention to surrender; or
- (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;

provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

3. When persons entitled to protection as prisoners of war have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation as provided for in Part III, Section I, of the Third Convention, they shall be released and all feasible precautions shall be taken to ensure their safety.

Article 42—Occupants of aircraft

1. No person parachuting from an aircraft in distress shall be made the object of attack during his descent.

2. Upon reaching the ground in territory controlled by an adverse Party, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act.

3. Airborne troops are not protected by this Article.

SECTION II

COMBATANT AND PRISONER-OF-WAR STATUS

Article 43—Armed forces

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.
2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Articles 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

Article 44—Combatants and prisoners of war

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.
2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.
3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
 - (a) during each military engagement, and
 - (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.

6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.

7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.

8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.

Article 45—Protection of persons who have taken part in hostilities

1. A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.

2. If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offence. The representatives of the Protecting Power shall be entitled to attend the proceedings in which that question is adjudicated, unless, exceptionally, the proceedings are held *in camera* in the interest of State security. In such a case the detaining Power shall advise the Protecting Power accordingly.

3. Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favorable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention.

Article 46—Spies

1. Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.

2. A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or at-

tempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.

3. A member of the armed forces of a Party to the conflict who is a resident of territory occupied by an adverse Party and who, on behalf of the Party on which he depends, gathers or attempts to gather information of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. Moreover, such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage.

4. A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs.

Article 47—Mercenaries

1. A mercenary shall not have the right to be a combatant or a prisoner of war.

2. A mercenary is any person who:

(a) is specially recruited locally or abroad in order to fight in an armed conflict;

(b) does, in fact, take a direct part in the hostilities;

(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;

(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

(e) is not a member of the armed forces of a Party to the conflict, and

(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

PART IV

CIVILIAN POPULATION

SECTION I

GENERAL PROTECTION AGAINST EFFECTS OF HOSTILITIES

Chapter I

Basic Rule and Field of Application

Article 48—Basic rule

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Article 49—Definition of attacks and scope of application

1. "Attacks" means acts of violence against the adversary, whether in offence or in defence.
2. The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the conflict but under the control of an adverse Party.
3. The provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.
4. The provisions of this Section are additional to the rules concerning humanitarian protection contained in the Fourth Convention, particularly in Part II thereof, and in other international agreements binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians and civilian objects on land, at sea or in the air against the effects of hostilities.

Chapter II Civilians and Civilian Population

Article 50—Definition of civilians and civilian population

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.
2. The civilian population comprises all persons who are civilians.
3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

Article 51—Protection of the civilian population

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.
4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
 - (a) those which are not directed at a specific military objective;
 - (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
 - (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

Chapter III Civilian Objects

Article 52—General protection of civilian objects

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

Article 53—Protection of cultural objects and of places of worship

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

(a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;

- (b) to use such objects in support of the military effort;
- (c) to make such objects the object of reprisals.

Article 54—Protection of objects indispensable to the survival of the civilian population

1. Starvation of civilians as a method of warfare is prohibited.
2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.
3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party:
 - (a) as sustenance solely for the members of its armed forces; or
 - (b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.
4. These objects shall not be made the object of reprisals.
5. In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

Article 55—Protection of the natural environment

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
2. Attacks against the natural environment by way of reprisals are prohibited.

Article 56—Protection of works and installations containing dangerous forces

1. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.
2. The special protection against attack provided by paragraph 1 shall cease:
 - (a) for a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations

and if such attack is the only feasible way to terminate such support;

(b) for a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;

(c) for other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.

3. In all cases, the civilian population and individual civilians shall remain entitled to all the protection accorded them by international law, including the protection of the precautionary measures provided for in Article 57. If the protection ceases and any of the works, installations or military objectives mentioned in paragraph 1 is attacked, all practical precautions shall be taken to avoid the release of the dangerous forces.

4. It is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals.

5. The Parties to the conflict shall endeavour to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1. Nevertheless, installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations.

6. The High Contracting Parties and the Parties to the conflict are urged to conclude further agreements among themselves to provide additional protection for objects containing dangerous forces.

7. In order to facilitate the identification of the objects protected by this article, the Parties to the conflict may mark them with a special sign consisting of a group of three bright orange circles placed on the same axis, as specified in Article 16 of Annex I to this Protocol. The absence of such marking in no way relieves any Party to the conflict of its obligation under this Article.

Chapter IV **Precautionary Measures**

Article 57—Precautions in attack

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall:

(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;

(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

5. No provision of this article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

Article 58—Precautions against the effects of attacks

The Parties to the conflict shall, to the maximum extent feasible:

(a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;

(b) avoid locating military objectives within or near densely populated areas;

(c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

Chapter V

Localities and Zones Under Special Protection

Article 59—Non-defended localities

1. It is prohibited for the Parties to the conflict to attack, by any means whatsoever, non-defended localities.

2. The appropriate authorities of a Party to the conflict may declare as a non-defended locality any inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse Party. Such a locality shall fulfil the following conditions:

(a) all combatants, as well as mobile weapons and mobile military equipment must have been evacuated;

(b) no hostile use shall be made of fixed military installations or establishments;

(c) no acts of hostility shall be committed by the authorities or by the population; and

(d) no activities in support of military operations shall be undertaken.

3. The presence, in this locality, of persons specially protected under the Conventions and this Protocol, and of police forces retained for the sole purpose of maintaining law and order, is not contrary to the conditions laid down in paragraph 2.

4. The declaration made under paragraph 2 shall be addressed to the adverse Party and shall define and describe, as precisely as possible, the limits of the non-defended locality. The Party to the conflict to which the declaration is addressed shall acknowledge its receipt and shall treat the locality as a non-defended locality unless the conditions laid down in paragraph 2 are not in fact fulfilled, in which event it shall immediately so inform the Party making the declaration. Even if the conditions laid down in paragraph 2 are not fulfilled, the locality shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

5. The Parties to the conflict may agree on the establishment of non-defended localities even if such localities do not fulfil the conditions laid down in paragraph 2. The agreement should define and describe, as precisely as possible, the limits of the non-defended locality; if necessary, it may lay down the methods of supervision.

6. The Party which is in control of a locality governed by such an agreement shall mark it, so far as possible, by such signs as may be agreed upon with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways.

7. A locality loses its status as a non-defended locality when it ceases to fulfil the conditions laid down in paragraph 2 or in the agreement referred to in paragraph 5. In such an eventuality, the locality shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

Article 60—Demilitarized zones

1. It is prohibited for the Parties to the conflict to extend their military operations to zones on which they have conferred by agreement the status of demilitarized zone, if such extension is contrary to the terms of this agreement.

2. The agreement shall be an express agreement, may be concluded verbally or in writing, either directly or through a Protecting Power or any impartial humanitarian organization, and may consist of reciprocal and concordant declarations. The agreement may be concluded in peacetime, as well as after the outbreak of hostilities, and should define and describe, as precisely as possible, the limits of the demilitarized zone and, if necessary, lay down the methods of supervision.

3. The subject of such an agreement shall normally be any zone which fulfils the following conditions:

(a) all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated;

(b) no hostile use shall be made of fixed military installations or establishments;

(c) no acts of hostility shall be committed by the authorities or by the population; and

(d) any activity linked to the military effort must have ceased.

The Parties to the conflict shall agree upon the interpretation to be given to the condition laid down in sub-paragraph (d) and upon persons to be

admitted to the demilitarized zone other than those mentioned in paragraph 4.

4. The presence, in this zone, of persons specially protected under the Conventions and this Protocol, and of police forces retained for the sole purpose of maintaining law and order, is not contrary to the conditions laid down in paragraph 3.

5. The Party which is in control of such a zone shall mark it, so far as possible, by such signs as may be agreed upon with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways.

6. If the fighting draws near to a demilitarized zone, and if the Parties to the conflict have so agreed, none of them may use the zone for purposes related to the conduct of military operations or unilaterally revoke its status.

7. If one of the Parties to the conflict commits a material breach of the provisions of paragraphs 3 or 6, the other Party shall be released from its obligations under the agreement conferring upon the zone the status of demilitarized zone. In such an eventuality, the zone loses its status but shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

Chapter VI Civil Defence

Article 61—Definitions and scope

For the purposes of this Protocol:

(a) "civil defence" means the performance of some or all of the under-mentioned humanitarian tasks intended to protect the civilian population against the dangers, and to help it to recover from the immediate effects, of hostilities or disasters and also to provide the conditions necessary for its survival. These tasks are:

- (i) warning;
- (ii) evacuation;
- (iii) management of shelters;
- (iv) management of blackout measures;
- (v) rescue;
- (vi) medical services, including first aid, and religious assistance;
- (vii) fire-fighting;
- (viii) detection and marking of danger areas;
- (ix) decontamination and similar protective measures;
- (x) provision of emergency accommodation and supplies;
- (xi) emergency assistance in the restoration and maintenance of order in distressed areas;
- (xii) emergency repair of indispensable public utilities;
- (xiii) emergency disposal of the dead;
- (xiv) assistance in the preservation of objects essential for survival;
- (xv) complementary activities necessary to carry out any of the tasks mentioned above, including, but not limited to, planning and organization;

(b) "civil defence organizations" means those establishments and other units which are organized or authorized by the competent authorities of a Party to the conflict to perform any of the tasks mentioned under sub-

paragraph (a), and which are assigned and devoted exclusively to such tasks;

(c) "personnel" of civil defence organizations means those persons assigned by a Party to the conflict exclusively to the performance of the tasks mentioned under sub-paragraph (a), including personnel assigned by the competent authority of that Party exclusively to the administration of these organizations;

(d) "*matériel*" of civil defence organizations means equipment, supplies and transports used by these organizations for the performance of the tasks mentioned under sub-paragraph (a).

Article 62—General protection

1. Civilian civil defence organizations and their personnel shall be respected and protected, subject to the provisions of this Protocol, particularly the provisions of this Section. They shall be entitled to perform their civil defence tasks except in case of imperative military necessity.
2. The provisions of paragraph 1 shall also apply to civilians who, although not members of civilian civil defence organizations, respond to an appeal from the competent authorities and perform civil defence tasks under their control.
3. Buildings and *matériel* used for civil defence purposes and shelters provided for the civilian population are covered by Article 52. Objects used for civil defence purposes may not be destroyed or diverted from their proper use except by the Party to which they belong.

Article 63—Civil defence in occupied territories

1. In occupied territories, civilian civil defence organizations shall receive from the authorities the facilities necessary for the performance of their tasks. In no circumstances shall their personnel be compelled to perform activities which would interfere with the proper performance of these tasks. The Occupying Power shall not change the structure or personnel of such organizations in any way which might jeopardize the efficient performance of their mission. These organizations shall not be required to give priority to the nationals or interests of that Power.
2. The Occupying Power shall not compel, coerce or induce civilian civil defence organizations to perform their tasks in any manner prejudicial to the interests of the civilian population.
3. The Occupying Power may disarm civil defence personnel for reasons of security.
4. The Occupying Power shall neither divert from their proper use nor requisition buildings or *matériel* belonging to or used by civil defence organizations if such diversion or requisition would be harmful to the civilian population.
5. Provided that the general rule in paragraph 4 continues to be observed, the Occupying Power may requisition or divert these resources, subject to the following particular conditions:
 - (a) that the buildings or *matériel* are necessary for other needs of the civilian population; and
 - (b) that the requisition or diversion continues only while such necessity exists.

6. The Occupying Power shall neither divert nor requisition shelters provided for the use of the civilian population or needed by such population.

Article 64—Civilian civil defence organization of neutral or other States not Parties to the conflict and international co-ordinating organizations

1. Articles 62, 63, 65 and 66 shall also apply to the personnel and *matériel* of civilian civil defence organizations of neutral or other States not Parties to the conflict which perform civil defence tasks mentioned in Article 61 in the territory of a Party to the conflict, with the consent and under the control of that Party. Notification of such assistance shall be given as soon as possible to any adverse Party concerned. In no circumstances shall this activity be deemed to be an interference in the conflict. This activity should, however, be performed with due regard to the security interests of the Parties to the conflict concerned.

2. The Parties to the conflict receiving the assistance referred to in paragraph 1 and the High Contracting Parties granting it should facilitate international co-ordination of such civil defence actions when appropriate. In such cases the relevant international organizations are covered by the provisions of this Chapter.

3. In occupied territories, the Occupying Power may only exclude or restrict the activities of civilian civil defence organizations of neutral or other States not Parties to the conflict and of international co-ordinating organizations if it can ensure the adequate performance of civil defence tasks from its own resources or those of the occupied territory.

Article 65—Cessation of protection

1. The protection to which civilian civil defence organizations, their personnel, buildings, shelters and *matériel* are entitled shall not cease unless they commit or are used to commit, outside their proper tasks, acts harmful to the enemy. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

2. The following shall not be considered as acts harmful to the enemy:

(a) that civil defence tasks are carried out under the direction or control of military authorities;

(b) that civilian civil defence personnel co-operate with military personnel in the performance of civil defence tasks, or that some military personnel are attached to civilian civil defence organizations;

(c) that the performance of civil defence tasks may incidentally benefit military victims, particularly those who are *hors de combat*.

3. It shall also not be considered as an act harmful to the enemy that civilian civil defence personnel bear light individual weapons for the purpose of maintaining order or for self-defence. However, in areas where land fighting is taking place or is likely to take place, the Parties to the conflict shall undertake the appropriate measures to limit these weapons to handguns, such as pistols or revolvers, in order to assist in distinguishing between civil defence personnel and combatants. Although civil defence personnel bear other light individual weapons in such areas, they shall nevertheless be respected and protected as soon as they have been recognized as such.

4. The formation of civilian civil defence organizations along military lines, and compulsory service in them, shall also not deprive them of the protection conferred by this Chapter.

Article 66—Identification

1. Each Party to the conflict shall endeavour to ensure that its civil defence organizations, their personnel, buildings and *matériel*, are identifiable while they are exclusively devoted to the performance of civil defence tasks. Shelters provided for the civilian population should be similarly identifiable.
2. Each Party to the conflict shall also endeavour to adopt and implement methods and procedures which will make it possible to recognize civilian shelters as well as civil defence personnel, buildings and *matériel* on which the international distinctive sign of civil defence is displayed.
3. In occupied territories and in areas where fighting is taking place or is likely to take place, civilian civil defence personnel should be recognizable by the international distinctive sign of civil defence and by an identity card certifying their status.
4. The international distinctive sign of civil defence is an equilateral blue triangle on an orange ground when used for the protection of civil defence organizations, their personnel, buildings and *matériel* and for civilian shelters.
5. In addition to the distinctive sign, Parties to the conflict may agree upon the use of distinctive signals for civil defence identification purposes.
6. The application of the provisions of paragraphs 1 to 4 is governed by Chapter V of Annex I to this Protocol.
7. In time of peace, the sign described in paragraph 4 may, with the consent of the competent national authorities, be used for civil defence identification purposes.
8. The High Contracting Parties and the Parties to the conflict shall take the measures necessary to supervise the display of the international distinctive sign of civil defence and to prevent and repress any misuse thereof.
9. The identification of civil defence medical and religious personnel, medical units and medical transports is also governed by Article 18.

Article 67—Members of the armed forces and military units assigned to civil defence organizations

1. Members of the armed forces and military units assigned to civil defence organizations shall be respected and protected, provided that:

- (a) such personnel and such units are permanently assigned and exclusively devoted to the performance of any of the tasks mentioned in Article 61;

- (b) if so assigned, such personnel do not perform any other military duties during the conflict;

- (c) such personnel are clearly distinguishable from the other members of the armed forces by prominently displaying the international distinctive sign of civil defence, which shall be as large as appropriate, and such personnel are provided with the identity card referred to in Chapter V of Annex I to this Protocol certifying their status;

- (d) such personnel and such units are equipped only with light individual weapons for the purpose of maintaining order or for self-defence. The provisions of Article 65, paragraph 3 shall also apply in this case;

- (e) such personnel do not participate directly in hostilities, and do not commit, or are not used to commit, outside their civil defence tasks, acts harmful to the adverse Party;

- (f) such personnel and such units perform their civil defence tasks only within the national territory of their Party.

The non-observance of the conditions stated in (e) above by any member of the armed forces who is bound by the conditions prescribed in (a) and (b) above is prohibited.

2. Military personnel serving within civil defence organizations shall, if they fall into the power of an adverse Party, be prisoners of war. In occupied territory they may, but only in the interest of the civilian population of that territory, be employed on civil defence tasks in so far as the need arises, provided however that, if such work is dangerous, they volunteer for such tasks.

3. The buildings and major items of equipment and transports of military units assigned to civil defence organizations shall be clearly marked with the international distinctive sign of civil defence. This distinctive sign shall be as large as appropriate.

4. The *matériel* and buildings of military units permanently assigned to civil defence organizations and exclusively devoted to the performance of civil defence tasks shall, if they fall into the hands of an adverse Party, remain subject to the laws of war. They may not be diverted from their civil defence purpose so long as they are required for the performance of civil defence tasks, except in case of imperative military necessity, unless previous arrangements have been made for adequate provision for the needs of the civilian population.

SECTION II

RELIEF IN FAVOUR OF THE CIVILIAN POPULATION

Article 68—Field of application

The provisions of this Section apply to the civilian population as defined in this Protocol and are supplementary to Articles 23, 55, 59, 60, 61 and 62 and other relevant provisions of the Fourth Convention.

Article 69—Basic needs in occupied territories

1. In addition to the duties specified in Article 55 of the Fourth Convention concerning food and medical supplies, the Occupying Power shall, to the fullest extent of the means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship.

2. Relief actions for the benefit of the civilian population of occupied territories are governed by Articles 59, 60, 61, 62, 108, 109, 110 and 111 of the Fourth Convention, and by Article 71 of this Protocol, and shall be implemented without delay.

Article 70—Relief actions

1. If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts. In the distribution of relief consignments, priority shall be given to those persons, such as children,

expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection.

2. The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.

3. The Parties to the conflict and each High Contracting Party which allows the passage of relief consignments, equipment and personnel in accordance with paragraph 2:

(a) shall have the right to prescribe the technical arrangements, including search, under which such passage is permitted;

(b) may make such permission conditional on the distribution of this assistance being made under the local supervision of a Protecting Power;

(c) shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned.

4. The Parties to the conflict shall protect relief consignments and facilitate their rapid distribution.

5. The Parties to the conflict and each High Contracting Party concerned shall encourage and facilitate effective international co-ordination of the relief actions referred to in paragraph 1.

Article 71—Personnel participating in relief actions

1. Where necessary, relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments; the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties.

2. Such personnel shall be respected and protected.

3. Each Party in receipt of relief consignments shall, to the fullest extent practicable, assist the relief personnel referred to in paragraph 1 in carrying out their relief mission. Only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted.

4. Under no circumstances may relief personnel exceed the terms of their mission under this Protocol. In particular they shall take account of the security requirements of the Party in whose territory they are carrying out their duties. The mission of any of the personnel who do not respect these conditions may be terminated.

SECTION III

TREATMENT OF PERSONS IN THE POWER OF A PARTY TO THE CONFLICT

Chapter I

Field of Application and Protection of Persons and Objects

Article 72—Field of application

The provisions of this Section are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a

Party to the conflict contained in the Fourth Convention, particularly Parts I and III thereof, as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.

Article 73—Refugees and stateless persons

Persons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence shall be protected persons within the meaning of Parts I and III of the Fourth Convention, in all circumstances and without any adverse distinction.

Article 74—Reunion of dispersed families

The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and shall encourage in particular the work of the humanitarian organizations engaged in this task in accordance with the provisions of the Conventions and of this Protocol and in conformity with their respective security regulations.

Article 75—Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

(a) violence to the life, health, or physical or mental well-being of persons, in particular:

- (i) murder;
- (ii) torture of all kinds, whether physical or mental;
- (iii) corporal punishment; and
- (iv) mutilation;

(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;

- (c) the taking of hostages;
- (d) collective punishments; and
- (e) threats to commit any of the foregoing acts.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;

(c) no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

(d) anyone charged with an offence is presumed innocent until proved guilty according to law;

(e) anyone charged with an offence shall have the right to be tried in his presence;

(f) no one shall be compelled to testify against himself or to confess guilt;

(g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgment acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;

(i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and

(j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

(a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and

(b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.

Chapter II

Measures in Favour of Women and Children

Article 76—Protection of women

1. Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.
2. Pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority.
3. To the maximum extent feasible, the Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.

Article 77—Protection of children

1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.
2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.
3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.
4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.
5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.

Article 78—Evacuation of children

1. No Party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a tem-

porary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require. Where the parents or legal guardians can be found, their written consent to such evacuation is required. If these persons cannot be found, the written consent to such evacuation of the persons who by law or custom are primarily responsible for the care of the children is required. Any such evacuation shall be supervised by the Protecting Power in agreement with the Parties concerned, namely, the Party arranging for the evacuation, the Party receiving the children and any Parties whose nationals are being evacuated. In each case, all Parties to the conflict shall take all feasible precautions to avoid endangering the evacuation.

2. Whenever an evacuation occurs pursuant to paragraph 1, each child's education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest possible continuity.

3. With a view to facilitating the return to their families and country of children evacuated pursuant to this Article, the authorities of the Party arranging for the evacuation and, as appropriate, the authorities of the receiving country shall establish for each child a card with photographs, which they shall send to the Central Tracing Agency of the International Committee of the Red Cross. Each card shall bear, whenever possible, and whenever it involves no risk of harm to the child, the following information:

- (a) surname(s) of the child;
- (b) the child's first name(s);
- (c) the child's sex;
- (d) the place and date of birth (or, if that date is not known, the approximate age);
- (e) the father's full name;
- (f) the mother's full name and her maiden name;
- (g) the child's next-of-kin;
- (h) the child's nationality;
- (i) the child's native language, and any other languages he speaks;
- (j) the address of the child's family;
- (k) any identification number for the child;
- (l) the child's state of health;
- (m) the child's blood group;
- (n) any distinguishing features;
- (o) the date on which and the place where the child was found;
- (p) the date on which and the place from which the child left the country;
- (q) the child's religion, if any;
- (r) the child's present address in the receiving country;
- (s) should the child die before his return, the date, place and circumstances of death and place of interment.

Chapter III

Journalists

Article 79—Measures of protection for journalists

1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.

2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians,

and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4 A (4) of the Third Convention.

3. They may obtain an identity card similar to the model in Annex II of this Protocol. This card, which shall be issued by the government of the State of which the journalist is a national or in whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist.

PART V

EXECUTION OF THE CONVENTIONS AND OF THIS PROTOCOL

SECTION I

GENERAL PROVISIONS

Article 80—Measures for execution

1. The High Contracting Parties and the Parties to the conflict shall without delay take all necessary measures for the execution of their obligations under the Conventions and this Protocol.
2. The High Contracting Parties and the Parties to the conflict shall give orders and instructions to ensure observance of the Conventions and this Protocol, and shall supervise their execution

Article 81—Activities of the Red Cross and other humanitarian organizations

1. The Parties to the conflict shall grant to the International Committee of the Red Cross all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts; the International Committee of the Red Cross may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the Parties to the conflict concerned.
2. The Parties to the conflict shall grant to their respective Red Cross (Red Crescent, Red Lion and Sun) organizations the facilities necessary for carrying out their humanitarian activities in favour of the victims of the conflict, in accordance with the provisions of the Conventions and this Protocol and the fundamental principles of the Red Cross as formulated by the International Conferences of the Red Cross.
3. The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the assistance which Red Cross (Red Crescent, Red Lion and Sun) organizations and the League of Red Cross Societies extend to the victims of conflicts in accordance with the provisions of the Conventions and this Protocol and with the fundamental principles of the Red Cross as formulated by the International Conferences of the Red Cross.
4. The High Contracting Parties and the Parties to the conflict shall, as far as possible, make facilities similar to those mentioned in paragraphs 2 and 3 available to the other humanitarian organizations referred to in the Conventions and this Protocol which are duly authorized by the respective Parties to the conflict and which perform their humanitarian activities in accordance with the provisions of the Conventions and this Protocol.

Article 82—Legal advisers in armed forces.

The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.

Article 83—Dissemination

1. The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population.

2. Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof.

Article 84—Rules of application

The High Contracting Parties shall communicate to one another, as soon as possible, through the depositary and, as appropriate, through the Protecting Powers, their official translations of this Protocol, as well as the laws and regulations which they may adopt to ensure its application.

SECTION II

REPRESSION OF BREACHES OF THE CONVENTIONS AND OF THIS PROTOCOL

Article 85—Repression of breaches of this Protocol

1. The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol.

2. Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.

3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

(a) making the civilian population or individual civilians the object of attack;

(b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);

(c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of

life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);

(d) making non-defended localities and demilitarized zones the object of attack;

(e) making a person the object of attack in the knowledge that he is *hors de combat*;

(f) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.

4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:

(a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;

(b) unjustifiable delay in the repatriation of prisoners of war or civilians;

(c) practices of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;

(d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;

(e) depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.

5. Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.

Article 86—Failure to act

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be if they knew or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Article 87—Duty of commanders

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and,

where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.

2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.

3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

Article 88—Mutual assistance in criminal matters

1. The High Contracting Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol.

2. Subject to the rights and obligations established in the Conventions and in Article 85, paragraph 1, of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.

3. The law of the High Contracting Party requested shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters.

Article 89—Co-operation

In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.

Article 90—International Fact-Finding Commission

1. (a) An International Fact-Finding Commission (hereinafter referred to as "the Commission") consisting of fifteen members of high moral standing and acknowledged impartiality shall be established.

(b) When not less than twenty High Contracting Parties have agreed to accept the competence of the Commission pursuant to paragraph 2, the depositary shall then, and at intervals of five years thereafter, convene a meeting of representatives of those High Contracting Parties for the purpose of electing the members of the Commission. At the meeting, the representatives shall elect the members of the Commission by secret ballot from a list of persons to which each of those High Contracting Parties may nominate one person.

(c) The members of the Commission shall serve in their personal capacity and shall hold office until the election of new members at the ensuing meeting.

(d) At the election, the High Contracting Parties shall ensure that the persons to be elected to the Commission individually possess the qualifications required and that, in the Commission as a whole, equitable geographical representation is assured.

(e) In the case of a casual vacancy, the Commission itself shall fill the vacancy, having due regard to the provisions of the preceding sub-paragraphs.

(f) The depositary shall make available to the Commission the necessary administrative facilities for the performance of its functions.

2. (a) The High Contracting Parties may at the time of signing, ratifying or acceding to the Protocol, or at any other subsequent time, declare that they recognize *ipso facto* and without special agreement, in relation to any other High Contracting Party accepting the same obligation, the competence of the Commission to enquire into allegations by such other Party, as authorized by this Article.

(b) The declarations referred to above shall be deposited with the depositary, which shall transmit copies thereof to the High Contracting Parties.

(c) The Commission shall be competent to:

(i) enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol;

(ii) facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol.

(d) In other situations, the Commission shall institute an enquiry, at the request of a Party to the conflict only with the consent of the other Party or Parties concerned.

(e) Subject to the foregoing provisions of this paragraph, the provisions of Article 52 of the First Convention, Article 53 of the Second Convention, Article 132 of the Third Convention and Article 149 of the Fourth Convention shall continue to apply to any alleged violation of the Conventions and shall extend to any alleged violation of this Protocol.

3. (a) Unless otherwise agreed by the Parties concerned, all enquiries shall be undertaken by a Chamber consisting of seven members appointed as follows:

(i) five members of the Commission, not nationals of any Party to the conflict, appointed by the President of the Commission on the basis of equitable representation of the geographical areas, after consultation with the Parties to the conflict;

(ii) two *ad hoc* members, not nationals of any Party to the conflict, one to be appointed by each side.

(b) Upon receipt of the request for an enquiry, the President of the Commission shall specify an appropriate time-limit for setting up a Chamber. If any *ad hoc* member has not been appointed within the time-limit, the President shall immediately appoint such additional member or members of the Commission as may be necessary to complete the membership of the Chamber.

4. (a) The Chamber set up under paragraph 3 to undertake an enquiry shall invite the Parties to the conflict to assist it and to present evidence. The Chamber may also seek such other evidence as it deems appropriate and may carry out an investigation of the situation *in loco*.

(b) All evidence shall be fully disclosed to the Parties, which shall have the right to comment on it to the Commission.

(c) Each Party shall have the right to challenge such evidence.

5. (a) The Commission shall submit to the Parties a report on the findings of fact of the Chamber, with such recommendations as it may deem appropriate.

(b) If the Chamber is unable to secure sufficient evidence for factual and impartial findings, the Commission shall state the reasons for that inability.

(c) The Commission shall not report its findings publicly, unless all the Parties to the conflict have requested the Commission to do so.

6. The Commission shall establish its own rules, including rules for the presidency of the Commission and the presidency of the Chamber. Those rules shall ensure that the functions of the President of the Commission are exercised at all times and that, in the case of an enquiry, they are exercised by a person who is not a national of a Party to the conflict.

7. The administrative expenses of the Commission shall be met by contributions from the High Contracting Parties which made declarations under paragraph 2, and by voluntary contributions. The Party or Parties to the conflict requesting an enquiry shall advance the necessary funds for expenses incurred by a Chamber and shall be reimbursed by the Party or Parties against which the allegations are made to the extent of fifty percent of the costs of the Chamber. Where there are counter-allegations before the Chamber each side shall advance fifty per cent of the necessary funds.

Article 91—Responsibility

A party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

PART VI FINAL PROVISIONS

Article 92—Signature

This Protocol shall be open for signature by the Parties to the Conventions six months after the signing of the Final Act and will remain open for a period of twelve months.

Article 93—Ratification

This Protocol shall be ratified as soon as possible. The instruments of ratification shall be deposited with the Swiss Federal Council, depositary of the Conventions.

Article 94—Accession

This Protocol shall be open for accession by any Party to the Conventions which has not signed it. The instruments of accession shall be deposited with the depositary.

Article 95—Entry into force

1. This Protocol shall enter into force six months after two instruments of ratification or accession have been deposited.

2. For each Party to the Conventions thereafter ratifying or acceding to this Protocol, it shall enter into force six months after the deposit by such Party of its instrument of ratification or accession:

Article 96—Treaty relations upon entry into force of this Protocol

1. When the Parties to the Conventions are also Parties to this Protocol, the Conventions shall apply as supplemented by this Protocol.

2. When one of the Parties to the conflict is not bound by this Protocol, the Parties to the Protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this Protocol in relation to each of the Parties which are not bound by it, if the latter accepts and applies the provisions thereof.

3. The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects:

(a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;

(b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and

(c) the Conventions and this Protocol are equally binding upon all Parties to the conflict.

Article 97—Amendment

1. Any High Contracting Party may propose amendments to this Protocol. The text of any proposed amendment shall be communicated to the depositary, which shall decide, after consultation with all the High Contracting Parties and the International Committee of the Red Cross, whether a conference should be convened to consider the proposed amendment.

2. The depositary shall invite to that conference all the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of this Protocol.

Article 98—Revision of Annex I

1. Not later than four years after the entry into force of this Protocol and thereafter at intervals of not less than four years, the International Committee of the Red Cross shall consult the High Contracting Parties concerning Annex I to this Protocol and, if it considers it necessary, may propose a meeting of technical experts to review Annex I and to propose such amendments to it as may appear to be desirable. Unless, within six months of the communication of a proposal for such a meeting to the High Contracting Parties, one third of them object, the International Committee of the Red Cross shall convene the meeting, inviting also observers of appropriate international organizations. Such a meeting shall also be convened by the International Committee of the Red Cross at any time at the request of one third of the High Contracting Parties.

2. The depositary shall convene a conference of the High Contracting Parties and the Parties to the Conventions to consider amendments pro-

posed by the meeting of technical experts if, after that meeting, the International Committee of the Red Cross or one third of the High Contracting Parties so request.

3. Amendments to Annex I may be adopted at such a conference by a two-thirds majority of the High Contracting Parties present and voting.

4. The depositary shall communicate any amendment so adopted to the High Contracting Parties and to the Parties to the Conventions. The amendment shall be considered to have been accepted at the end of a period of one year after it has been so communicated, unless within that period a declaration of non-acceptance of the amendment has been communicated to the depositary by not less than one third of the High Contracting Parties.

5. An amendment considered to have been accepted in accordance with paragraph 4 shall enter into force three months after its acceptance for all High Contracting Parties other than those which have made a declaration of non-acceptance in accordance with that paragraph. Any Party making such a declaration may at any time withdraw it and the amendment shall then enter into force for that Party three months thereafter.

6. The depositary shall notify the High Contracting Parties and the Parties to the Conventions of the entry into force of any amendment, of the Parties bound thereby, of the date of its entry into force in relation to each Party, of declarations of non-acceptance made in accordance with paragraph 4, and of withdrawals of such declarations.

Article 99—Denunciation

1. In case a High Contracting Party should denounce this Protocol, the denunciation shall only take effect one year after receipt of the instrument of denunciation. If, however, on the expiry of that year the denouncing Party is engaged in one of the situations referred to in Article I, the denunciation shall not take effect before the end of the armed conflict or occupation and not, in any case, before operations connected with the final release, repatriation or re-establishment of the persons protected by the Convention or this Protocol have been terminated.

2. The denunciation shall be notified in writing to the depositary, which shall transmit it to all the High Contracting Parties.

3. The denunciation shall have effect only in respect of the denouncing Party.

4. Any denunciation under paragraph 1 shall not affect the obligations already incurred, by reason of the armed conflict, under this Protocol by such denouncing Party in respect of any act committed before this denunciation becomes effective.

Article 100—Notifications

The depositary shall inform the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of this Protocol, of:

(a) signatures affixed to this Protocol and the deposit of instruments of ratification and accession under Articles 93 and 94;

(b) the date of entry into force of this Protocol under Article 95;

(c) communications and declarations received under Articles 84, 90 and 97;

(d) declarations received under Article 96, paragraph 3, which shall be communicated by the quickest methods; and

(e) denunciations under Article 99.

Article 101—Registration

1. After its entry into force, this Protocol shall be transmitted by the depositary to the Secretariat of the United Nations for registration and publication, in accordance with Article 102 of the Charter of the United Nations;

2. The depositary shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to this Protocol.

Article 102—Authentic texts

The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the depositary, which shall transmit certified true copies thereof to all the Parties to the Conventions.

PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS (PROTOCOL II)

PREAMBLE

The High Contracting Parties,

Recalling that the humanitarian principles enshrined in Article 3 common to the Geneva Conventions of 12 August 1949, constitute the foundation of respect for the human person in cases of armed conflict not of an international character,

Recalling furthermore that international instruments relating to human rights offer a basic protection to the human person,

Emphasizing the need to ensure a better protection for the victims of those armed conflicts,

Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience,

Have agreed on the following:

PART I

SCOPE OF THIS PROTOCOL

Article 1—Material field of application

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions

of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Article 2—Personal field of application

1. This Protocol shall be applied without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria (hereinafter referred to as "adverse distinction") to all persons affected by an armed conflict as defined in Article 1.

2. At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty.

Article 3—Non-intervention

1. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

2. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

PART II

HUMANE TREATMENT

Article 4—Fundamental guarantees

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:

(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) collective punishments;

- (c) taking of hostages;
- (d) acts of terrorism;
- (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (f) slavery and the slave trade in all their forms;
- (g) pillage;
- (h) threats to commit any of the foregoing acts.

3. Children shall be provided with the care and aid they require, and in particular:

(a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;

(b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;

(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

(d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured;

(e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

Article 5—Persons whose liberty has been restricted

1. In addition to the provisions of Article 4, the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained:

(a) the wounded and the sick shall be treated in accordance with Article 7;

(b) the persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict;

(c) they shall be allowed to receive individual or collective relief;

(d) they shall be allowed to practise their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions;

(e) they shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.

2. Those who are responsible for the internment or detention of the persons referred to in paragraph 1 shall also, within the limits of their capabilities, respect the following provisions relating to such persons:

(a) except when men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision of women;

(b) they shall be allowed to send and receive letters and cards, the number of which may be limited by competent authority if it deems necessary;

(c) places of internment and detention shall not be located close to the combat zone. The persons referred to in paragraph 1 shall be evacuated when the places where they are interned or detained become particularly exposed to danger arising out of the armed conflict, if their evacuation can be carried out under adequate conditions of safety;

(d) they shall have the benefit of medical examinations;

(e) their physical or mental health and integrity shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances.

3. Persons who are not covered by paragraph 1 but whose liberty has been restricted in any way whatsoever for reasons related to the armed conflict shall be treated humanely in accordance with Article 4 and with paragraphs 1 (a), (c) and (d), and 2 (b) of this Article.

4. If it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding.

Article 6—Penal prosecutions

1. This Article applies to the prosecution and punishment of criminal offences related to the armed conflict.

2. No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. In particular:

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;

(c) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

(d) anyone charged with an offence is presumed innocent until proved guilty according to law;

(e) anyone charged with an offence shall have the right to be tried in his presence;

(f) no one shall be compelled to testify against himself or to confess guilt.

3. A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

4. The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.

5. At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

PART III

WOUNDED, SICK AND SHIPWRECKED

Article 7—Protection and care

1. All the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected.
2. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

Article 8—Search

Whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead, prevent their being despoiled, and decently dispose of them.

Article 9—Protection of medical and religious personnel

1. Medical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties. They shall not be compelled to carry out tasks which are not compatible with their humanitarian mission.
2. In the performance of their duties medical personnel may not be required to give priority to any person except on medical grounds.

Article 10—General protection of medical duties

1. Under no circumstances shall any person be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.
2. Persons engaged in medical activities shall neither be compelled to perform acts or to carry out work contrary to, nor be compelled to refrain from acts required by, the rules of medical ethics or other rules designed for the benefit of the wounded and sick, or this Protocol.
3. The professional obligations of persons engaged in medical activities regarding information which they may acquire concerning the wounded and sick under their care shall, subject to national law, be respected.
4. Subject to national law, no person engaged in medical activities may be penalized in any way for refusing or failing to give information concerning the wounded and sick who are, or who have been, under his care.

Article 11—Protection of medical units and transports

1. Medical units and transports shall be respected and protected at all times and shall not be the object of attack.

2. The protection to which medical units and transports are entitled shall not cease unless they are used to commit hostile acts, outside their humanitarian function. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

Article 12—The distinctive emblem

Under the direction of the competent authority concerned, the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground shall be displayed by medical and religious personnel and medical units, and on medical transports. It shall be respected in all circumstances. It shall not be used improperly.

PART IV

CIVILIAN POPULATION

Article 13—Protection of the civilian population

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.

Article 14—Protection of objects indispensable to the survival of the civilian population

Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.

Article 15—Protection of works and installations containing dangerous forces

Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.

Article 16—Protection of cultural objects and of places of worship

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort.

Article 17—Prohibition of forced movement of civilians

1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.
2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

Article 18—Relief societies and relief actions

1. Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked.
2. If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as food stuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

PART V

FINAL PROVISIONS

Article 19—Dissemination

This Protocol shall be disseminated as widely as possible.

Article 20—Signature

This Protocol shall be open for signature by the Parties to the Conventions six months after the signing of the Final Act and will remain open for a period of twelve months.

Article 21—Ratification

This Protocol shall be ratified as soon as possible. The instruments of ratification shall be deposited with the Swiss Federal Council, depositary of the Conventions.

Article 22—Accession

This Protocol shall be open for accession by any Party to the Conventions which has not signed it. The instruments of accession shall be deposited with the depositary.

Article 23—Entry into force

1. This Protocol shall enter into force six months after two instruments of ratification or accession have been deposited.

2. For each Party to the Conventions thereafter ratifying or acceding to this Protocol, it shall enter into force six months after the deposit by such Party of its instrument of ratification or accession.

Article 24—Amendment

1. Any High Contracting Party may propose amendments to this Protocol. The text of any proposed amendment shall be communicated to the depositary which shall decide, after consultation with all the High Contracting Parties and the International Committee of the Red Cross, whether a conference should be convened to consider the proposed amendment.

2. The depositary shall invite to that conference all the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of this Protocol.

Article 25—Denunciation

1. In case a High Contracting Party should denounce this Protocol, the denunciation shall only take effect six months after receipt of the instrument of denunciation. If, however, on the expiry of six months, the denouncing Party is engaged in the situation referred to in Article 1, the denunciation shall not take effect before the end of the armed conflict. Persons who have been deprived of liberty, or whose liberty has been restricted, for reasons related to the conflict shall nevertheless continue to benefit from the provisions of this Protocol until their final release.

2. The denunciation shall be notified in writing to the depositary, which shall transmit it to all the High Contracting Parties.

Article 26—Notifications

The depositary shall inform the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of this Protocol, of:

- (a) signatures affixed to this Protocol and the deposit of instruments of ratification and accession under Articles 21 and 22;
- (b) the date of entry into force of this Protocol under Article 23; and
- (c) communications and declarations received under Article 24.

Article 27—Registration

1. After its entry into force, this Protocol shall be transmitted by the depositary to the Secretariat of the United Nations for registration and publication, in accordance with Article 102 of the Charter of the United Nations.

2. The depositary shall also inform the Secretariat of the United Nations of all ratifications and accessions received by it with respect to this Protocol.

Article 28—Authentic texts

The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic shall be deposited with the depositary, which shall transmit certified true copies thereof to all the Parties to the Conventions.

INTERNATIONAL LEGAL MATERIALS *

CONTENTS

VOL. XVII, No. 1 (January 1978)

JUDICIAL AND SIMILAR PROCEEDINGS

International Arbitral Tribunal: Award on the Merits in <i>Dispute between Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arab Republic (Compensation for Nationalized Property)</i>	1
United Kingdom: House of Lords Decision in <i>Westinghouse Electric Corporation Uranium Contract Litigation (Execution of Letters Rogatory)</i>	38
United States:	
Court of Appeals for the Second Circuit Decision in <i>Reed v. Wiser and Neuman (Warsaw Convention Liability Limitations; Airline Employee Use of Limitations as Defense)</i>	62
Court of Appeals for the Tenth Circuit Decision concerning <i>Westinghouse Electric Corporation Uranium Contracts Litigation (Compliance with Discovery Order; Enforcement of Letters Rogatory in Canada)</i>	77
Supreme Court Decision in <i>Pfizer, Inc., et al. v. Government of India et al. (Right of Foreign Nations to Sue in U.S. Courts under Antitrust Laws)</i>	93

TREATIES AND AGREEMENTS

Bangladesh-India: Agreement on <i>Sharing of the Ganges' Waters</i> ..	103
Canada Centre for Remote Sensing-European Space Agency: Arrangement for <i>Cooperation in the Conduct of Remote-Sensing Programs</i>	107
Cuba-United States: <i>Maritime Boundary Agreement</i>	110
Inter-Governmental Maritime Consultative Organization-Norway: Agreement on <i>Co-operation in Development Assistance</i>	113

REPORTS

International Fund for Agricultural Development: Report of the Preparatory Commission to the Governing Council on <i>Lending Policies and Criteria</i>	119
--	-----

LEGISLATION AND REGULATIONS

Chile: <i>Foreign Investment Statute</i>	134
United States:	
Act concerning the <i>Powers of the President in Time of War or National Emergency</i>	139
<i>Clean Water Act of 1977 (Excerpts)</i>	144
Department of Commerce Regulations on <i>Restrictive Trade Practices or Boycotts</i>	169
Department of the Treasury Revised Guidelines with regard to <i>International Boycotts</i>	198
<i>Foreign Corrupt Practices Act of 1977</i>	214

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OTHER DOCUMENTS

Nuclear Suppliers Group: Guidelines for <i>Nuclear Transfers</i>	220
United Nations: General Assembly Resolution on <i>Restructuring the Economic and Social Sectors of the U.N. System</i>	235
RECENT ACTIONS REGARDING TREATIES TO WHICH THE UNITED STATES IS A PARTY	249
RECENT ACTIONS REGARDING TREATIES TO WHICH THE UNITED STATES IS NOT A PARTY	259
NOTICE OF OTHER RECENT DOCUMENTS (not reprinted)	260

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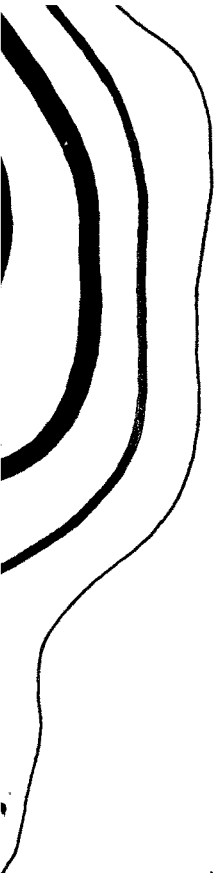
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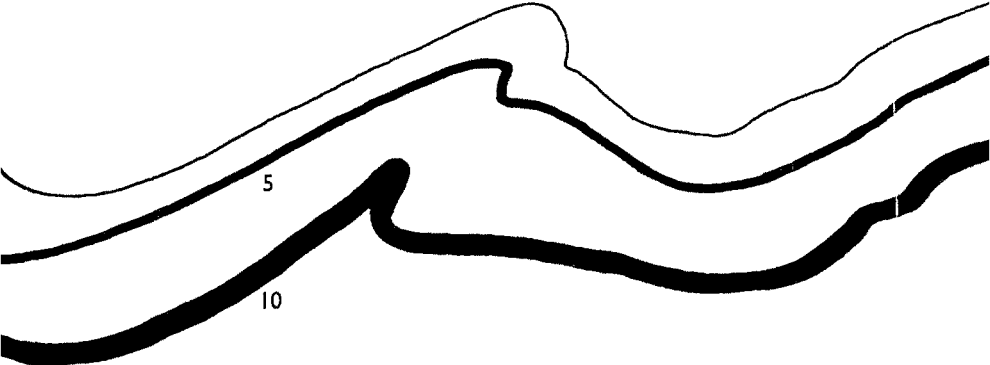
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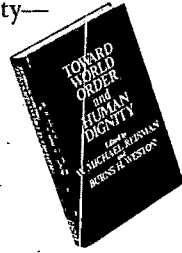
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CONTENTS

	PAGE
U.S. Generalized System of Preferences for Developing Countries: International Innovation and the Art of the Possible <i>Thomas R. Graham</i>	513
Applicability of Multilateral Conventions to Occupied Territories <i>Theodor Meron</i>	542
May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez <i>Brice M. Clagett and O. Thomas Johnson, Jr.</i>	558
The Palestinian Refugees: The Right to Return in International Law <i>Kurt René Radley</i>	586
Editorial Comment	
Brunson MacChesney	R. R. Baxter 615
Correspondence	616
Contemporary Practice of the United States Relating to International Law <i>Marian Nash</i>	620
Judicial Decisions <i>Alona E. Evans</i>	662
Book Reviews and Notes	
Institut Universitaire de Hautes Etudes Internationales, <i>International Relations in a Changing World</i>	675
Kirgis, Frederic L., Jr., <i>International Organizations in Their Legal Setting: Documents, Comments and Questions</i>	676
Stein, Eric, Peter Hay, and Michel Waelbroeck, <i>European Community Law and Institutions in Perspective: Text, Cases and Readings. Documents for European Community Law and Institutions in Perspective</i>	678
Mutharika, A. Peter, <i>The Regulation of Statelessness Under International and National Law</i>	680
Ehrenzweig, Albert A. and Erik Jayne, <i>Private International Law: A Comparative Treatise on American International Conflicts Law, Including the Law of Admiralty. Vol. III</i>	681
Putzwiller, Max, <i>Geschichte des Internationalprivatrechts. Von den Anfängen zu den grossen Kodifikationen</i>	682
Oppler, Alfred C., <i>Legal Reform in Occupied Japan</i>	683
Maust, Jordan J., Albert P. Blaustein, and Adele Higgins, <i>The Arab Oil Weapon</i>	685
LeMarquand, David G., <i>International Rivers: The Politics of Cooperation</i>	686
Marcoff, Marco G., <i>Traité de Droit international public de l'espace</i>	687
Vallenstein, Gerd D., <i>International Telecommunications Agreements. Vol. I</i>	689

Lazarus, Claude, Charles Leben, Antoine Lyon-Caen, and Bernard Verdier, <i>L'entreprise multinationale face au droit</i>	690
<i>Foreign Relations of the United States, 1950. Vol. III: Western Europe</i>	691
—, —, Vol. VI: <i>East Asia and the Pacific</i>	692
<i>British Yearbook of International Law, 1974-1975. Vol. XLVII.</i>	695
Briefer Notices: Ofuatey-Kodjoe 696; Tekoah, 697; Bailey, 698; <i>Annual Review of United Nations Affairs, 1976</i> , 699; Shinkaretskaia, 699; Kokot and Skubiszewski (eds.), 700; Manero, 701; Leipziger and Mudge, 701; Plat-zöder, 702; Dupuy, 703; Flachsmann, 703; IAEA, Legal Series #10, 704; Chayes and Lewis (eds.), 705; Ball (ed.), 706; Kugel and Gruenberg, 706; Hermann and Jones, 707; Crotti, 708; Kavass and Sprudz (comp.) 709	

Books Received	709
-----------------------	-----

OFFICIAL DOCUMENTS

United States: Nuclear Non-Proliferation Act of 1978	712
International Legal Materials. Contents, Vol. XVII, No. 2 (March) and No. 3 (May) 1978.	743

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THE U.S. GENERALIZED SYSTEM OF PREFERENCES FOR DEVELOPING COUNTRIES: INTERNATIONAL INNOVATION AND THE ART OF THE POSSIBLE

*By Thomas R. Graham **

On January 1, 1976, some 2,700 articles from 137 developing countries and territories became eligible to enter the United States free of import duties. By this overnight elimination of tariffs that had ranged as high as 28 percent, on articles as diverse as sausage and spacecraft, from countries as different as Brazil and Bangladesh, the United States became the twenty-third and most recent industrialized country to implement a "Generalized System of Preferences" (GSP),¹ permitting imports from developing countries to enter at lower rates of duty than those applicable to the same products from industrialized countries.

The GSP concept, which consists essentially of tariff preferences being given, supposedly without strings attached, by all developed countries to products of all developing countries, has been controversial from the time that it first was introduced internationally in 1964. To its proponents, the GSP promised through "trade rather than aid" to increase the exports and purchasing power of developing countries in the short run and to diversify LDC economies in the longer run by encouraging the export of manufactured and semimanufactured articles.

To its detractors, however, the GSP proposal threatened the delicately constructed GATT² international trading system by undermining its cornerstone—the most-favored-nation (MFN) principle of nondiscrimination—and was, moreover, economically ineffectual, a sacrifice of American jobs to cheap-labor imports, and a windfall to LDC-based multinational enterprises.

Small wonder then that the U.S. GSP program (as well as all other national GSP schemes) reflects compromises that were struck during its twelve-year evolution. This article briefly retraces that evolution to show why the U.S. legislation on GSP and the administration of such prefer-

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¹ The U.S. GSP was authorized by Title V of the Trade Act of 1974 [hereinafter referred to as the Trade Act], 19 U.S.C. §§2461-2465 (Supp. V 1975), and was implemented by Exec. Order No. 11,888, 40 Fed. Reg. 55,275 (1975). Other countries implementing GSP schemes are Australia, Austria, Canada, the original six of the European Economic Community (the United Kingdom, Denmark, and Ireland later incorporated into the E.E.C. scheme their separate GSP programs), Finland, Japan, New Zealand, Norway, Sweden, Switzerland, Bulgaria, Czechoslovakia, Hungary, and the USSR. Poland implemented a GSP program on the same day as the United States.

² General Agreement on Tariffs and Trade, *done* Oct. 30, 1947, 61 Stat. A3, TIAS No. 1700, 55 UNTS 187.

ences developed as they did and then examines how the program is operating after two years of experience. The economic effects of the U.S. GSP and other GSP schemes already have been analyzed ably and in depth.³ The purpose here is to concentrate on the formulation and administration of the U.S. GSP rules.

EVOLUTION OF THE U.S. GSP RULES

ACCEPTANCE OF THE GSP CONCEPT

The first ⁴ formal proposal of a Generalized System of Preferences was made by Argentine economist Raúl Prebisch in his keynote report ⁵ to the first United Nations Conference on Trade and Development (UNCTAD), held in Geneva in early 1964.⁶ Citing a "trade gap" resulting from the slow growth of LDC primary exports compared with the relatively rapid growth of demand for manufactured goods of industrialized nations, Prebisch proposed that LDC exports be granted temporary duty-free entry into all developed-country markets as a "logical extension of the infant industry argument."

... [I]t would help the industries of developing countries to overcome the difficulties that they encounter in export markets because of their high initial costs. It is a temporary measure which by opening up larger markets to the industries of developing countries, would enable them to lower their costs and thus compete on world markets without the need for continuing preference.⁷

³ See T. MURRAY, *TRADE PREFERENCES FOR DEVELOPING COUNTRIES* (1977). See also Ginman & Murray, *The Generalized System of Preferences: A Review and Appraisal*, in *THE NEW INTERNATIONAL ECONOMIC ORDER: CONFRONTATION OR COOPERATION BETWEEN NORTH AND SOUTH?* (K. SAUVANT & H. HASENPFUG eds. 1977). For early economic analyses of the GSP proposal, see H. JOHNSON, *ECONOMIC POLICIES TOWARD LESS DEVELOPED COUNTRIES* (1967); and J. PINCUS, *TRADE, AID, AND DEVELOPMENT: THE RICH AND POOR NATIONS* (1967). For recent articles describing other aspects of the GSP, see Young, *The Generalized System of Preferences: Nations More Favored Than Most*, 8 *LAW & POLICY INT. BUS.* 783 (1976) and Nemmers & Rowland, *The U.S. Generalized System of Preferences: Too Much System, Too Little Preference*, 9 *id.* 855 (1977).

⁴ The idea of particular tariff preferences is not new. For decades, Britain and France maintained special trading relationships with their former colonies, while the United States granted preferential duty rates to products of Cuba until 1961 and to products of the Philippines until 1975. These arrangements predated the formulation of the GATT in 1948 and thus were "grandfathered" by the Protocol of Provisional Application, by which signatory nations in effect undertook to apply the GATT rules only prospectively. The GATT rules themselves, moreover, explicitly sanction preferential arrangements inherent in the creation of free trade areas and customs unions.

⁵ Raúl Prebisch, "Toward a New Trade Policy for Development," in 2 *UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT* [hereinafter referred to as UNCTAD], *PROC.*, 1st Sess. 5 (1964).

⁶ For the full report of the 1964 UNCTAD Conference, see 1-8 *id.* For a general description of the background and issues related to the first UNCTAD, see B. Gosovic, *UNCTAD: CONFLICT AND COMPROMISE* (1972).

⁷ Prebisch, "Toward a New Trade Policy," *supra* note 5, at 35.

Prebisch built into his skeleton GSP several limits that clearly anticipated political opposition. He emphasized that preferences need not be given to LDC industries that already were competitive internationally,⁸ hinted that preferences might be limited to manufactures and semimanufactures if a satisfactory definition of those terms could be found,⁹ and stressed that preferences normally would not be needed for more than ten years by any one LDC industry. Prebisch argued that firms and workers in GSP-donor countries would be protected against the disruptive effects of duty-free import competition by three different "safeguard" provisions: first, a single overall limit, to be agreed upon by all donor countries, on the volume of articles eligible for the GSP; second, an agreed number of peremptory exclusions that each donor country could use to eliminate from its own GSP scheme specific products that would compete with particularly sensitive domestic industries; and third, the right of each donor country to exclude from its GSP articles that were imported in excess of a fixed percentage of domestic consumption of such articles.¹⁰ On these and other key points, such as the treatment of the least developed developing countries¹¹ and LDC's already receiving special preferences related to their former colonial status,¹² Prebisch's proposal was prudently limited and was phrased in sufficiently general terms to allow room for negotiation.¹³

⁸ . . . [I]f as a result of the preference, a country exerts undue pressure on the prices prevailing in the industrial countries, it thereby demonstrates either that it does not need the preference or that the preference is excessive. Developed countries could hardly be expected to offer encouragement to those industries in developing countries that are already able to stand on their own feet in world markets and still less to those industries whose costs are much lower than those of similar industries in developed countries.

Id. at 38.

⁹ Prebisch feared that internationally agreed limits on product coverage would sink such coverage to the most restrictive common denominator and thus preferred that all LDC exports be eligible in principle. He appeared to recognize the unlikelihood of such a broad coverage, however, and concluded that disagreements over product coverage "should not prevent the Conference from adopting a decision in principle in favor of preferences." *Id.* at 37.

¹⁰ *Id.*

¹¹ Prebisch suggested, as one means of ensuring that the least developed countries were not entirely preempted from donor-country markets by the larger LDC's, that articles peremptorily excluded from the GSP schemes of each donor (on grounds that they competed with sensitive domestic industries) nevertheless be granted GSP benefits when imported from the least developed countries. *Id.* at 39.

¹² Not surprisingly, those already receiving special preferences wished to be compensated for any loss of their privileged status in the British and E.E.C. markets. The British representative to UNCTAD I, Edward Heath, then Secretary of State for Industry, Trade, and Regional Development, suggested what became the conventional wisdom with respect to such compensation—that the increase in the number of donor countries through the worldwide extension of preferences would sufficiently compensate recipients of colonial preferences for the loss of their privileged status. See 2 UNCTAD, *Proc.*, *supra* note 5, at 390.

¹³ The LDC's at UNCTAD I proposed in committee a GSP program that was considerably more liberal in several respects than the Prebisch proposal. Although this proposal was not adopted by the UNCTAD plenary conference, it served in succeeding years to rally the LDC's around a specific negotiating position. See 1 *id.* at 20.

UNCTAD I began that negotiation by exposing issues and positions¹⁴ and by creating an ongoing international Group on Preferences.¹⁵ Opposition to the GSP at UNCTAD I and in the years immediately thereafter was led by the United States, which doubted that the GSP would be effective enough to warrant endangering the MFN¹ principle, feared that the GSP would create a vested interest among LDC's in preventing further worldwide MFN tariff reductions in order to preserve their margins of preference, and believed that the Kennedy Round of trade negotiations, which had then just begun, would succeed in lowering tariffs to such an extent that tariff preferences would become largely irrelevant.¹⁶

In the period following UNCTAD I, however, after Australia unilaterally implemented a limited preference system for some 60 LDC products,¹⁷ the U.S. Administration was feeling increasingly isolated in its opposition to the GSP and was under intense pressure from Latin American nations (which did not benefit from the European special preference systems) to institute a "defensive" Western Hemisphere regional preference system.¹⁸ At the same time, U.S. policymakers saw in the GSP an oppor-

¹⁴ The debates at UNCTAD I showed the developed countries to be split into three basic camps: a group flatly opposing the GSP, which was led by the United States and included Canada, Switzerland, Norway, Finland, and Iceland; a group clearly supporting the GSP, which included the United Kingdom, the Federal Republic of Germany, the Netherlands (which called the GSP perhaps an "advance payment in the Kennedy Round"), and Denmark; and a group favoring qualified, negotiated preferences, composed principally of France and Belgium. This third approach became known as the "Brasseur Plan," after Maurice Brasseur, Head of the Belgian Delegation, who first proposed such negotiated preferences in the GATT in 1963. The plan was seen by other delegations as a means of preserving existing colonial preferences or at least of extracting concessions for their removal.

¹⁵ The work of the Group is reported in "The Question of the Granting and Extension of Preferences in Favour of Developing Countries," UNCTAD Doc. TD/12 (1967).

¹⁶ See Statement by George Ball, Head of the U.S. Delegation, in 2 UNCTAD, PROC., *supra* note 5, at 394. For an extensive discussion of the early U.S. position, see S. WEINTRAUB, *TRADE PREFERENCES FOR LESS-DEVELOPED COUNTRIES* (1966). See also JOHNSON, *supra* note 3, at 165-70; and PINCUS, *supra* note 3, at 205 *et seq.* U.S. opposition to the GSP at UNCTAD I may have enabled other developed countries to appear more flexible than they would have been in the absence of such opposition. See Robertson, *The Creation of UNCTAD*, in R. COX, *INTERNATIONAL ORGANIZATION: WORLD POLITICS* 262 (1969).

¹⁷ The text of a waiver granted by the GATT, excusing Australia from its MFN obligations for the purpose of instituting its preference system, is set forth in GATT, 14th Supp. B.I.S.D. 23 (1966).

¹⁸ The Inter-American Committee of the Alliance for Progress, in a letter of August 10, 1965, to the Presidents of the American Republics, stated that:

[A]lthough we are opposed to the creation of spheres of influence we commend for urgent consideration, a policy of transitory, defensive measures to compensate for such preferences. It is inequitable for the products of some of the developing countries to enjoy preferences outside this hemisphere plus non-discriminatory access to the U.S. market. A policy to compensate for such discrimination against Latin America should be worked out pragmatically, on a commodity-by-commodity basis, with provisions which would facilitate return to non-discriminatory trade as discriminatory practices are removed elsewhere.

See UNCTAD Doc. TD/B/82/Add. 2, at 29 n. 12, *quoted in* Prebisch, "Toward a Global Strategy for Development," UNCTAD Doc. TD/3, at 64 n.1 (1968).

tunity to halt the trend toward cartelization of world trade through exclusive preferential arrangements, particularly those existing between the European Economic Community (E.E.C.) and the former British and French colonies, which were being extended to other developing countries around the Mediterranean basin and which, through "reverse preferences" granted by the beneficiary LDC's to the E.E.C. member states, discriminated against U.S. exports.¹⁹ These factors persuaded President Johnson to announce to the American Chiefs of State, meeting at Punte del Este on April 14, 1967, that:

We are ready to explore with other industrialized countries—and with our own people—the possibility of temporary preferential tariff advantages for all developing countries in the markets of all the industrialized countries.²⁰

This statement enabled the Organisation for Economic Co-operation and Development (OECD) to announce the following November a consensus among developed countries, based on "political and psychological factors rather than economic criteria," that the GSP could be a useful tool for economic development²¹ and to present to UNCTAD II meeting in New Delhi in early 1968 united, if somewhat vague, positions on several key GSP elements. The OECD members agreed, for example, that the GSP should last ten years, should consist of tariff cuts either to zero or to "substantial reductions below MFN rates," and should have a product coverage extending to manufactured and semimanufactured products, with processed and semiprocessed primary and agricultural products to be examined on a case-by-case basis. These nations further agreed that GSP benefits should be extended to self-designated, "bona-fide" developing countries and that domestic safeguards might consist either of the withdrawal of GSP benefits from imports exceeding a particular volume or of an "escape-clause" type withdrawal of benefits if GSP imports were

¹⁹ Perhaps the most concise explanation of the reasons for the change in the U.S. position with respect to the GSP is contained in the prepared statement by Anthony M. Solomon, then Assistant Secretary of State for Economic Affairs, before the Subcommittee on Foreign Economic Policy of the Joint Economic Committee, July 12, 1967. Mr. Solomon stated, *inter alia*, that

[t]he growing rash of further proliferation of trade arrangements which discriminate among developing countries was from our viewpoint a most unfortunate development both politically and economically. It threatened to fragment world trade; it increased the pressures from Latin America for exclusive trade arrangements with the United States; it was a retrogression toward special spheres of influence. It became quite apparent to us in the Executive Branch that this posture which the U.S. had maintained since the issue of trade preferences first arose in 1964 was ill-suited to our political and economic interests. Politically, we found ourselves virtually isolated from all the developing countries and most of the industrialized countries as well. Economically, our reservation in principle and skepticism precluded our having much influence over the proliferation of discriminatory arrangements and also reduced our influence with regard to the specific workings of a preference scheme which other industrialized countries indicated they might put into effect whether or not the United States took part. . . .

²⁰ 56 DEPT. STATE BULL. 709 (1967).

²¹ "Report by the Special Group on Trade with Developing Countries of the Organisation for Economic Co-operation and Development," OECD Doc. TC (67)(16), Pt. 1, para.(1).

causing or threatening injury to a domestic industry. The OECD countries also noted that developed countries probably would exclude from GSP benefits at the outset some products for which LDC's already were competitive. They insisted, moreover, in the interest of future worldwide MFN tariff reductions, that margins of preference not be guaranteed.

For their part, the developing countries set forth in the "Charter of Algiers" their proposal that the GSP consist of 20-year, duty-free treatment for all exports of developing countries, subject only to developed-country domestic safeguards to be agreed upon and monitored internationally.²²

The 1968 UNCTAD Conference in New Delhi agreed unanimously in principle that a GSP should be established but it could not narrow the specific differences between developed and developing countries. In July 1969, under the auspices of an UNCTAD Special Committee on Preferences, the United States and seventeen other industrialized countries produced "illustrative submissions" tentatively indicating basic outlines of their national GSP proposals. These submissions professed to attempt "as concerted an approach as possible," but in fact the major donors' proposals differed fundamentally. The United States proposed "a simple scheme" of duty-free treatment for most manufactured and semi-manufactured products, relying only on the standard escape clause²³ and adjustment assistance²⁴ as safeguards for domestic industries. The E.E.C. and Japan, by contrast, proposed more complex GSP systems in which eligible articles were divided into "sensitive," "semi-sensitive," and "non-sensitive" categories, with less than duty-free treatment and tariff-rate quotas (by which the duty rate rose automatically to the nonpreferential level on articles imported in excess of specified quantities) applicable to the sensitive and semi-sensitive categories.

The United States further proposed to except textiles, shoes, petroleum, and petroleum products from its list of eligible manufactured and semi-manufactured products and to grant preferences on a selected list of agricultural and fishery products. The U.S. GSP was intended not to last

²² UNCTAD Doc. TD/38 and Add. 1 & 2, *reprinted in* 1 UNCTAD, Proc., 2d Sess. 431 (1968). The LDC position at Algiers built upon earlier detailed studies by the UNCTAD Secretariat, including "The Question of the Granting and Extension of Preferences in Favour of Developing Countries," UNCTAD Doc. TD/B/C.2/AC. 1/7 (1967). See also "A System of Preferences for Exports of Manufactures and Semi-Manufactures from Developing to Developed Countries," UNCTAD Doc. TD/12/Supp. 2 (1967); and "The Question of Granting and Extension of Preferences in Favour of Developing Countries," UNCTAD Doc. TD/12 (1967).

²³ The escape clause is an internationally accepted mechanism that permits import barriers to be raised temporarily in order to provide an opportunity for recovery to a domestic industry that has been injured or threatened with injury by import competition. Currently, U.S. authority and procedures for escape-clause actions are embodied in sections 201-203 of the Trade Act, 19 U.S.C. §§2251-2253 (Supp. V 1975). Use of the escape clause as a domestic safeguard is permitted by Article XIX of the GATT.

²⁴ Adjustment assistance, consisting of federal aid to workers, firms, and communities affected adversely by import competition, is authorized by sections 221-274 of the Trade Act, 19 U.S.C. §§2271-2374 (Supp. V 1975).

more than ten years, would not constitute a binding commitment,²⁵ and was not to impede future MFN tariff reductions.

The United States attached three important conditions to its proposal: first, that all developed countries adopt a single, common scheme; second, that LDC's receiving special preferences in other developed-country markets for products covered by the GSP be excluded from the U.S. scheme; and third, that developing countries granting reverse preferences to the products of other developed countries be excluded from eligibility for U.S. GSP benefits. The first of these conditions reflected a U.S. concern for equal GSP burden sharing among donor countries, which was viewed as a practical and political necessity on the ground that any donor country which provided a significantly more liberal GSP scheme than others would have its market flooded by LDC imports, being diverted away from the markets of the more restrictive donors. The second two conditions illustrated the intention of the United States to use the GSP to dismantle, or to prevent the spread of, exclusive trading blocs.

In the fall of 1970, the donor countries submitted redrafted proposals, which the UNCTAD Special Committee on Preferences found to be satisfactory as bases for implementing acceptable national GSP schemes. The UNCTAD Trade and Development Board formally accepted these on behalf of the LDC's on October 13, 1970.²⁶ A temporary GATT waiver of developed-country MFN obligations to the extent necessitated by the GSP, granted in June of 1971, completed international acceptance of the GSP concept.²⁷

Most of the donor-country compromises that made international consensus on the GSP possible came from the United States. Between 1969 and 1970, the United States dropped its insistence on a single common GSP (asking instead for comparable results and burden sharing from systems that were harmonized to the extent possible); dropped its exclusion *ab initio* of LDC's receiving special preferences, but reserved the right to exclude such LDC's if trade under the special preferences grew to significant proportions; and modified its exclusion of LDC's granting reverse preferences to products of developed countries by offering to include such LDC's in return for assurances that the reverse preferences would be phased out within a reasonable period.

The developing countries, for their part, made consensus possible by

²⁵ The significance of a tariff binding in international trade usage is that a country making such a binding cannot thereafter raise the bound duty rate or otherwise nullify or impair the benefits of the binding without risking trade retaliation against its exports by affected countries. Such retaliation may be avoided by "compensating" the affected countries with trade concessions (such as other bound tariff reductions) on other products. The U.S. emphasis on the nonbinding nature of the GSP reflected the strongly held position of the United States and other donor countries that the withdrawal of GSP benefits was not to give rise to threats of trade retaliation or to claims for trade compensation.

²⁶ UNCTAD Doc. TD/B/330 (1970).

²⁷ The text of the waiver is set forth in GATT Doc. L/3545 (1971), *reprinted in* GATT, 18th Supp. B.I.S.D. 24 (1972).

accepting GSP proposals described in terms that were general enough to mask unsettled points and by yielding to the donors' viewpoints on virtually all key issues such as limited product coverage, unilateral safeguard mechanisms, self-election of beneficiaries, ten-year duration, and vagueness regarding any special measures to be taken in favor of the least developed of the developing countries. This flexibility reflected an apparent LDC belief that they had struck the best bargain possible and a desire to hurry the GSP into reality in time for inclusion in the strategy of the Second United Nations Development Decade and before the start of the 1972 U.S. presidential election campaign.²⁸

ENACTMENT OF THE GSP LEGISLATION

A. The Administration initiative

On July 1, 1971, the original six states of the E.E.C implemented the first full-fledged GSP scheme, based on the principles of the 1969-1970 E.E.C. proposals. Japan followed a month later; Norway instituted a GSP in October; Denmark, Finland, Ireland, New Zealand, Sweden, and the United Kingdom implemented schemes on January 1, 1972; and Switzerland and Austria followed shortly thereafter.²⁹

For the United States, GSP implementation was more complicated. Unlike most other donor countries, whose schemes were implemented by administrative regulations, the U.S. GSP required implementing legislation. Early U.S. implementation would have required that a heavily Democratic Congress enact the proposal of a Republican President to admit alleged "low-wage imports" duty free during an election year in which protectionist sentiment was running at the highest level in decades and in which the U.S. balance of payments was causing sufficient concern to generate the "Nixon shocks" of August 1971.

There were, moreover, unsettled problems concerning the structure and content of the U.S. GSP. The decisions of the Johnson and Nixon Administrations to participate in the granting of generalized preferences had been premised on the assumption that an internationally uniform GSP scheme of zero duties, no quantitative limits, and standard escape-clause safeguards would be adopted by all donor countries. This single, simple, unrestricted system was key to the burden-sharing among GSP donor countries, which the U.S. viewed as essential both for congressional support and in order to prevent unbalanced preferential opportunities from merely diverting LDC trade from the markets of the least generous donors to those of more generous donors. By the spring of 1970, however, it was clear that the E.E.C. and Japan would not abandon their insistence on a more complicated tariff-rate quota approach and the United States, again isolated internationally, dropped its demand for an internationally uniform GSP on the assurance that an OECD mechanism would keep

²⁸ See Gosovic, *supra* note 6, at 87.

²⁹ For a capsule description of all national GSP schemes, see "Generalized System of Preferences: Digest of Schemes," UNCTAD/UNDP Doc. TAP/136/Rev. 1 (1976).

national GSP schemes under surveillance and would recommend necessary adjustments.

By the summer of 1971, with the E.E.C. and Japan implementing GSP schemes based on limited preferential access, both in terms of quantity and in terms of preferential duty rates that were less than zero in some cases, the U.S. Administration undertook a basic reevaluation of its approach to the GSP. The immediate cause, and to some extent the excuse, for this review was the report of the President's Commission on International Trade and Investment Policy, known generally as the *Williams Commission Report*. This report recommended, in July 1971, that the President request from the Congress legislative authority to initiate a GSP along the lines of the 1970 U.S. proposal, provided that countries which demonstrated competitiveness in specific products not be granted preferences for those products and that the responsibility for improved markets for LDC's be shared among developed countries, "in particular the European Community and Japan."³⁰

Each of these proposals was responsible for a major addition to the evolving U.S. preference system. The necessary flexibility to maintain international burden sharing was assured by adding authority for the President to withdraw, suspend, or limit GSP benefits at any time for any article or country. By embracing a "competitive-need" concept, a mechanism was provided for promoting the twin principles that preferences should be granted only where needed to establish a competitive foothold and that the least developed of the LDC's and new exporters should not be entirely squeezed out of GSP markets by established LDC exporters. This concept, which Prebisch in essence had invented in his first GSP proposal,³¹ called for the withholding of GSP benefits from any particular article of a GSP-beneficiary LDC that had exported that article to the United States during the previous year in a quantity exceeding either a specified dollar amount or a fixed percentage of total U.S. imports of the article. Both the competitive-need formula and the presidential discretion to restrict GSP benefits were to become central features of the U.S. GSP program.

Many other important details remained to be settled, such as: whether to exclude *ab initio* other products in addition to textiles, shoes, petroleum, and petroleum products, which had been excluded from the initial U.S. proposal;³² whether to relax the proposal to condition the eligibility of those LDC's granting reverse preferences on their giving advance assurances that such preferences would be ended within a reasonable period in order to permit those 50-odd LDC's to be eligible initially, subject to

³⁰ UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD (1971). The Commission's chairman was Albert L. Williams of IBM.

³¹ *Supra*, note 8.

³² There was particularly heavy pressure to add watches to this exclusionary list, mainly because watch assembly operations are important to the Virgin Islands, American Samoa, and Guam, each of which exported assembled watches duty free to the United States under special tariff provisions.

the loss of eligibility if the reverse preferences were not ended by a fixed date;³³ how to handle Hong Kong, a particularly sensitive question because of Hong Kong's highly developed export industries; what to do about Communist LDC's;³⁴ whether to add a special escape-clause mechanism permitting domestic industries to seek termination of GSP benefits for imports with which they competed by demonstrating to the U.S. Tariff Commission that GSP competition, as contrasted with import competition from all sources, had injured them;³⁵ and whether the U.S. countervailing duty law would be applicable to articles that were duty free under the GSP.³⁶

The resolution of each of these issues involved essentially political decisions regarding a balance between international pressures to implement a liberal GSP program and domestic pressures to exclude "import-sensitive" products and unpopular countries and to limit the GSP in other ways that would build political support for enactment of the program. The executive branch was acutely aware that, except for importers, govern-

³³ The LDC's granting reverse preferences had protested vigorously the U.S. requirement of advance assurances that the preferences would be ended; they were unwilling to risk losing the advantages they derived from preferential access to the E.E.C. market by publicly promising to end the E.E.C.'s preferential access to their markets. In response, the United States was willing to consider dropping the requirement of an advance commitment to end reverse preferences and instead to set a date by which U.S. GSP eligibility would end if the reverse preferences continued. The date mentioned most often was 1975, the year that the Yaoundé Convention, covering many of the E.E.C.-LDC preferential relationships, and the Laurel-Langley Agreement, establishing a preferential relationship between the United States and the Philippines, were to expire. It was recognized that such a change would put pressure on the E.E.C. to eliminate the requirement of reverse preferences in any new arrangement succeeding Yaoundé.

³⁴ It was generally assumed that those Communist countries whose products did not already receive nondiscriminatory MFN treatment from the United States would not be eligible for U.S. GSP benefits. Questions remained, however, with respect to Yugoslavia, which received MFN treatment from the United States and was a member of the GATT and the UNCTAD Group of 77, as well as other Communist LDC's that might receive MFN status from the United States in the future. Poland, which also enjoyed U.S. MFN status, generally was regarded as a developed country and was not a potential GSP beneficiary.

³⁵ The U.S. OECD submission had indicated that the standard escape clause, which required a showing that increased imports resulting in major part from a trade concession (or, in this case, the GSP) caused or threatened serious injury to a competing domestic industry, would be the only safeguard in the U.S. system. A debate remained as to whether the President should have the authority to distinguish between GSP-beneficiary countries and other countries in applying escape-clause import relief and to confine relief to the withdrawal of GSP benefits if preferential imports were the cause of injury.

³⁶ In 1971, the U.S. countervailing duty law did not apply to duty-free imports. Administration planners had to address the question whether imports entering duty free under the U.S. GSP could be freely subsidized without the possibility of countervailing duties offsetting the effects of the subsidies and, if not, whether the imposition of countervailing duties would be subject to an "injury test," since the U.S. countervailing duty law did not require a showing of injury to a domestic industry as a prerequisite to the imposition of countervailing duties on subsidized dutiable imports.

ment trade policy specialists, and academicians, the GSP was bereft of an organized and committed constituency and was in constant danger of being viewed by the Congress as expendable. The Executive thus drafted its GSP legislation with an eye to congressional acceptability and attached the legislation to the widely supported trade reform bill (H.R. 6767) that was developing rapidly in early 1973.³⁷

B. Congressional changes

H.R. 6767 added to the 10-year, zero-duty GSP that the United States had proposed in 1970 the unlimited presidential discretion to end GSP benefits at any time for countries or articles, which was designed to ensure burden sharing, and also added annual "competitive-need" limits of \$25 million and 50 percent of total U.S. imports for each eligible article from each beneficiary country.³⁸ The bill maintained a hard line on reverse-preference countries, requiring assurances that such preferences would be ended by January 1, 1976, and as expected excluded most Communist countries by permitting GSP benefits only for countries that were accorded most-favored-nation status by the United States.³⁹ Although the bill did not exclude any products by name, it did exclude articles subject to import restrictions under any of seven different legal provisions⁴⁰ and required the holding of public hearings and the receipt

³⁷ The legislation authorizing the GSP was submitted as Title VI of H.R. 6767, the Trade Reform Act of 1973, which was transmitted by the President to the Congress on April 10, 1973. The President's message accompanying his transmittal of the bill showed, in outline form, how some of the outstanding questions had been settled. The President announced

. . . our intention to exclude certain import-sensitive products such as textile products, footwear, *watches and certain steel products* from . . . preferential treatment, *along with products which are now subject to outstanding orders restricting imports*. . . Public hearing procedures would be held before such preferences were granted and preferential imports would be subject to the import relief provisions. . . . Once a particular product from a given country became fully competitive, however, it would no longer qualify for special treatment. We would not grant preferences to countries which discriminate against our products in favor of goods from other industrialized nations unless those countries agreed to end such discrimination (emphasis added).

See "Message of the President," in HOUSE COMM. ON WAYS AND MEANS, THE ADMINISTRATION PROPOSAL ENTITLED THE "TRADE REFORM ACT OF 1973," H.R. DOC. NO. 478, 93rd Cong., 1st Sess. (1973).

³⁸ The bill provided that the competitive-need limits could be waived by the President on grounds of national interest.

³⁹ In addition to the mandatory criteria on MFN and reverse preferences, H.R. 6767 provided that the President was to take into account such factors as a country's self-election to developing status, its level of economic development, whether it had nationalized U.S. property without compensation, and GSP burden sharing among donor countries. Aimed primarily at Hong Kong, this last guideline provided the President with a handle for the removal of Hong Kong's eligibility if other countries ceased to grant it GSP benefits.

⁴⁰ These were the escape-clause provisions in Section 350 of the Trade Expansion Act and Sections 201-203 of H.R. 6767; Section 22 of the Agricultural Adjustment Act; Section 202 of the Sugar Act of 1948; Meat Import Act of 1964; any agreement con-

of advice from the Tariff Commission and several executive branch agencies before any article could be designated for GSP benefits.⁴¹

The GSP provisions passed the House in December 1973, as Title V of the Trade Reform Act of 1973.⁴² The House retained essentially intact the Administration's concept of the GSP program only sharpening the drafting and tightening congressional oversight of it. The most significant House amendments were the listing of 26 developed countries that were not to be eligible for GSP benefits⁴³ and the tightening of the competitive-need limits to require that a beneficiary country that exceeded either of the limits for any article during a calendar year would lose its GSP benefits for that article within 60 days after the close of the calendar year, unless the President determined that it was in the national interest to let the benefits continue.

The Senate changed the name of the trade bill to the Trade Act of 1974 and passed it on December 13, 1974, in the waning hours of the 93rd Congress.⁴⁴ The House-Senate Conference Report was adopted on December 20, 1974,⁴⁵ and President Ford signed the Trade Act into law on January 3, 1975.⁴⁶ As the trade bill hung in the balance during months of markup sessions in the Senate Finance Committee and later on the Senate floor, Title V was viewed generally as the section that was in the greatest danger of elimination. This perception weakened the bargaining position of advocates of GSP in and out of the government and made the program an easy target for restrictive amendments.

Thus, in the wake of the 1973 OPEC oil embargo and in the midst of the 1974 recession, the Senate Finance Committee added provisions flatly excluding from GSP eligibility: (1) all OPEC members and all members of other international cartels that disrupt prices and supplies, unless such countries would agree to assure the United States of reasonably priced

cluded under Section 204 of the Agricultural Act of 1956; or any national security action by the President pursuant to Section 232 of the Trade Expansion Act. The bill also provided for special escape-clause relief in that the President could, following an affirmative finding of injury to a domestic industry from imports, terminate the status of an article as eligible for the GSP in lieu of providing any other import relief.

⁴¹ In addition, in order to ensure that GSP benefits were not accorded to products of developed countries that were merely transshipped through eligible developing countries, the bill provided that for an article to receive GSP benefits, it would have to be imported directly from a GSP beneficiary country; it would also have to have a value added, consisting of the sum of the cost or value of materials produced in the beneficiary country plus the direct costs of processing operations performed in the beneficiary country, equal to or exceeding a percentage of the appraised value of the article to be prescribed by the Secretary of the Treasury.

⁴² H.R. 10710, 119 CONG. REC. 40, 502 (1973).

⁴³ These countries were Australia, Austria, Canada, Czechoslovakia, the E.E.C. member states, Finland, East Germany, Hungary, Iceland, Japan, Monaco, New Zealand, Norway, Poland, Republic of South Africa, Sweden, Switzerland, and the USSR.

⁴⁴ 120 CONG. REC. S21,484 (daily ed. Dec. 13, 1974).

⁴⁵ 120 CONG. REC. H12,575 (daily ed. Dec. 20, 1974), *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 7367.

⁴⁶ 11 WEEKLY COMP. OF PRES. DOC. (Jan. 10, 1975).

access to economically important supplies; (2) all Communist countries;⁴⁷ (3) all countries granting reverse preferences *that have a significant adverse effect on U.S. commerce*, unless such countries gave assurances that they would eliminate the preferences or *take steps to substantially eliminate the adverse effects* by January 1, 1976;⁴⁸ (4) countries that nationalize U.S. property without prompt, adequate, and effective compensation, good faith negotiations, or arbitration; and (5) countries that do not cooperate with U.S. efforts to prevent illegal drug traffic. A sixth restriction, denying eligibility to countries that fail to recognize or enforce valid arbitral awards in favor of U.S. persons, was added on the Senate floor.⁴⁹ A seventh restriction, denying eligibility to countries that aid and abet international terrorism, was enacted in 1976 following the Israeli raid to release hostages at Entebbe.⁵⁰ The Finance Committee tightened significantly the competitive-need provision by specifying much narrower authority for the President to waive imposition of the limits than was provided in the House bill;⁵¹ the Committee also added an "inflation escalator" allowing the competitive-need limit of \$25 million to change in proportion to changes in the U.S. gross national product.

The Finance Committee report listed some 100 countries that the Committee assumed would be "actively considered" for GSP beneficiary status,⁵² although no attempt was made to define "developing countries." The report included a letter from the President's Special Trade Representative, Ambassador William Eberle, reaffirming the Nixon commitment that textile articles subject to textile agreements, footwear, watches, and certain steel products would be excluded from GSP eligibility and adding that "other items which may be considered import-sensitive in the context of generalized preferences"—a phrase that was to play a major role in GSP administration—also would be excluded. This exclusionary list, plus "import-sensitive electronic articles" and "import-sensitive semi-manu-

⁴⁷ This provision was more restrictive than the corresponding provision in the House bill which excluded only countries the products of which "do not receive nondiscriminatory treatment" from the United States.

⁴⁸ Emphasis added. This provision, which was known as the "Israeli Amendment" because it loosened the reverse-preference restrictions so as to permit Israel to qualify for the GSP, was substantially more liberal than the House version.

⁴⁹ This amendment, proposed by Senator Taft, was apparently aimed at India.

⁵⁰ Tax Reform Act of 1976, §1802, P.L. 94-455, 90 Stat. 1763, 19 U.S.C. §2462(b)(7).

⁵¹ The House bill provided the President with a general waiver of the limits on the basis of "national interest." The Senate bill limited the waiver to countries that: (1) had a historical preferential trade relationship with the United States; (2) had a treaty or trade agreement covering economic relations with the United States in force at the time of the waiver; and (3) did not discriminate against, or impose unjustifiable or unreasonable barriers to, U.S. commerce. This provision, which remained in the law as enacted, is known generally as the "Philippine waiver," because only the Philippines can meet the first requirement; it has never been used. Only Cuba, in addition to the Philippines, could potentially meet the first test, but Cuba is not currently eligible for the U.S. GSP by reason of the provision excluding Communist countries that do not have MFN status.

⁵² S. REP. NO. 1298, 93rd Cong., 2d Sess. 220 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7186, 7350.

factured and manufactured glass products," was added to the text of the Trade Act during the eleventh-hour scramble on the Senate floor.⁵³

The House-Senate conference compromised on the provision excluding Communist countries, by providing that no Communist country could be designated for GSP benefits unless: (1) the country's products received MFN treatment from the United States, (2) the country was a member of the GATT and the IMF, and (3) it was not "dominated or controlled by international communism."⁵⁴ The conference also provided the President with authority to waive, for reasons of national economic interest, the country exclusions based on nationalization of U.S. property, failure to assist in controlling drug traffic, and refusal to honor arbitral awards. The conference changed the presentation of the OPEC and "other cartel" exclusions, without in fact changing their practical effect.⁵⁵ In addition, the Trade Act not only provided that articles subject to presidentially proclaimed escape-clause actions are ineligible to receive GSP benefits, but also established a special escape-clause procedure for the denial of GSP benefits to imports that cause domestic injury as a result of their GSP eligibility.⁵⁶ The law, moreover, expressly allows countervailing duties to be imposed against GSP-eligible imports that benefit from subsidies in the exporting country, but it subjects such actions to the same "injury test" that applies to all countervailing duty actions involving duty-free products.⁵⁷

II.

OPERATION OF THE GSP PROGRAM

IMPLEMENTATION

Enactment of Title V shifted the focus of stress and controversy from the Congress back to the Executive. Although the legislation ensured

⁵³ Trade Act, §503 (c)(1), 19 U.S.C. §2464(c)(1) (Supp. V 1975).

⁵⁴ These provisions were intended to be a shorthand description of Yugoslavia, which already had MFN status, and Romania, which was shortly to be granted it.

⁵⁵ The conference combined the two exclusions into a single provision. This appeared to change the meaning by specifying that a member of OPEC or another arrangement was to be ineligible for the GSP if "such country *participates*" in an embargo or a price increase with disruptive effects. The use of the present tense might have been viewed as an exclusion only of countries that embargo or raise prices in the future and not as an automatic exclusion of all OPEC countries, their embargo and initial large price increase having occurred before passage of the Trade Act. An Administration review led to a conclusion not to follow this approach, however, in part because of intense congressional opposition to it. In addition to the ambiguity regarding the use of the present tense, a key phrase is repeated in the last lines of the provision as enacted in a way that obscures the meaning. One version states that OPEC or other cartel members are ineligible for the GSP if they participate in embargoes or price increases "and . . . cause serious disruption of the world economy"; the other version uses the phrase "which causes serious disruption of the world economy." See Trade Act, §502(b)(2), 19 U.S.C. §2462(b)(2), (Supp. V 1975).

⁵⁶ Trade Act §203(f), 19 U.S.C. §2253(f) (Supp. V 1975).

⁵⁷ Trade Act §331(a), *amending* Tariff Act of 1930 §516, 19 U.S.C. §1515(d)(3) (Supp. V 1975).

that the United States would have a GSP program and established the general outline of the program, it left the designation of beneficiary countries and eligible articles, as well as key legal interpretations and operational decisions, to the Administration. Each of these steps required a semblance of consensus among agencies with widely differing institutional viewpoints and the cultivation of congressional and private-sector support for what was still perceived as a politically vulnerable program.

A. Beneficiary countries

The first procedural step posed a major political dilemma. The Trade Act required the President to designate GSP beneficiary countries, after notifying the House and Senate of his intention to do so, before making any other moves to implement the program.⁵⁸ Such an early designation inevitably would draw considerable attention to the list of countries that could *not* be designated because of the law's exclusionary provisions. This attention was viewed as undesirable, not merely because it would heighten the international criticism being leveled against the country exclusions, but more importantly because any such early public identification of eligible or ineligible countries would be counterproductive and misleading. It was anticipated that many LDC's with reverse-preference or nationalization problems would take quiet steps to settle those problems and attain eligibility for GSP before the program became operational later in the year, and it was feared that identification of such countries as being currently ineligible would reduce the likelihood of their taking such steps.⁵⁹ The accurate identification of countries with serious reverse-preference problems and of those with unsettled nationalization problems was, moreover, a time-consuming task.⁶⁰

⁵⁸ *Id.*, §§131, 502(a)(1), and 503(a), 19 U.S.C. §§2151, 2462(a)(1), and 2463(a), (Supp. V 1975), in combination, require that the following procedural steps be taken in order to implement the GSP: that the President notify the House and Senate of the beneficiary countries that he intends to designate, together with the considerations entering into his decision to designate them; that the President designate beneficiary countries by Executive order; that the President publish and furnish to the U.S. International Trade Commission (USITC) lists of articles that may be considered for GSP designation; that the USITC, within 6 months, furnish a report on the probable economic effects of such designations on domestic industries producing like or directly competitive articles and on consumers; that the Departments of Agriculture, Commerce, Defense, Interior, Labor, State, and Treasury, and the Special Representative for Trade Negotiations, as well as other appropriate sources, furnish information and advice regarding the designations; and that the Administration hold public hearings with respect to the designations. The President may then designate eligible articles by Executive order and provide duty-free treatment for those articles when imported from the designated beneficiary countries.

⁵⁹ The Executive had argued strenuously but unsuccessfully to the House-Senate conferees that the law should permit a temporary or conditional designation of beneficiary countries, in order to give the public and agencies studying potentially eligible articles a good idea as to which countries would be eligible, without requiring the exclusion of countries that could not immediately qualify under the criteria of eligibility.

⁶⁰ Initial determinations regarding the effect of nationalization problems on a coun-

The President attempted to finesse these problems by announcing to the House and Senate his intention to make blanket use of the law's "national economic interest" waiver,⁶¹ so that no country would be excluded from the initial designation (subject to review before the GSP went into operation) because of problems with nationalization, drugs, or arbitration.⁶² Those countries that clearly were caught by the Communist, OPEC, or reverse-preference exclusions, which cannot be waived, were to be listed separately as "countries which may eventually be designated." This approach was abandoned, however, after it received severe criticism from key congressional staff members, who argued that it stretched the waiver provision beyond what was intended and that the public had a right to know, when participating in hearings preparatory to implementation of the program, precisely which countries would be GSP beneficiaries. The second reason contained more rhetoric than logic, in view of the President's authority to amend the beneficiary list at any time before or after the GSP became operational.

The controversy concerning use of the national economic interest waiver and the process of identifying countries with nationalization problems delayed the formal designation of beneficiary countries until late March 1975, when the President designated 89 developing countries and 43 dependent territories as GSP beneficiaries.⁶³ In the same Executive order, the President listed as "under consideration" 24 countries that were not then eligible.⁶⁴ These lists were to be amended before the GSP went into effect.

try's GSP eligibility were made by the Interagency Staff Coordinating Group on Expropriation. The Group operated under the auspices of the Council on International Economic Policy, but it was chaired by an official of the Department of State. The recommendations of this Group were sent to the Trade Policy Staff Committee for action.

⁶¹ Trade Act, §502(b), 19 U.S.C. §2462(b), (Supp. V 1975), sets forth the national economic interest waiver in the following terms:

Paragraphs (4), (5), and (6) [the nationalization, drug, and arbitration exclusions] shall not prevent the designation of any country as a beneficiary developing country under this section if the President determines that such designation will be in the national economic interest of the United States and reports such determination to the Congress with his reasons therefor.

⁶² Letter of January 13, 1975, from President Ford to Speaker of the House Carl Albert and President of the Senate Nelson Rockefeller, on file at the Office of the Special Representative for Trade Negotiations. The President's letter stated that use of the waiver to designate all countries that would otherwise have been ineligible was in the national economic interest "in order to allow the International Trade Commission to take into account all prospective beneficiaries when evaluating the domestic economic effects of granting generalized preferential treatment."

⁶³ Exec. Order No. 11,844, 40 Fed. Reg. 55,275 (1975). The President determined that 18 of the designated countries (Afghanistan, Argentina, Bangladesh, Bolivia, Central African Republic, Congo (Brazzaville), Dahomey, Egypt, El Salvador, Ethiopia, India, Morocco, Pakistan, Sri Lanka, Sudan, Syria, Tanzania, and Zaire) were taking steps to carry out their obligations under international law with respect to nationalizations of U.S. property and thus were eligible for designation notwithstanding the nationalizations.

⁶⁴ The 24 countries listed as under consideration were Algeria, Ecuador, Gabon,

Several additional political and legal issues remained after this first designation. The OPEC exclusion, which President Ford had singled out for criticism in signing the Trade Act into law,⁶⁵ drew intense foreign criticism, centered in Latin America, where Venezuela and Ecuador, which had not participated in the 1973 oil embargo but which raised their prices along with other OPEC members, were ineligible for U.S. GSP benefits.⁶⁶ A proposal to permit nonembargoing OPEC members to qualify for the GSP, which was supported by the Administration, died in the House Ways and Means Committee in the spring of 1975.⁶⁷ Other similar proposals continue to be considered at this writing.

The Trade Act provision that permitted free trade areas or customs unions to request joint designation as a single GSP beneficiary⁶⁸ could

Indonesia, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, United Arab Emirates, and Venezuela (OPEC membership); Cyprus, Greece, Israel, Portugal, Spain, and Turkey (reverse preferences); Somalia, Uganda, People's Republic of Yemen (nationalizations); Romania (Communist, without U.S. MFN status or other requisites); and Hong Kong (controversy regarding developed state of its manufacturing industries).

⁶⁵ Gerald R. Ford, "Remarks Upon Signing the Trade Act of 1974," [1975] PUB. PAPERS 3.

⁶⁶ This attitude perhaps was based more on the symbolism of the exclusion than on the loss of tangible trade benefits. Only about 0.4 percent of dutiable Venezuelan exports to the United States and 11.9 percent of dutiable Ecuadorian exports would have been eligible for GSP in any event, based on 1972 data. *Hearings on U.S. Trade Relations with Latin America Before the Subcom. on Western Hemisphere Affairs of the Senate Comm. on Foreign Relations*, 94th Cong., 1st Sess. 221 (1975) (statement of Kenneth A. Guenther, Acting Deputy Special Trade Representative). The figures for the dutiable imports from the Arab OPEC members that stood to benefit from the GSP would, in all likelihood, be smaller still. OPEC members could, moreover, have qualified for GSP eligibility, pursuant to section 502(e) of the Trade Act, 19 U.S.C. §2462(e) (Supp. V 1975), by entering into agreements described in section 108 of the Trade Act, 19 U.S.C. §2118 (Supp. V 1975) that would assure the United States of "fair and equitable access" to oil "at reasonable prices." Not surprisingly, the prospect of eligibility for the U.S. GSP was not sufficient leverage to induce the OPEC countries to seek such agreements, and it is doubtful that agreements could have been reached in any event, since such an agreement on the basis of current prices would have required implicit recognition by the United States that the current prices were "reasonable."

⁶⁷ The bill, H.R. 5897, was introduced by Congressman William Green and would have permitted the President to exercise the national economic interest waiver with respect to the OPEC members that did not participate in the 1973 oil embargo, *i.e.*, Ecuador, Venezuela, Gabon, Indonesia, Iran, and Nigeria. An identical bill, S. 1706, was introduced in the Senate by Senator Brock. Another bill, S. 394, introduced by Senator Bentsen, would have denied GSP eligibility only to countries that both raised prices and participated in the embargo. Still another, S. 465, introduced by Senator Kennedy, would have permitted OPEC members in the Western Hemisphere (Ecuador and Venezuela) to qualify. Congressman Michael Harrington introduced in the House an amendment identical to that of Senator Kennedy.

⁶⁸ Trade Act §502(a)(3), 19 U.S.C. §2462(a)(3), (Supp. V 1975) provides that:

[I]n the case of an association of countries which is a free trade area or customs union, the President may by Executive order provide that all members of such an association other than members which are barred from designation under subsection (b) shall be treated as one country for purposes of this title.

scarcely have been designed to discourage more effectively such designations. The only advantage of such a joint designation, other than the political one of being officially recognized as a free trade area or customs union, was the ability of the member countries to aggregate the "value added" that each contributed to products jointly produced by several members, in order to meet the GSP rules of origin requirements in cases where no one country's input could qualify.⁶⁹ This rather hypothetical advantage was entirely outweighed, however, in part by the application of more stringent rules of origin requirements (50 percent versus 35 percent) to products jointly produced by members of a free trade area or customs union designated as a single beneficiary and more importantly by the fact that the competitive-need rules made no allowance for products from jointly designated groups of countries. The Latin American Free Trade Area (LAFTA), for example, if designated as a single beneficiary, could export only up to \$25 million worth, or 50 percent of total U.S. imports, of widgets annually without losing its beneficiary status for widgets the next year. If LAFTA members were designated individually, each would be able to export widgets up to those limits without losing eligibility. No association of developing countries, moreover, was formally recognized by the United States as a free trade area or customs union in the GATT context, and the Administration was reluctant to have this issue forced as a result of the GSP.

Another interpretive problem concerned the discretionary criterion, which the President was to take into account in designating beneficiary countries, based on the "extent to which such country has assured the United States it will provide equitable and reasonable access to the markets and basic commodity resources of such country."⁷⁰ The Administration rejected arguments that this provision should prevent the designation of any article from any country that denied United States exporters access to its markets for the same article and instead interpreted the criterion literally to mean that *general* market access provided by the prospective beneficiaries was to be considered.

B. Eligible articles

Almost simultaneously with his initial designation of beneficiary countries, the President published a list of some 3,000 articles that were being considered for GSP eligibility;⁷¹ requested the advice of the U.S. Inter-

⁶⁹ For example, if Colombia imported widgets from Switzerland, increased their value by 30 percent, and exported them to the United States, the widgets would not qualify for the U.S. GSP because they would not meet the minimum 35 percent "rules of origin requirement." If, however, LAFTA were designated as a single GSP beneficiary, and if Colombia added 30 percent to the value of the widgets and Peru added another 25 percent, then the widgets would qualify for GSP benefits under the 50 percent value-added requirement applicable to jointly designated free trade areas or customs unions.

⁷⁰ Trade Act §502(c)(4), 19 U.S.C. §2462(c)(4) (Supp. V 1975).

⁷¹ 40 Fed. Reg. 13,456 (1975). This list included virtually all eligible manufac-

national Trade Commission on the domestic economic effects of designating these articles;⁷² delegated to his Special Trade Representative (STR) (in consultation with the Secretary of State) the function of administering the GSP program;⁷³ and delegated to the STR-chaired, cabinet-level Trade Policy Committee the role of making recommendations with respect to country and article eligibilities.⁷⁴

To select eligible articles, the Administration held public hearings in a dozen cities, sifted some 20,000 pages of advice and backup material from the U.S. International Trade Commission on the probable domestic economic effects of designating each article, forged rough consensus among agencies whose attitudes toward the GSP ranged from antipathy to zeal, and hazarded additional interpretations of the new legislation. The most important of these interpretations involved the list of items that the Trade Act expressly excluded from GSP eligibility.⁷⁵ Almost every item on this supposedly specific list begged questions: Was a textile article "subject to textile agreements" if it was merely covered by the comprehensive Multifiber Arrangement,⁷⁶ which provides the international umbrella for bilateral agreements regulating textile imports, or did the article have to be actually restrained by a bilateral? Did the exclusion of watches also exclude clocks and watch parts? Which electronic, steel, and glass articles were "import-sensitive"? What articles were "import-sensitive in the context of the Generalized System of Preferences," and did this phrase

tured and semimanufactured articles, along with selected lists of primary mineral and agricultural articles that were developed with the approval of the Departments of Agriculture and Interior.

⁷² Letter of March 24, 1975, from President Ford to Chairman Katherine Bedell of the U.S. International Trade Commission, on file at Office of Special Representative for Trade Negotiations.

⁷³ Exec. Order No. 11,846 §8(a), 40 Fed. Reg. 14,291 (1975).

⁷⁴ *Id.* §8(b). The Trade Policy Committee consists of the Special Representative for Trade Negotiations, as Chairman, the Secretaries of State, Treasury, Defense, Agriculture, Commerce, Labor, and Interior, and the Attorney General. The STR subsequently delegated to the interagency Trade Policy Staff Committee [hereinafter referred to as the TPSC] the role of holding public hearings on the GSP, formulating initial positions on country and article designations, and tending to day-to-day matters for which interagency approval was a practical necessity. In practice, these functions were handled by a GSP subcommittee of the TPSC.

⁷⁵ Trade Act §503(c), 19 U.S.C. §2463(c) (Supp. V 1975). The list is composed of "textile and apparel articles which are subject to textile agreements; watches; import-sensitive electronic articles; import-sensitive steel articles; footwear articles [in specified tariff categories]; import-sensitive semimanufactured and manufactured glass products; any other articles which the President determines to be import-sensitive in the context of the Generalized System of Preferences"; and articles "the subject of any action proclaimed pursuant to section 203 of this Act or section 232 or 351 of the Trade Expansion Act of 1962."

⁷⁶ The "Arrangement Regarding International Trade in Textiles" ([1974] 25 UST 1005, TIAS No. 7840) is a multilateral "umbrella" arrangement worked out under auspices of the GATT to permit GATT Contracting Parties to enter bilateral agreements regulating textile imports. The product coverage of the MFA is described in very general terms and potentially encompasses virtually all textile items.

indicate that GSP countries, rather than general import competition, had to be the cause of the import sensitivity?⁷⁷

C. Implementation

In a speech to the Seventh Special Session of the United Nations in September, 1975, Secretary of State Kissinger promised implementation of the U.S. GSP by January 1, 1976.⁷⁸ This announcement precipitated a scramble within the Administration to complete decisions about the eligibilities of articles and adjustments to be made to the list of beneficiary countries. In the six months following the initial designation of beneficiary countries, Israel had given satisfactory assurances that there would be no significant adverse effect on U.S. commerce resulting from its reverse preferences to the European Community (EC).⁷⁹ Romania had entered into a trade agreement with the United States under Title IV of the Trade Act, which permitted Romanian imports to the United States to receive MFN status, and which, together with Romania's membership in the GATT and the IMF and its independent foreign policy, enabled Romania to qualify for GSP eligibility notwithstanding the exclusion for Communist countries;⁸⁰ the reverse preferences granted to EC products by Cyprus and Turkey were determined not to have a significant adverse effect on U.S. commerce; Somalia and Turkey were found to be discharging their obligations under international law with respect to nationalized property of U.S. persons;⁸¹ and it was decided that Hong Kong's highly developed manufacturing industries need not prevent its designation, because the competitive-need limits would prevent it from driving most other potential GSP beneficiaries out of U.S. markets.⁸² As a result, each of these countries became eligible for the GSP. South Vietnam and Cambodia, by contrast, had been designated originally as GSP beneficiaries but were determined to be no longer legally eligible after the change of their governments in the spring of 1975.

By late fall, all decisions and documents were ready; however, the GSP

⁷⁷ For an opinion of the STR Office that "import-sensitivity in the context of the GSP" implies a link between the sensitivity and the GSP program (as well as for a great deal of other information about the GSP program), see letter of April 15, 1976, from Ambassador Frederick B. Dent, Special Representative for Trade Negotiations, to Mr. Gerald O'Brien, Executive Vice President, American Importers Association, *reprinted in* AMERICAN IMPORTERS ASSOCIATION, *GENERALIZED SYSTEM OF PREFERENCES* 3 (1976).

⁷⁸ Secretary Kissinger's speech was read to the General Assembly, by Ambassador Moynihan. 73 DEPT. STATE BULL. 425 (1975).

⁷⁹ These assurances consisted mainly of an undertaking to lower the MFN duty rates that applied to several key U.S. products so as to reduce or eliminate the margin of preference between these MFN rates and the preferential rates applicable to the same products from the E.E.C.

⁸⁰ [1975] 26 UST 2305, TIAS No. 8159.

⁸¹ Presidential determination to this effect was signed on November 10, 1975. 41 Fed. Reg. 2627 (1976).

⁸² It also was discovered that the Cocos (Keeling) Islands had been inadvertently left off the original designation.

program suffered one more tense but temporary delay. The United Nations General Assembly passed a resolution on November 10, defining Zionism as "a form of racism and racial discrimination."⁸³ This resolution, which drew an immediate and bitter reaction in the U.S. Congress,⁸⁴ was supported by 41 countries that were, or were soon to be, GSP beneficiaries. Members of the Congress who were searching for a timely means of retaliation found the GSP a convenient vehicle and threatened everything from delay to repeal. After several days of intensive discussions, however, the storm passed and the program went forward. On November 24, 1975, President Ford issued Executive Order No. 11,888, which designated 2,724 eligible articles, redesignated a total of 137 beneficiary developing countries and territories (adding to those previously designated Cyprus, Hong Kong, Israel, Somalia, Turkey, Christmas Island, and the Cocos (Keeling) Islands, and dropping South Vietnam and Cambodia), and provided that duty-free treatment would begin on January 1, 1976.⁸⁵

Viewed statically, on the basis of 1974 data, the initial GSP product coverage was not overwhelming. Of some \$100 billion in total U.S. imports, the value of eligible articles from beneficiary developing countries was about \$2.6 billion.⁸⁶ By not counting petroleum imports and imports that already were duty free, however, the proportion of U.S. imports eligible for the GSP rose from 2.6 to 19 percent. Viewed dynamically, the GSP looked somewhat better. The total 1974 value of U.S. imports, from all countries, of articles eligible for the GSP was about \$25 billion. The GSP was designed to offer beneficiary developing countries an edge in competing with developed countries for that \$25 billion (and growing) market for manufactured and semimanufactured goods.

Before the GSP became operational, the U.S. Customs Service issued regulations governing administration of the rules of origin and direct shipment requirements,⁸⁷ and the STR published regulations governing use

⁸³ GA Res. 3378. 30 GAOR, Supp. (No. 34) 83, UN Doc. A/10034 (1975).

⁸⁴ For the text of Senate and House resolutions condemning the UN anti-Zionist resolution and calling for a reassessment of further U.S. participation in the General Assembly, see H.R. Res. 855, S. Res. 288, and S. Con. Res. 73, 94th Cong., 1st Sess. (1975).

⁸⁵ See *supra* note 1. The order was effective with respect to articles that were both imported (*i.e.*, physically arrived) and entered or withdrawn from warehouse for consumption (*i.e.*, cleared through customs) on or after January 1, 1976.

⁸⁶ STR Press Release No. 211, Nov. 24, 1975. The list of 3,000 articles that originally were under consideration for GSP, which was published in March 1975, had excluded some 2,000 articles that were covered by the statutory exclusions. Imports from beneficiary developing countries of the 3,000 items on that initial list, after the competitive-need limits were applied, had a 1974 trade value of about \$3.5 billion. The interagency review of USITC advice and the results of public hearings further reduced the initial list by some 300 items, worth about \$0.9 billion in GSP trade to beneficiary LDC's. These 300 articles included automobiles; certain items of glass, china, and earthenware; honey and certain fruits and vegetables; bicycles; certain sporting goods; firearms; hardware; clocks; and electronic products; certain leather and wood products; and some chemicals. *Id.*

⁸⁷ 40 Fed. Reg. 60,047 (1975); 19 C.F.R. Pt. 10.171-10.178 (1975).

of the President's discretion to modify the list of articles eligible for the GSP.⁸⁸ These STR regulations, which called for interagency reviews at least semiannually of petitions to add or delete article (but not countries)⁸⁹ from GSP coverage, completed the move away from the original concept of the escape clause as the only domestic safeguard in the U.S. GSP scheme.

THE FIRST YEAR: SHAKEDOWN PERIOD

The first two months of the program exposed some early flaws. The first and most heavily criticized problem concerned the fact that the law gave the Administration only 60 days following the end of each year to adjust the competitive-need list to ensure the exclusion from GSP benefits of articles exported by beneficiary countries to the United States, during the year just completed, in excess of \$26.6 million dollars in value⁹⁰ or 50 percent of total U.S. imports of such articles.⁹¹ This meant not only that major amendments had to be made almost immediately after the GSP program began, but also that, by the time official 1975 trade and GNP figures were established and analyzed, there was very little time for advance public notice of such changes.⁹² In fact, on February 26, 1976, the President changed the competitive-need status of 180 articles on one

⁸⁸ 40 Fed. Reg. 60,042 (1975); 15 C.F.R. Ch. XX, Pt. 2007 (1975). These regulations invite interested parties to submit information relevant to the import sensitivity of articles that they wish to have added or deleted from GSP product coverage. The regulations also permit the Trade Policy Staff Committee to review the GSP article coverage on its own motion.

⁸⁹ Country eligibilities were considered to involve matters of foreign relations and classified information that were the exclusive concern of the Federal Government.

⁹⁰ The dollar-value limit was raised to \$26.6 million for 1975 by the "inflation escalator" clause in Trade Act §504(c)(1)(A), 19 U.S.C. §2464(c)(1)(A) (Supp. V 1975), which provides that the ratio of the applicable dollar limit to nominal U.S. GNP for the calendar year to which such limit applies is to remain the same as the ratio of \$25 million to 1974 GNP.

⁹¹ The competitive-need provision in Trade Act §504(c)(1), 19 U.S.C. §2464(c)(1) (Supp. V 1975), specifies that "whenever the President determines that any country [has exceeded in any year, for any article, the dollar or percentage limits] then, not later than 60 days after the close of such calendar year, such country shall not be treated as a beneficiary country with respect to such article. . . ." The unworkability of this 60-day deadline arises from the fact that official import statistics and GNP data (needed to adjust the dollar limit, *see supra*, note 90), for the recently completed year do not become available until about mid-February, after which an implementing Executive order must be submitted to the White House with some lead time prior to signature by the President.

⁹² The initial competitive-need exclusions, which were announced in November 1975, were based on data for calendar 1974. The Administration considered making no competitive-need changes in the first 60 days of 1976, but instead waiting until 1977 to make changes based on 1976 data. This approach is not explicitly inconsistent with the statute, but it was rejected as being contrary to the spirit of the law and too untidy administratively, as it would have caused 1975 data never to be used in applying the competitive-need limits.

day's effective notice.⁹³ This action, which was required by law, drew severe criticism from importers with goods caught on the water.

In making these changes, the Administration had addressed the question whether particular articles from countries that exceeded the competitive-need limits in 1974 (and thus were ineligible initially), but that fell below those limits in 1975, were to be designated for GSP benefits automatically or only after surviving a case-by-case review. The law authorizes such "redesignations" but does not require them.⁹⁴ This issue was particularly difficult with respect to imports that hovered just below the limits. In the first competitive-need review, the Administration left open the possibility of future case-by-case reviews but in fact redesignated virtually all articles from countries that were newly eligible with respect to such articles.⁹⁵

This first review also demonstrated the irrationality of a rigid application of the 50-percent competitive-need rule to low-trade items, and to items produced by a single beneficiary developing country, or by two beneficiaries only. Widgets from Ruritania must be excluded from receiving GSP benefits, for example, if Ruritania accounted for \$51 of the \$100 worth of widgets imported during the previous year.⁹⁶ Similarly, a Mexican jumping bean or tequila—by definition a product of Mexico—could never fail to exceed the 50-percent limit. Thus such articles may only receive GSP benefits if there is no U.S. production of them, in which case the 50-percent limit does not apply.⁹⁷ Production in only two bene-

⁹³ Exec. Order No. 11,906, 41 Fed. Reg. 8,758 (1976). The order also corrected—by summarily withdrawing the designation of face-finished plywood—the unfortunate results of having designated finished plywood for duty-free benefits, while continuing the 20 percent duty on the unfinished product, thereby placing domestic processors at a severe competitive disadvantage. The plywood item affected was classified to category 240.25 of the U.S. Tariff Schedules. The order also withdrew the designations of four iron alloy products (classified to tariff categories 607.01, 607.02, 607.03, and 607.04), for which the import duty is based on the alloy content, because it was considered practically impossible to administer GSP benefits for them.

⁹⁴ Trade Act §504(c)(2), 19 U.S.C. §2464(c)(2) (Supp. V 1975), states that "a country which is no longer treated as a beneficiary developing country with respect to an eligible article by reason of this subsection may be redesignated . . . if imports of such article from such country did not exceed the limitations . . . during the preceding calendar year."

⁹⁵ The only exception was Mexico's exports of woodwind musical instruments, for which 1975 import statistics were very near the 50-percent limit.

⁹⁶ Nemmers & Rowland, *supra* note 3, at 905 n.191, cite the following actual examples that occurred during the 1977 competitive-need review, based on 1976 data: Syria exceeded the 50 percent limit for marjoram and thus became ineligible even though the total value of marjoram shipments from Syria during the whole of 1976 was \$595. Similarly, Hong Kong lost GSP eligibility for certain salts of vegetable origin, because its \$400 shipment equaled 100 percent of U.S. imports of the item.

⁹⁷ Trade Act §504(d), 19 U.S.C. §2464(d) (Supp. V 1975), provides that the 50-percent competitive-need limit "does not apply with respect to any eligible article if a like or directly competitive article is not produced on the date of enactment of this Act in the United States." The Administration has published a list of 63 articles that have been determined to meet this test and for which the 50-percent limit thus does not apply. See 42 Fed. Reg. 20,973 (1977). A more flexible approach was

beneficiary developing countries tends to ensure a "ping-pong effect," whereby products are eligible from country A and ineligible from country B in the first year, with this situation being reversed in each subsequent year as importers annually switch their sources to the eligible country. Finally, importers complained that the competitive-need limits excluded many of their traditional sources of supply and thus disrupted their operation.

There was an information gap that prevented the GSP from being utilized fully during the early months. The implementing Executive order listed eligible articles only by their tariff item numbers, rather than by description, and the format of the order was opaque in other respects.⁹⁸ The customs forms for claiming GSP benefits were slow to arrive, and the regulations governing the rules of origin and direct-shipment requirements were thought by some to be unduly restrictive.⁹⁹ There was, moreover, simply an inevitable practical problem of disseminating to domestic importers and end users and to foreign exporters information that would enable them to take advantage of the new scheme. U.S. officials and UNCTAD representatives separately conducted regional seminars in several parts of the world and produced explanatory documents in an effort to increase awareness of the program.¹⁰⁰

first proposed by the Administration: to grant the President authority to waive the competitive-need limits for reasons of national interest. The limited waiver of both competitive-need rules that does exist, in §504(c)(i), (ii), and (iii), as has been shown above, can apply at present only to the Philippines.

⁹⁸ The order had four separate lists, one in the body of the order and three in annexes. The first list, which the order inserted verbatim into the U.S. Tariff Schedules, set forth the articles that were subject to competitive-need exclusions, together with the countries that had exceeded the competitive-need limits for such articles. The second list, in Annex I of the order, subdivided several tariff categories in order to designate for GSP benefits only a part of each category (e.g., Item 107.50, "beef in airtight containers," was divided into 107.48, "corned beef," and 107.52, "other," so that only corned beef could be designated). The third list, in Annex II, set forth the tariff item numbers of articles that were eligible for the GSP and were not subject to any competitive-need limits. The fourth list, in Annex III, contained the numbers for articles that were eligible for GSP benefits but were not to receive duty-free treatment when imported from certain beneficiary developing countries that had exceeded the competitive-need limits for those articles. To understand the order, a person not only had to understand the relationship of these three lists, but also had to have access to the U.S. Tariff Schedules, in order to translate the listed item numbers into product descriptions.

⁹⁹ In particular, there was criticism of the restrictive approach taken by the regulations with respect to items that could be included in the "direct costs of processing" in the LDC claiming GSP benefits, for purposes of meeting the 35 percent value-added requirement. These items excluded costs not "directly attributable to the merchandise," such as profit; administrative salaries and salesman's commissions, advertising, etc.

¹⁰⁰ See, e.g., "Scheme of Generalized Preferences of the United States of America," UNCTAD, Doc. TD/B/C.5/38 (1975); "Report of the Seminar on the GSP," Brussels, Nov. 18-27, 1975, UNCTAD Doc. TAP/160 (1976); Republic of the Philippines, "GSP Info Materials" (1975). "The Generalized System of Preferences: A Practical Guide," available from U.S. Embassies and Consulates; U.S. Customs Service, "GSP and the Traveler" (1977). See also compilations of all GSP-eligible articles by

Numerous interests, primarily domestic producers wishing to eliminate GSP benefits for articles with which they competed, sought changes in product coverage under the program. The STR regulations turned these initiatives away from the Congress and from the possibility of peremptory Executive action into a regular procedure involving public notice of petitions, opportunity for rebuttal, public hearings, and publicly announced results. The first review involved petitions for the removal of some 50 articles and the designation of eight products.¹⁰¹ It resulted in the removal, on September 1, 1976, of five articles (two types of inedible gelatin, pig and hog leather, sew-on fasteners, and large TV picture tubes), as well as the designation of one item (tamarind fruit paste).¹⁰² As separate actions unrelated to the product review, the Executive Order of September 1 terminated the beneficiary status of Laos, on grounds of communism, and designated Portugal a beneficiary following Portuguese actions that removed the adverse effects of their E.E.C. reverse preferences. The second general review, which carried over into 1977 and almost into the change of Administrations, resulted in the designation of 26 new articles and no product removals.¹⁰³

These two reviews demonstrated considerable frustration in the private sector with the imprecision of the standard for removal established by the regulations, which stated that an article would not be recommended for designation, or would have its eligibility terminated, if "the appropriate interagency committee considers that the article is or would be import-sensitive in the context of the GSP. . . ." ¹⁰⁴ This vague standard raised several complex questions. In the first place, the statute provided that, in considering use of his authority to withdraw, suspend, or limit GSP benefits, the President was to consider the effect that his action would have on furthering the economic development of developing countries, the extent to which other major developed countries were undertaking comparable GSP programs (*i.e.* burden sharing), and the "antici-

product descriptions, all beneficiary countries, and all articles affected by competitive-need limits, published first in 41 Fed. Reg. 11,956 (1976) and later updated and published in 42 Fed. Reg. 20,914 (1977). *See also* a comprehensive and continuous reference service on the U.S. GSP, available for a fee from the American Importers Association, New York, N.Y.

¹⁰¹ The first review was weighted numerically toward product removals in part because domestic manufacturers reacted faster to the possibility of greater import competition than did importers or foreign exporters and their governments. In order to offset this bias, the executive branch proposed a number of articles for GSP designation during subsequent reviews.

¹⁰² Exec. Order No. 11,934, 41 Fed. Reg. 37,084 (1976). The actions taken by this order and the results of the first review are explained more fully in 41 Fed. Reg. 37,859 (1976).

¹⁰³ Exec. Order No. 11,960, 42 Fed. Reg. 4,317 (1977). This order was to have become effective March 1, 1977, *but see infra*, note 107. For an explanation of the actions taken by this order, as well as a listing of petitions that were under review, *see* 42 Fed. Reg. 9,636 (1977).

¹⁰⁴ 15 C.F.R., Ch. XX, Pt. 2007.1(b)(2).

pated impact of such action on United States producers of like or directly competitive products.”¹⁰⁵ Could import sensitivity “in the context of the GSP” be an aggregation of these factors and a conclusion based on the consideration of them? Second, the law prohibited the initial designation of articles that were “import-sensitive in the context of the Generalized System of Preferences.”¹⁰⁶ Did this mean that articles that became “import-sensitive . . .” subsequent to their designation had to be removed? And was this question meaningless if the catch-phrase “import-sensitivity in the context of the GSP” described in fact a conclusion after consideration of all relevant factors? Finally, did the qualification “in the context of the GSP” mean that the standard may not be met even if imports from industrialized countries were decimating their U.S. competitors, so long as there was little competition from LDC’s? Most of these questions have not been answered fully at this writing, but they were addressed in the comprehensive review of the GSP program, which lasted through much of 1977.

THE SECOND YEAR: CONSOLIDATION AND REVIEW

Following some confusion as the second product review and the annual competitive-need changes were being put into place at the same time,¹⁰⁷ the new Administration settled down to a comprehensive review of the management of the GSP program in light of its first year of operation. The principal issues that arose in this review were adequacy of the “import-sensitivity” standard for terminating the GSP eligibility of articles, development of more specific guidance for petitioners as to the type of information that the TPSC was looking for in its reviews, spacing and timing of product reviews so as to achieve more regularity and certainty, and clarification of the right of foreign governments to request amendments to the GSP product coverage. This review resulted in revisions to the GSP regulations that included the addition of an explicit statement that foreign governments could petition for product-eligibility changes, either in the same manner as private petitioners or by diplomatic correspondence; express recognition of the interagency GSP Subcommittee as the body to whom petitions should be addressed; much more specific guidance regarding information that the GSP Subcommittee was seeking

¹⁰⁵ Trade Act §501, 19 U.S.C. §2461 (Supp. V 1975).

¹⁰⁶ Trade Act §503(c)(1)(G), 19 U.S.C. §2463(c)(1)(G) (Supp. V 1975).

¹⁰⁷ Exec. Order No. 11,960, *supra* note 103, designating 26 articles for GSP eligibility as a result of the second review of petitions, was to have taken effect on March 1, 1977, the same date that the annual competitive-need changes, based on 1976 data, were required by law to take effect. In an effort to reduce confusion, Exec. Order No. 11,974, 42 Fed. Reg. 11,228 (1977), implementing the competitive-need changes, incorporated the designations made by Exec. Order No. 11,960, and revoked that order. Thus Exec. Order No. 11,960 never took effect, and its substance was implemented by Exec. Order No. 11,974. For an explanation of Exec. Order No. 11,974 and the competitive-need changes of February 1977, see 42 Fed. Reg. 12,276 (1977).

in petitions and diplomatic representations; and a fixed schedule for annual product reviews.¹⁰⁸

The most difficult issue in the review involved the adequacy of the "import-sensitivity" standard against which petitions were to be weighed. After exhausting and exhaustive internal discussions, the Administration elected to drop the troublesome standard of "import-sensitivity in the context of the GSP" from the regulations and to specify instead that reviews of petitions would take into account all information "relevant to the statutory prerequisites for Presidential action contained in Title V of the Trade Act of 1974." This change was a defeat for the legalists, who preferred automatic, required removal or designation of articles if objectively established criteria were met, and was a victory for those who preferred to retain the maximum administrative discretion permitted within the statutory criteria for product eligibility and removals.

III.

CONCLUSION

As the GSP enters its third year of operation, the following assessments appear to be warranted.

First, with the clear exception of the OPEC exclusion—which remains a thorn in the side of United States–LDC relations—the statutory criteria for country eligibilities have not proved nearly so restrictive as was feared by some. Romania and Yugoslavia, Communist members of the UNCTAD LDC Group of 77, are GSP beneficiaries, as are virtually all beneficiaries of special E.E.C. preferences under the Lomé Convention, as well as Israel, Turkey, Cyprus, and most other countries of the Mediterranean basin that grant reverse preferences to products of the E.E.C.¹⁰⁹ Only Cambodia, Laos, and Vietnam have had their GSP benefits withdrawn, and, with the exception of OPEC members, only four of the 24 countries originally listed as "under consideration" remain ineligible.¹¹⁰

Second, despite the anomalies created by blind application of the 50-percent competitive-need rule, the competitive-need formula as a whole has worked reasonably well as a rule of thumb for excluding from GSP benefits those exporters that can compete without them and for preventing exporters in the least developed of the developing countries from being entirely squeezed out of the U.S. GSP market by more developed LDC exporters. Of the total competitive-need exclusions in effect at the end of 1977, 44 percent by trade value were accounted for by products of Mexico and Hong Kong. Other LDC's were affected by the

¹⁰⁸ See the revised GSP regulations, published in 42 Fed. Reg. 45,532 (1977), which replace regulations currently codified at 15 C.F.R., Ch. XX, Pt. 2007.

¹⁰⁹ Exceptions are Greece and Spain, which so far have been reluctant to make the accommodations that, in the U.S. view, are needed to remove the "significant adverse effects" on U.S. commerce of their reverse preferences for EC products.

¹¹⁰ Those non-OPEC LDC's that remain ineligible are Greece, the People's Democratic Republic of Yemen, Spain, and Uganda.

competitive-need limits roughly in proportion to their degrees of development.¹¹¹

Third, the periodic administrative reviews of the GSP product coverage have performed their intended function as a channel for pressures and a necessary safety valve, but they have resulted in relatively few product withdrawals and have not destabilized the program. By the end of 1977, only six products had been wholly withdrawn from GSP eligibility, in response to scores of requests for withdrawals.

Fourth, the margins of preference between zero-duty GSP benefits and existing MFN duty rates have not acquired the permanence that U.S. policymakers once feared and have not deterred the United States from pursuing broad MFN tariff reductions in the Tokyo Round of Multilateral Trade Negotiations, even when such reductions lessen the preferential margin enjoyed by GSP beneficiaries. The United States has always viewed the GSP as only one component of its broader LDC trade policy, one facet of which is, in the words of the declaration that launched the Tokyo Round, to provide "special and more favourable treatment" for LDC's where appropriate and feasible;¹¹² but another facet of which is to draw LDC's into the international trading system as responsible partners, by requiring that the LDC's give some measure of trade concessions in return for the permanent concessions that they receive. In the longer run, U.S. representatives have argued, LDC exporters will benefit from this approach, because permanent, bargained-for concessions derive their stability from mutual advantage and thus are not vulnerable to passing domestic political pressures to the same extent as is the GSP. This attitude explains why U.S. negotiators in the Tokyo Round consistently have refused to guarantee margins of preference, to exempt GSP-eligible articles from general tariff reductions, or to take other measures that would freeze current GSP benefits at the expense of more general and permanent reductions of trade barriers. It also accounts for the fact that in the Tropical Products, or LDC, area of the Tokyo Round, the United States has continued to insist that LDC's provide at least some reciprocity for U.S. concessions on products of LDC interest, even though some industrialized countries long ago improved slightly their GSP schemes as their entire contribution to the Tropical Products negotiations.

Finally, it should surprise no one that the U.S. GSP, as well as other national schemes, is a far cry from the sweeping program demanded by LDC's in the Charter of Algiers and has not by itself greatly increased the competitiveness of LDC manufactured goods in world markets. International trade, and more specifically import competition, is the most politically visible and volatile component of international economic relations. Innovations in this area, however enlightened, usually must make their bow to the art of the possible. Raúl Prebisch must have realized this when he drafted his original scheme with enough qualifications and

¹¹¹ Source: STR Computerized information on the GSP.

¹¹² GATT Doc. GATT/1,134 (1973), *reprinted in* 12 ILM 1533 (1973) and in GATT, 20th Supp. B.I.S.D. (1974).

generalities to form a basis for eventual international consensus out of widely differing national viewpoints.

Perhaps the most lasting value of the GSP lies in its conceptual breakthrough: it got the world's trading nations to recognize, jointly and officially, that equal treatment under the MFN principle may not always be desirable among trading partners of vastly unequal economic strength. This principle found its way into the Tokyo Round, and no doubt it will be with us for a long time.

APPLICABILITY OF MULTILATERAL CONVENTIONS TO OCCUPIED TERRITORIES

By Theodor Meron *

I.

INTRODUCTION

The failure at the 63rd International Labor Conference (Geneva, 1977) to adopt the Report of the Committee on the Application of Conventions and Recommendations was regarded by many delegates as yet another example of denial of due process by that organization and may have influenced the United States in its decision to withdraw from ILO.¹ The decision of the Conference, although primarily political, had certain legal implications in so far as it suggested that an occupying power, such as Israel, may not apply international labor conventions to which it is a party to territories that it occupies.

This was not the first time that such a question had been presented in an international organization. In 1974 and in 1975 the International Civil Aviation Organization had decided that Jordan and not Israel controlled the application of the Chicago Convention² to the airport of Jerusalem.

The object of this article is to consider whether an occupying power has the right or the duty under international law to apply multilateral treaties to which it is a party in the territories which it occupies, focusing on the case of the territory west of the Jordan River, which prior to the Six Days' War was under the jurisdiction of Jordan and which is commonly known as the West Bank or under its biblical names of Judea and Samaria (hereinafter "the territory"). For the purposes of this article, it will be assumed that that territory has the status of an area under belligerent occupation, a proposition which is strongly contested by the Government of Israel. It is only on such an assumption that a legal analysis of the questions raised can be carried out.

This study will deal with the relevant ILO conventions, the Chicago Convention, the law of belligerent occupation, and the interaction between these bodies of law. We shall not consider, except in passing, conventions expressly designed to apply, in whole or in part, to occupied territories, such as the Hague Convention No. IV of 1907 respecting the Laws and Customs of War on Land, particularly Articles 42-56 of the Regulations

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¹ See in general, Gupte, *U.S. Quits I.L.O. and Touches Off a Furor in U.N.*, N.Y. Times, Nov. 2, 1977, §A at 13, col. 1; Raskin, *Struggle over I.L.O. Pullout*, N.Y. Times, Nov. 3, 1977, §A at 10, col. 1. See also press briefing by the Secretary of Labor, F. Ray Marshall, Nov. 1, 1977. 72 AJIL 375 (1978), 16 ILM 1561 (1977).

² Convention on International Civil Aviation, done Dec. 7, 1944, 61 Stat. 1180, TIAS No. 1591, 15 UNTS 295.

annexed to the Convention,³ the Fourth Geneva Convention of August 12, 1949 relative to the Protection of Civilian Persons in Time of War,⁴ and the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict.⁵ It is obvious that an occupying power is duty bound to apply such conventions in the territories which it occupies, whether because they are declaratory of customary international law (as is true of the Hague Regulations of 1907) or because it has expressed its consent to be bound by them (as in the case of the Fourth Geneva Convention⁶ or the Hague Convention of 1954).

In practice a number of questions have arisen with regard to the applicability to the territory of other multilateral conventions, but they will not be considered because of limitations of space and because they have been resolved on a pragmatic basis, without giving rise to a broader discussion of the legal issues involved,⁷ due perhaps to the reluctance of the Government of Israel to be wedded to a particular juridical doctrine regarding the status of the territory and the applicability therein of general multilateral conventions.

³ Signed Oct. 18, 1907, 36 Stat. 2277, TS No. 539, 1 Bevans 631.

⁴ Dated Aug. 12, 1949, 6 UST 3516, TIAS No. 3365, 75 UNTS 287.

⁵ Done May 14, 1954, 249 UNTS 215, Art. 5; Regulations for the Execution of the Convention, Arts. 13 and 19; Protocol, para. 1(4).

⁶ Regarding the Israeli views on the applicability of the Fourth Geneva Convention to the territory, see *infra*, note 31.

⁷ Article 29 of the Convention on the Law of Treaties, *done* at Vienna, May 23, 1969, UN Doc. A/CONF.39/27 (1969) at 289, 63 AJIL 875, 884 (1969) was not intended to deal with the question of extraterritorial application of treaties and is not helpful as regards territories under belligerent occupation. See the Commentary on Article 25 of the International Law Commission's Draft Articles on the Law of Treaties, Report of the International Law Commission to the General Assembly, 21 GAOR, Supp. (No. 9), UN Doc. A/6309/Rev.1 (1966), *reprinted in* [1966] 2 Y.B. INT. L. COMM. 169, 213, UN Doc. A/CN.4/SER.A/1966/Add.1.

Following the Six Days' War, the Government of Israel and the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) agreed that UNRWA would continue its assistance to refugees in the West Bank and the Gaza Strip and that Israel would recognize that the Convention on the Privileges and Immunities of the United Nations, *done* at New York, Feb. 13, 1946, 21 UST 1418, TIAS No. 6900, 1 UNTS 15, 43 AJIL Supp. 1 (1949), (to which both Israel and Jordan were parties) governed the relations between the government and UNRWA. Exchange of Letters of June 14, 1967 constituting a provisional agreement concerning assistance to Palestine Refugees, 620 UNTS 183. It is arguable that Israel would have had the duty under Article II to apply this Convention to UNRWA on the West Bank even in the absence of such a special agreement. See *in general* Military Prosecutor v. Fatima Abdel Fatah Al Nag'uli, 1 SELECTED JUDGEMENTS OF THE MILITARY COURTS IN THE ADMINISTERED TERRITORIES 197 at 202-03 (1970) (in Hebrew).

The Government of Israel agreed on the administrative level to grant West Bank institutions of higher learning the right to import, free of duty, books and publications in accordance with the [UNESCO] Agreement on the Importation of Educational, Scientific and Cultural Materials, *done* Nov. 22, 1950, 131 UNTS 25, to which both Israel and Jordan were parties. A request from another party to the European Convention on Mutual Assistance in Criminal Matters *done* at Strasbourg, Apr. 20, 1959, EUROP. T.S. No. 30, 472 UNTS 185, to execute a letter rogatory with regard to a resident of the West Bank has been executed by the Israel Government through the cooperation of the West Bank judiciary system.

II.

INTERNATIONAL LABOR CONVENTIONS

The "Resolution Concerning the Policy of Discrimination, Racism and Violation of Trade Union Freedoms and Rights Practised by the Israeli Authorities in Palestine and in the Other Occupied Arab Territories,"⁸ adopted by the 59th International Labor Conference in 1974, condemned "the policy of racial discrimination and violation of trade union freedoms" allegedly pursued by the Israeli authorities and invited the Governing Body and the Director-General of ILO to use all means at the disposal of the ILO to put an immediate end to these violations and discriminatory practices. The preamble part of this resolution referred to the ratification by Israel of ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organize,⁹ which Jordan had not ratified, and Convention No. 111, concerning Discrimination in Respect of Employment and Occupation,¹⁰ to which both Israel and Jordan had become parties prior to the Six Days' War. While the operative part of this resolution did not explicitly refer to these conventions, the implication was that Israel was guilty of failure to apply their provisions in the occupied territories.

The opponents of the resolution argued that it constituted a prejudgment and condemnation without inquiry or fact finding and thus violated the basic procedures of the ILO. The supporters of the resolution argued that the regular ILO procedures for dealing with alleged violations of freedom of association or of the principles of nondiscrimination were designed for normal situations and were not suitable for extraordinary situations such as occupation. No one appears to have questioned the need to apply the provisions of the two conventions to the occupied territories.¹¹

The ILO Constitution contains provisions dealing with application of conventions to nonmetropolitan territories,¹² but does not mention the case of belligerent occupation. Convention No. 111 provides that the parties will follow a national policy designed to promote equality of opportunity and treatment in employment by methods appropriate to national condi-

⁸ INTERNATIONAL LABOR CONF., 59th Sess., RECORD OF PROCEEDINGS 351-52 (1974) [hereinafter INT. LABOR CONF., PROC.].

⁹ Adopted July 9, 1948, 68 UNTS 17.

¹⁰ Adopted June 25, 1958, 362 UNTS 31.

¹¹ INT. LABOR CONF., 59th Sess., PROC. 349-54, 417-27, 467-70, 477-78 (1974).

¹² Instrument for the Amendment of the Constitution of the International Labor Organization, dated Oct. 9, 1946, 62 Stat. 3485, TIAS No. 1868, 4 Bevans 188, 15 UNTS 35, Art. 35, providing, *inter alia*, for the duty of members that have ratified ILO conventions to apply them to non-self-governing nonmetropolitan territories, except where they are inapplicable because of local conditions. Regarding ILO conventions that have been specifically designed for nonmetropolitan territories, see C. JENKS, THE COMMON LAW OF MANKIND, 234-37 (1958). Because of the varying stages of economic and social development of such territories and for other reasons, Jenks did not support suggestions that ILO conventions should be automatically applicable to nonmetropolitan territories. *Id.* at 247. As regards ILO conventions in time of war, see Wolf, *L'Interdépendance des Conventions internationales du Travail*, 121 REC. DES COURS 113 at 135 (1967-II).

tions.¹³ The preamble to the Convention indicates that discrimination is regarded as a violation of human rights.¹⁴ These provisions can be interpreted narrowly, as applicable to the national territory proper, or broadly, as referring to a national policy to be followed in other territories controlled by the party, such as occupied territories. In light of the significance of the Convention for the protection of human rights, there would be greater merit to the latter interpretation.

Neither in 1974 nor subsequently have questions been raised by Israel or other states regarding the clear duty of Israel to apply the provisions of Convention No. 111 to workers *from* the territory who are employed in Israel, as to all the other workers *in* Israel. Reports submitted by the Director-General of the ILO¹⁵ and by the Government of Israel to the ILO, in the context of allegations of discrimination in violation of Conven-

¹³ Art. 2. It appears that prior to the beginning of the occupation, Jordan had not adopted legislation aimed specifically at implementing Convention No. 111. The first report concerning that Convention, submitted by Jordan to the ILO in 1967, drew attention to the constitutional guarantees of equal opportunity as regards access by nationals to employment and stated that the Labor Code was in conformity with the principles of the Constitution. Labor legislation was being prepared with a view to granting Arab and foreign workers equal opportunity on the basis of reciprocity. INT. LABOR CONF., 51st Sess., Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations, Summary of Reports on Ratified Conventions, Report III, Part I at 206 (1967).

¹⁴ Article 6 of the Convention deals with its applicability to nonmetropolitan territories in accordance with the Constitution of the ILO. Brownlie reprints the text of both Conventions in his *Basic Documents on Human Rights* at 279, 296 (1971). Regarding the relevance of the Conventions for human rights, see L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 517, 532-33 (1973).

In its Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the International Court of Justice observed that, given the fact that South Africa's presence in Namibia had been declared illegal by the Security Council, member states were under an obligation to abstain from entering into treaty relations with South Africa in all cases in which South Africa purported to act on behalf of or concerning Namibia. As regards existing bilateral treaties, member states must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental cooperation. The Court added, however, that the same rule could not be applied to certain general multilateral conventions, "such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia." [1971] ICJ REP. 16 at 55. The case for the application of general multilateral conventions of a humanitarian character to which the power in control is a party is even stronger in the case of belligerent occupations, which have not been declared illegal by the UN Security Council or the International Court of Justice. Regarding "general welfare" treaties, see Separate Opinion of Judge Jessup in the *South West Africa Cases*, Preliminary Objections, [1962] ICJ REP. 319 at 428.

¹⁵ See Progress Report on the Study of the Situation of Workers of the Territories Occupied by Israel, submitted by the Director-General of the ILO to the 199th Session of the Governing Body, in ACTIVITIES OF THE ILO, 1976, REPORT OF THE DIRECTOR-GENERAL TO THE INTERNATIONAL LABOR CONFERENCE 47 at 51, 42-47 (1977, Part 2).

ILO has been receiving reports regarding Arab workers in the territory submitted by Israel in response to the organization's requests as well as reports submitted on their own initiative by Arab governments and Arab trade unions.

tion No. 111, dealt with the situation not only of Arab workers from the territory employed in Israel but also of Arab workers employed in the territory itself. The Government of Israel stated that Jordanian labor law was being applied on the West Bank¹⁶ and that it complied, in respect to the inhabitants of the West Bank, with "every one of the [ILO] Conventions."¹⁷

In response to a request submitted in 1977 by the Committee of Experts on the Application of Conventions and Recommendations for information on the situation of workers in the occupied territories,¹⁸ Israel submitted a report which concluded that both the policy and the practice of the government "have been in full accord with the provisions of Convention No. 111."¹⁹

When that report was brought up for discussion in the tripartite [Conference] Committee on the Application of Conventions and Recommendations, a number of representatives objected to the discussion on the ground that the occupying power should not be allowed to apply the Convention to the territory which it occupied and which was under the sovereignty of another state. The Chairman of the Committee expressed the view that the issue was the protection of workers under a convention which had been ratified by Jordan, Syria, Egypt, and Israel, the latter being the only state which could at that time assure the protection of such workers. A motion that the report by Israel on the application of Convention No. 111 not be discussed was not carried in committee,²⁰ but the report of the Committee was challenged in the plenary by delegates who argued that neither the Committee of Experts nor the [Conference] Committee could accept and examine a report submitted "by an illegal authority on the application of Convention No. 111 on territories . . . occupied by military force and . . . not under the sovereignty of those authorities." That was why the supervision of the application of the Convention was entrusted to the Director-General of the ILO and to the Governing Body.²¹ Neither committee was a proper forum for review of the conduct of the

¹⁶ Progress Report, *supra* note 15, at 55.

¹⁷ ISRAEL INFORMATION CENTRE, *Human Rights in the Administered Areas*, INFORMATION BRIEFING No. 10 (1976).

¹⁸ INT. LABOR CONF., 63d Sess., Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III, Part 4A at 230 (1977).

¹⁹ INT. LABOR CONF., 63d Sess., PROV. REC., Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations, Report of the Committee on the Application of Conventions and Recommendations, 25/52 at 25/58 (1977).

²⁰ *Id.* at 25/61-25/62. See also the letter dated June 9, 1977 from Secretary-General Francis Blanchard to the President of the Conference. PROV. REC., 12th sitting, at 12/31.

²¹ The delegate of Iraq, on behalf of all the Arab delegations, *id.*, 28th sitting, at 31/10.

In its 1971 Advisory Opinion on *Namibia* (see *supra* note 14), the International Court of Justice observed that "[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States." [1971] ICJ REP. 16 at 54.

occupying power,²² and ILO procedures were not applicable to a case of occupation.²³

The Government delegate of Israel complained of the lack of consistency but did not raise the question of estoppel. In 1974, Convention No. 111 was invoked to obtain a condemnation of Israel in violation of due process.²⁴ Now, when the application of the Convention was to be reviewed by objective experts, Israel was told that it could not apply the Convention, which had been ratified by all the states concerned and which provided the only agreed international standard for determining whether a state had practiced discrimination.²⁵

Professor Roberto Ago, the Government delegate of Italy, stated that, given the fact that all the states concerned had ratified it, Convention No. 111 was in force in the occupied territories when the occupation began. Israel as a party to the Convention was under an obligation to apply it; but, even if it were not a party, it would be under such an obligation with regard to conventions that were in force in the occupied areas.²⁶ Nothing in the ILO Constitution excluded the duty to report annually on the action taken to give effect to obligations undertaken by a state. This was true not only for the state's territory but for all territories over which it exerted any kind of authority.

Following a debate in which the question of the right of Israel to apply in the territory the provisions of Convention No. 111 was not always distinguished from the question whether Israel had the right to report to the ILO on such application of that Convention (question of proper supervisory procedures), the entire report, not only the part concerning Israel, was not approved for lack of a quorum,²⁷ to the satisfaction of delegates of many countries that had been mentioned in the report as being in violation of various ILO conventions.

It should be observed that Jordan has a comprehensive and advanced

²² The Government delegate of Egypt, 28th sitting, at 31/25.

²³ *Id.* at 31/15. See also statement by the Government adviser of the USSR, *id.* at 31/12. As to the obligations of member states with regard to ILO conventions which they have ratified, see Arts. 19 and 22 of the ILO Constitution.

²⁴ See also the statement by the Government delegate of the United States, 28th sitting, at 31/19-31/20.

²⁵ *Id.* at 31/18.

²⁶ *Id.* at 31/16. Professor Ago based this conclusion mainly on the fact that, during the Second World War, Nazi Germany respected the extritoriality of certain buildings in Rome in accordance with treaties concluded between Italy and the Holy See. Can such a general conclusion be drawn from this case? For a view that the occupant may suspend commercial treaties entered into by the legitimate sovereign of the occupied territory and involving such territory, see G. VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY* 212 (1957). G. Schwarzenberger takes the view that the occupant does not succeed to the obligations of the dispossessed government under a concession agreement concluded by the latter. 2 *INTERNATIONAL LAW* 343-44 (1968).

²⁷ In the ILO, proposals are often not adopted through the technique of preventing the required quorum from being obtained. See Art. 20 of the Standing Orders of the International Labor Conference and Art. 17(3) of the ILO Constitution. For the results of the vote, see 28th sitting, at 31/27.

labor law: Labor Law No. 21 of 1960, as amended in 1965.²⁸ The Israeli military government in the territory has not interfered with the operation of that law except to a very limited extent and in marginal matters.²⁹ However, one of the Orders promulgated by the military government, Order No. 439, pertained to the amendment of the Jordanian labor law. That Order was challenged before the Israeli Supreme Court, sitting as the High Court of Justice, in the case of the *Christian Society for the Holy Places v. Minister of Defence*,³⁰ as exceeding the legislative authority of the occupying power under Article 43 of the Hague Regulations and Article 65 of the Fourth Geneva Convention. This case may throw some light on the issue under consideration.

The Jordanian labor law provided that, in case of a labor dispute, an arbitration council should be appointed, comprising, *inter alia*, representatives chosen by employers' and employees' associations. Faced with a labor dispute between the Christian Society and its employees and also with the fact that, since such associations did not exist in Jordan, the establishment of an arbitration council was impossible, the military government amended the Jordanian law by Order No. 439, providing for an alternative way of forming the arbitration council. It was this Order that was challenged by the employer.

The Court emphasized that an occupying power was duty bound to be concerned with the welfare of the local population. Especially in cases of prolonged military occupation, when important changes occur in the economic and social conditions of the occupied territory, new legislative measures may be essential to adapt the law to the changing needs of the population. When local laws do not make it possible for the military government to carry out the duties incumbent upon it in relation to the local population, a case exists in which the occupant is "absolutely prevented" under Article 43 of the Hague Regulations and the military government may change the law in the interest of the population. Order No. 439 was therefore not *ultra vires* the legislative authority of the occupant under Article 43. Neither was there any violation of Article 65 of the Fourth Geneva Convention which prohibits retroactive penal provisions.³¹

²⁸ Law No. 21 of 1960, OFF. GAZ. No. 1491; Law No. 2 of 1965, OFF. GAZ. No. 1818.

²⁹ Orders Nos. 37, 95, 181, 256, 408, 420, 430, 433, 438, 439, 445, 446, 453, 514, 515, 662, 663.

³⁰ 26 (1) PISKEI DIN 574 (1972), summarized in English in 2 ISRAEL Y.B. ON HUMAN RIGHTS 354 (1972); see also Muhammad Amin Al Ja'bari v. Ahmad Ya'qub 'Abd Al-Karim Al-Awiwi 42 I.L.R. 484 (1971); Dinstein, *The Power of Legislation in the Administered Territories*, 2 IYUNEI MISHPAT (Tel Aviv U. L. Rev.) 505 (1972); *Judicial Review of Acts of the Military Government in the Administered Territories*, 3 *id.* 330 (1973); *The Judgment in the Rafiah Intersection Case*, 3 *id.* 934 (1974) (in Hebrew).

³¹ In this case and in a number of other cases, the High Court of Justice put various Orders of the military government to the test of the Fourth Geneva Convention and of the Hague Regulations by specific consent of the Attorney General without laying down any general ruling as to the applicability of these instruments to the occupied territories. The Government of Israel has claimed that the status of the territory is *sui generis*, that the legal standing of Jordan in the West Bank was that of a bel-

H. Cohn J. in a cogent dissenting opinion expressed the view that the Order was *ultra vires* since the power of the occupant did not extend to the introduction of a new public order, especially where a comprehensive and progressive local labor law existed. H. Cohn J. noted that as regards arbitration the Jordanian law was more advanced than the Israel law.

Doubts are sometimes expressed as to whether the concern of an occupant for the welfare of the local population is always sincere. To deal with that problem, a comment on the *Christian Society* case has suggested that the new legislation promulgated by an occupant ostensibly in the interest of the population should be put to the test of whether such new legislation corresponds to the legislation in force in the occupant's own country.³² This writer accepts the view that the occupant may take measures affecting local laws not only when required to do so for reasons of military necessity but also when such changes are required in the interest of the welfare of the local population.³³ But the test mentioned above

ligerent occupant following an unlawful invasion, that territory controlled in war does not always become "belligerently occupied territory" to which the rules of the Fourth Geneva Convention apply, and left open the question of the applicability of the Convention. The Attorney General expressed his personal opinion that the Fourth Geneva Convention did not apply to the occupied territories but stated that the government "decided to act *de facto*, in accordance with the humanitarian provisions of the Convention." Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISRAEL Y.B. ON HUMAN RIGHTS 262 at 263, 265-66 (1971).

See in general Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISRAEL L. REV. 279 (1968); Shapira, *The Six-Day War and the Right of Self-Defence*, 6 *id.* 65 (1971); E. Lauterpacht, *Jerusalem and the Holy Places*, Anglo-Israel Association, Pamphlet No. 19 (1968); Schwebel, *What Weight to Conquest?* 64 AJIL 344 (1970).

For a criticism of the position of Israel with regard to the status of the West Bank and the applicability of the Fourth Geneva Convention, see Boyd, *The Applicability of International Law to the Occupied Territories*, 1 ISRAEL Y.B. ON HUMAN RIGHTS 258 (1971); Dinstein, *supra* note 30; Feinberg, *The West Bank's Legal Status*, NEW OUTLOOK 60 (Oct.-Nov. 1977). Following the establishment of the Likud Government, the statements of Israel with regard to the Fourth Geneva Convention appear to have moved from ambivalent to negative. During the 32nd session of the UN General Assembly, Foreign Minister Dayan stated that "[i]n view of this illegal annexation of the West Bank [by Jordan], the Fourth Geneva Convention is not applicable." UN Doc. A/32/PV.27 at 83-85 (1977). This statement was not qualified by any indication that the humanitarian provisions of the Convention would continue to be applied. This statement notwithstanding, it appears that the directives of the military government as to the administrative and the legal system of the West Bank have not been changed. Indeed, in reply to a query, this writer was informed by the Israel Ministry for Foreign Affairs that "although the IVth Geneva Convention is not applicable, Israel continues to apply the humanitarian provisions of the Convention." Letter from Deputy Legal Adviser R. Sabel (Apr. 7, 1978).

³² Dinstein, *supra* note 30, at 511 (1972). For a critique of this test, see M. DRORI, *THE LEGISLATION IN THE AREA OF JUDEA AND SAMARIA* 82 (1975) (in Hebrew).

³³ See 2 L. OPPENHEIM, *INTERNATIONAL LAW* 434 (7th ed., H. Lauterpacht 1952); G. VON GLAHN, *supra* note 26, at 97; Schwenk, *Legislative Power of the Military Occupant under Article 43, Hague Regulations*, 54 YALE L. J. 393, 400-01 (1945).

The "Pictet Commentary" on Article 51 of the Fourth Geneva Convention supports the view that working conditions need not remain unchanged throughout the period of occupation and that labor laws would probably be modified from time to time.

can be useful only in the negative sense: If legislative changes introduced by an occupant, ostensibly in order to benefit the local population, do not correspond to the law in force in the occupant's own territory, there may be an immediate case for suspecting the occupant's *animus*. One should, however, be wary of carrying such a test, inconclusive as it is, beyond this point. In practice the standard implicit in the test may be abused by an occupant interested in a gradual extension of its laws to the occupied territory under a strategy of creeping annexation. Except in cases of occupation of a country where a system of racial, religious, or political discrimination prevailed, an occupant has the duty to respect the institutions of the occupied territory, especially when they reflect an enlightened regime. It may not introduce changes simply on the ground that it is "upgrading" the local institutions to the level obtaining in the occupant's own country and that it is in the interest of the local population.³⁴

International labor conventions, as distinguished from the labor laws of a particular country, are evidence of generally agreed labor standards and may therefore be regarded as being in the interests of the population of an occupied territory. As a general proposition, the application by an occupant of norms incorporated in international labor conventions is a benevolent measure which serves the interests of the local population. On the other hand, these positive considerations should be weighed against the consideration that the ratification or nonratification of such conventions prior to the commencement of the occupation was a sovereign prerogative of the previous government. During the occupation, the local population usually has an interest in the maintenance and preservation of local institutions and laws, an interest which is protected by Article 43 of the Hague Regulations and the relevant provisions of the Fourth Geneva Convention. Moreover, as indicated by Article 35 of the Constitution of ILO, it is not axiomatic that every international labor convention is suitable for local social and economic conditions. The question of the applicability of international labor conventions to occupied territories is, therefore, more complex than would appear at first sight. It may be suggested that the following norms could appropriately regulate this question:

1. If, prior to the commencement of the occupation of a territory, the territorial sovereign had ratified an international labor convention and adopted the necessary implementing legislation, the occupant must respect the relevant labor standards as part of the local legislation in force.

O. UHLER & H. COURSIER, COMMENTARY ON THE GENEVA CONVENTIONS OF 1949: THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 298 (1958). See also M. GREENSPAN, THE MODERN LAW OF LAND WARFARE 273 (1959).

Regarding labor in occupied territories, see also U.S. DEPT. OF THE ARMY, THE LAW OF LAND WARFARE, (FM 27-10), paras. 418-21 (1956); GREAT BRITAIN, WAR OFFICE, THE LAW OF WAR ON LAND BEING PART III OF THE MANUAL OF MILITARY LAW 154-55 (1958).

³⁴ See also Schwenk, *supra* note 33, at 403. As regards the continuation of social security regulations in force in the occupied territory, except for the elimination of vicious features or practices offending the principles of international law, see M. GREENSPAN, *supra* note 33, at 274.

2. When, prior to the commencement of the occupation of a territory, the territorial sovereign had ratified an international labor convention but has not completed the necessary implementing legislation, that ratification should be regarded as determining that the convention is suitable for the local social and economic conditions. The occupant may therefore implement the convention in the occupied territory and may report to the ILO. In cases in which the occupant is also a party to the international labor convention involved, the case for the applicability of that convention to the occupied territory is particularly strong and may, depending on the object, purpose, and content of the convention, constitute a legal duty of the occupant.

3. When the occupant but not the territorial sovereign has ratified an international labor convention prior to the commencement of the occupation,³⁵ there is a presumption against the applicability of that convention to the occupied territory, but account must be taken of the positions taken by the latter government with regard to that convention in the relevant international bodies. The answer must, however, be given in each case in light of the specific convention, the social and economic conditions of the occupied territory, the needs of the population, and the character of the changes in the local laws and institutions that would be required.

In light of the foregoing, certain conclusions about the position taken by the 63rd International Labor Conference can now be ventured. Although the 1974 resolution implied that Israel should have applied Convention No. 87 (which Jordan had not ratified) and Convention No. 111 to the territory, it was only the applicability of the latter convention that was questioned in 1977. Articles 2 and 3 of the Convention require that a broad policy against discrimination be followed through a variety of measures, including possibly legislative ones. In view of the fact that both Israel and Jordan were parties to this Convention, it seems clear that Israel had at least the right, and arguably even the duty, to apply the provisions of the Convention to the West Bank, given its character as a source of general human rights. The opposition to the application of the Convention by Israel and to its exercise of reporting functions with regard to the application of the Convention in the territory arose from the questionable assumption that such an action would have implications for claims of sovereignty over the West Bank, from the reluctance of the majority to apply the regular ILO procedures in this case, and from the interest of the countries criticized in the report to climb on the "occupied territories bandwagon" in order to defeat the report *in toto*.

III.

THE CHICAGO CONVENTION ON INTERNATIONAL CIVIL AVIATION

The airport of Jerusalem at Atarot (previously Kalandia) is situated north of the City of Jerusalem in an area which had been under Jordanian

³⁵ The more controversial question of the effect of the acts of the dispossessed government during the occupation will not be considered. See in general A. McNAIR & A. WATTS, *THE LEGAL EFFECTS OF WAR* 445-46 (1966).

jurisdiction prior to the Six Days' War and to which Israel applied, in the aftermath of that war, the totality of its laws, thus treating it as part of its sovereign territory. Other states and the United Nations consider that these measures are invalid and regard this area as part of the occupied West Bank.

On June 12, 1967 the Civil Aviation Administration of Israel issued a Notice to Airmen (NOTAM) advising that the Lod Flight Information Region (FIR) was being extended to west of the Jordan River and that approach control services to all aircraft approaching or departing from Jerusalem airport would be provided by Lod Approach. Subsequently, the Government of Israel approved that airport for domestic and international flights,³⁶ including charter flights.³⁷ While maps circulated by Israel³⁸ and maps used for navigation purposes by aircraft pilots³⁹ list Jerusalem airport as within the Lod (Ben Gurion) FIR, ICAO's Air Navigation Plan, Middle East and South East Asia Regions (hereinafter "ICAO's Plan") continues to show the entire territory, including the Jerusalem airport, as within the Amman FIR.⁴⁰ The airport is used for domestic and international nonscheduled flights, and approach control is provided by the Lod FIR.

In 1974, Iraq and Jordan complained to the ICAO Assembly of the endeavors of Israel to establish air traffic services to Jerusalem airport in disregard of ICAO's Plan, which listed that airport under Jordan, and in violation of Articles 1, 5, and 6 of the Chicago Convention.⁴¹ It was argued that only the authorities recognized in that Plan had the right to retain control and sovereignty over the airport and that the occupant should not be allowed to make use of it for civil aviation purposes. Moreover, resolutions of the UN General Assembly and of the Security Council, which declared that changes carried out by Israel in the occupied territories in contravention of the Fourth Geneva Convention were null and void and which called upon states not to recognize such changes, should also be taken into account.

Since Israel does not regard the airport as occupied territory but as a part of its own sovereign territory, it did not answer the claim that it was

³⁶ 3 YALKUT HAPIRUMIM 1832 (1967), No. 1376; 2 KOVETZ HATAKANOT 1277 (1968), No. 2211.

³⁷ Licensing of Aviation Services (Charter Flights Regulations) (1976).

³⁸ Maps of the Air Traffic Services System, Aeronautical Information Publication, (AIP).

³⁹ See Middle East High/Low Altitude Enroute Charts, ME(H/L) 2, Jeppesen & Co. (1970).

⁴⁰ ICAO Doc. 8700/10, Chart ATS 3 2-2-13 and AGA 1 1-1-36 (1976).

⁴¹ It should be observed that Iraq joined in the complaint, although in 1949 it had invoked Article 89 of the Chicago Convention against Israel (as did Egypt). Article 89 provides:

In case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals. The same principle shall apply in the case of any contracting State which declares a state of national emergency and notifies the fact to the Council. See also under Article 89, ICAO, REPERTORY GUIDE TO THE CONVENTION ON INTERNATIONAL CIVIL AVIATION, Doc. 8900, Part IV, Ch. XIX, at 1-2 (1971).

acting in violation of the Fourth Geneva Convention. It argued that ICAO could not decide, even indirectly, on the territorial rights of contracting states, that, in so far as Israel was concerned, the Chicago Convention was applicable to Israel, not to Jordan, and that the Convention made it clear that airports were operated by the authorities who were in fact exercising control over them, *i.e.*, the Israeli, not the Jordanian authorities. Israel invoked the disclaimer contained in the Foreword to ICAO's Plan explaining that nothing in the presentation of material in the Plan "implies endorsement or acceptance by ICAO in matters affecting the status and boundaries of States and territories."⁴²

By a majority of 52 to 3, with 38 abstentions (including the United States), the ICAO Assembly adopted Resolution A21-7, which noted that Jerusalem lies in occupied Arab territories, is registered as under the jurisdiction of Jordan in the ICAO's Plan, recalled Articles 1, 5, and 6 of the Chicago Convention, and resolved that in implementation of those articles all contracting states should refrain from operating, or giving permission to any airline to operate, any air service to or from Jerusalem airport, unless prior permission is granted by Jordan.⁴³ In 1975, a number of Arab states complained to the Council of ICAO that, in disregard of Resolution A21-7, flights were taking place to and from the Jerusalem airport without the permission of the Jordanian Civil Aviation Authority. By 17 votes in favor, 1 against (the United States), and 10 abstentions, the Council adopted a resolution deeply deploring the disregard by Israel of Resolution A21-7 and urging Israel to abide by it.

In neither the Assembly nor in the Council has Israel, committed to treating the airport as part of its sovereign territory, claimed any rights of a belligerent occupant, thus, in the view of some observers, facilitating the adoption of the above resolutions. Given the political character of the Council and the Assembly, a claim of belligerent rights is unlikely to have affected the outcome, but it may have influenced individual votes. And although on several occasions in the past certain Arab states had suspended the privileges of Israel and of third states under the Chicago Convention by invoking Article 89, neither Israel nor the Arab states specifically invoked that article in the proceedings before the Assembly and the Council.⁴⁴

⁴² See ICAO Doc. 8700/10 at D-6E.

⁴³ For the debates, see ICAO, 21st Sess., Minutes of the Plenary Meetings, Doc. 9119, A21-Min. P/1-12, at 154-65. The resolution is in Doc. 9118, A21-RES. at 38-39.

⁴⁴ See *supra* note 41. The debates of the Council were closed to the public. Doc. 9158-C/1028, C-Min. 86 (18) (closed). The resolution of the Council is in Doc. 9163/C/1029, at 41-42.

India argued before the International Court of Justice that Article 89 was declaratory of customary international law. Appeal relating to the Jurisdiction of the ICAO Council [1972] ICJ REP. 46, at 69, 109 and Pleadings at 158-59, 571-73, 635. See also Little, *Commentary on the Development of the Individual Articles of the Convention on International Civil Aviation, Article 89*, 2 PROCEEDINGS OF THE INTERNATIONAL CIVIL AVIATION CONFERENCE, Chicago, Illinois, Nov. 1-Dec. 7, 1944, at 1395, Dept. of State Publication No. 2820 (1949) [hereinafter cited as PROC.].

The question under consideration involves two bodies of the law—the law of civil aviation and the law of belligerent occupation.

Article 1 of the Chicago Convention, which provides that every state has complete and exclusive sovereignty over the airspace over its territory, is declaratory of a rule of customary international law.⁴⁵ The principal difficulty lies in the interpretation of the related Article 2 of the Convention, which defines territory in somewhat archaic terms: Territory "shall be deemed to be" certain areas "under the sovereignty, suzerainty, protection or mandate" of a state. The literal reading of these words would suggest that the enumeration is exhaustive. The definition does not mention trusteeships,⁴⁶ (which is understandable in view of the fact that the Chicago Conference took place before the San Francisco Conference), areas under belligerent occupation, and possibly some other situations as well.⁴⁷ Moreover, a conflict could have arisen between State A as a protectorate of State B, but sovereign power over its territory, and the protector State B as to their respective status under the Chicago Convention.⁴⁸ It has been said that the definition "includes" territories for the international relations of which a contracting state is responsible, but this is helpful only to the extent of suggesting that the definition is not exhaustive.⁴⁹

The alternative would be to interpret Article 2 as not exhaustive and as intended to embrace situations in which a state has effective control and possession over a territory, such as trusteeship⁵⁰ or belligerent occu-

For a view that the right of belligerency under customary law prevails over the rights granted by a belligerent to a neutral state under Article 5 of the Chicago Convention, see I SHAWCROSS & BEAUMONT ON AIR LAW 207 (3d ed. 1966).

⁴⁵ See H. WASSENBERGH, *POST-WAR INTERNATIONAL CIVIL AVIATION POLICY AND THE LAW OF THE AIR* 100 (2d rev. ed. 1962); Goedhuis, *Questions of Public International Air Law*, 81 REC. DES COURS 201 at 209-11 (1952-II).

⁴⁶ H. WASSENBERGH, *supra* note 45, at 70.

⁴⁷ Regarding leased areas, see SHAWCROSS & BEAUMONT, *supra* note 44, at 193 n. 3; B. CHENG, *THE LAW OF INTERNATIONAL AIR TRANSPORT* 294-95 (1962).

⁴⁸ On protectorates in international law, see I L. OPPENHEIM, *INTERNATIONAL LAW* 192, 290, 561 (8th ed. H. Lauterpacht, 1958). Traffic rights with respect to protectorates have been granted by the protecting powers. See B. CHENG, *supra* note 47, at 294.

⁴⁹ SHAWCROSS & BEAUMONT, *supra* note 44, at 193. The authors agree that trusteeship territories and territories for whose international relations a contracting state is responsible "presumably" come within the scope of Article 2 but express the view that only territories over which the sovereignty of a state has been recognized come within the meaning of Article 2 and that Ethiopia once conquered would not be considered Italian territory (except by Germany, which "recognized the conquest"). *Id.*, and n. 2. See also B. CHENG, *supra* note 47, at 109.

⁵⁰ *Id.* at 106.

While the travaux préparatoires of the Chicago Convention do not lead to a clear conclusion regarding the interpretation of Article 2, they are consistent with the view that the definition of territory is not comprehensive and that it embraces situations of "jurisdiction." Article 3 of the U.S. proposal (1 Proc., *supra* note 44, at 556) provided that the Convention shall be applicable to all territory over which each contracting state "exercises sovereignty or jurisdiction." See also Art. 1(10), *id.* While Article 3 was deleted from the text of the Convention, it appears that this was done

pation, situations which are not mentioned in Article 2. Such a broad interpretation would commend itself for several reasons: First, it would be in accordance with the object and purpose of the Convention—the establishment of safe international civil aviation—since only the authority actually in possession and control of a territory rather than the dispossessed government (in the case of belligerent occupation) can ensure the safety of aviation over that territory.⁵¹ Otherwise, the effectiveness of the Convention would be endangered. Secondly, such a broad reading would avoid a conflict with the customary international law governing belligerent occupation⁵² and would accord with past practice on civil aviation in occupied territories, such as Germany and Berlin,⁵³ as well as Okinawa,⁵⁴

because “[i]t was agreed that if the definition of ‘territory’ were reformulated, Article 3 could be omitted” (*id.* at 680) and because it was “redundant” (*id.* at 691). See also *id.* at 651, 671 and the *Commentary*, *supra* note 44, at 1381.

⁵¹ See the Preamble to the Convention and Article 44(a), (d), and (h). ICAO's Plans are prepared in implementation of Annex 11 to the Convention, which provides that the contracting states shall determine in accordance with the provisions of the Annex and for the territories over which they have “jurisdiction” where air traffic services will be provided (§§2.1.1, 2.1.2).

Despite occasional difficulties, especially with regard to the establishment of FIR boundaries over areas of high seas where disputes have arisen over delineation of areas of economic jurisdiction (see working paper by IATA presented to the 22nd ICAO Assembly in 1977, ICAO Doc. A22-WP/40, TE/3(1977)), the practice of ICAO supports the proposition that agreements pertaining to delineation of FIR boundaries and their approval by the ICAO do not imply recognition of sovereignty over an area and are concerned simply with flight safety. See Appendix N, Art. 1–2 of the Chicago Convention (Resolution A21-21), in ICAO, *REPERTORY GUIDE TO THE CONVENTION ON INTERNATIONAL CIVIL AVIATION*, Doc. 8900/2, Part I, Ch. I (2d ed. 1977). See also Report of the Technical Commission, Doc. A22-WP/141, P/43 (1977), approved by the ICAO Assembly on October 3, 1977, which states that the boundaries of airspaces subject to Air Traffic Services, which include FIRs, shall be established on the basis of technical and operational considerations.

⁵² GREAT BRITAIN, WAR OFFICE, *THE LAW OF WAR ON LAND BEING PART III OF THE MANUAL OF MILITARY LAW 147* (1958). Regarding the right of the belligerent occupant to regulate the operation of all means of transport in occupied territories, see U.S. DEPT. OF THE ARMY, *THE LAW OF LAND WARFARE* (FN 27-10), para. 378.

⁵³ See *id.* at 297–303. Arts. 1 and 5 of Chapter 12 (Civil Aviation) of the Convention on the Settlement of Matters arising out of the War and the Occupation, concluded on May 26, 1952 between the United Kingdom, France, the United States, and the Federal Republic of Germany. 332 UNTS 220 at 310.

As regards civil aviation, it has been observed that international practice supports the proposition that a belligerent occupant may not only prohibit air traffic over occupied territory, but may also regulate civil air navigation. E. CASTRÉN, *THE PRESENT LAW OF WAR AND NEUTRALITY* 596–97 (1954). See also B. CHENG, *supra* note 47, at 386. Cheng observes also that, during the period when the former colonies of Italy in Africa were under British military occupation after the Second World War, traffic rights with respect to them were granted by the British Government. *Id.* at 295.

⁵⁴ See Treaty of Peace with Japan signed Sept. 8, 1951, 3 UST 3169, TIAS No. 2490, 136 UNTS 46, 46 AJIL Supp. 71 (1952), Art. 3; Civil Air Transport Agreement between the United States and Japan signed Aug. 11, 1952, 4 UST 1948, TIAS No. 2854, 212 UNTS 27, Art. 2 and Schedule; Agreement for Air Services between the United Kingdom and Japan signed Dec. 29, 1952, 175 UNTS 130, Schedule and Exchanges of Notes; Exchanges of Notes between the United States and Japan amending the Civil Air Transport Agreement of Aug. 11, 1952, 23 UST 677, TIAS No. 7333,

where international civil aviation was controlled and regulated by the occupants. The persuasive effect of these precedents is, however, limited because each reflected special circumstances.

While a literal reading of Article 2 would lead to unreasonable results, a broader reading would serve the object and purpose of the Convention and take into account the law of belligerent rights, applicable in the relations between Israel and Jordan, as indicated by Article 31, paragraph 3(c) of the Vienna Convention on the Law of Treaties.⁵⁵

Two further reasons may be adduced in support of the above interpretation of Article 2. In the first place, Article 89 of the Chicago Convention provides an important contextual link with the law of belligerent rights. That very broad war clause of the Convention reserved the freedom of action of the contracting states affected by war (or emergency conditions) whether as belligerents or as neutrals, and, one might add, as occupying powers.⁵⁶ It is conceivable that because of Article 89 a specific reference to belligerent occupation in the text of the Convention was not considered necessary.

Secondly, a further link with the law of belligerent rights and specifically with the law of belligerent occupation is created by the International Air Services Transit Agreement, a companion agreement to the Chicago Convention, adopted by the same Chicago Conference and signed on the same day. Under Article I of this Agreement, to which both Israel and Jordan are parties, the exercise of the two freedoms in areas of active hostilities or of *military occupation* and, in time of war, along the supply routes leading to such areas, shall be subject to the approval of the competent military authorities.⁵⁷ Obviously, in areas under military occupa-

835 UNTS 212; Agreement between the United States and Japan concerning the Ryukyu Islands and the Daito Islands, signed June 17, 1971, 23 UST 446, TIAS No. 7314. See also B. CHENG, *supra* note 47, at 296-97.

⁵⁵ *Supra* note 7.

⁵⁶ Regarding the broad character of Article 89, see Jennings, *International Civil Aviation and the Law*, 22 BRIT. Y. B. INT. L. 191, at 203, n. 3 (1945); see also *supra* note 44.

⁵⁷ Signed Dec. 7, 1944, 59 Stat. 1693, EAS No. 487, 3 Bevans 916, 84 UNTS 389. Jennings observed that this Agreement does not contain a peacetime clause and may continue to operate, within certain limits, even during war. *Supra* note 56, at 203. The Agreement itself (Art. 1, sec. 2) makes it clear that the exercise of the two freedoms was to be in accordance with the provisions of the Chicago Convention, thus strengthening the case for taking this agreement into account for the interpretation of the Chicago Convention. See Art. 31, para. 2, of the Vienna Convention on the Law of Treaties, *supra* note 7; T. BUERGENTHAL, *LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION* 154 (1969).

Wording similar to that of Article 1 of the International Air Services Transit Agreement was included by the Chicago Conference in the draft standard form agreement for provisional air routes. See 2 Proc., *supra* note 44, at 1289, 1294. Lord Swinton, Chairman of the United Kingdom delegation, declared in a policy statement that "even after the fighting is over, there will be a considerable period during which the allied military authorities will remain in charge. . . . Over a large part of the world . . . any arrangements which are made during the interim period will have to be made in close consultation with the allied military authorities." 1 Proc., *supra* note 44, at 66.

tion it is the occupant who is the competent authority, and it can suspend the exercise of the two freedoms even when the territorial sovereign opposes such a suspension. Although Article I is worded in terms of power to suspend only, it would make sense to interpret this provision in the context of belligerent rights, which include not only the power to prohibit, but also the powers to grant and to regulate.⁵⁸ Especially in the case of large occupied areas—this is obviously not true of the West Bank—the regulation of civil aviation by the occupant may be of considerable importance for the good of the population.⁵⁹

It may thus be concluded that the applicability of the Chicago Convention to occupied territories should be controlled by the occupant, rather than by the dispossessed government, and that the dichotomy between the real world of control of civil aviation by the *de facto* authorities and the ICAO-supported illusory control by the dispossessed government is dangerous for the safety of civil aviation. Neither is it justified in terms of international law.

IV.

CONCLUSIONS

There is no a priori reason why multilateral conventions to which occupying powers are parties should not be applicable to occupied territories, but whether a particular convention applies or not must be decided *in concreto*. The above decisions of the ILO and of the ICAO make bad law and little sense. This, alas, happens only too often when the supervision of important multilateral conventions is entrusted to international organizations which act on the basis of political considerations.

⁵⁸ *Supra* note 52.

⁵⁹ *Supra* note 33.

MAY ISRAEL AS A BELLIGERENT OCCUPANT LAWFULLY EXPLOIT PREVIOUSLY UNEXPLOITED OIL RESOURCES OF THE GULF OF SUEZ?

By Brice M. Clagett and O. Thomas Johnson, Jr.*

INTRODUCTION

Since shortly after the 1967 Middle East war, Israel has sought to reduce its dependence on imported oil by exploiting the resources of captured Egyptian territory.¹ Until recently attention was centered on the Sinai's Abu Rhodeis fields, which in 1974 were reported to be meeting 55 percent of Israel's needs.² In 1975, however, these fields were returned to Egypt as part of the second Egypt-Israel Disengagement Agreement.³ Previously unexploited areas of the eastern Gulf of Suez then became the subject of Israeli efforts,⁴ and by the fall of 1976 exploratory drilling was in progress off the Sinai coast. On November 25, 1977, Israel announced that this drilling had resulted in a commercial strike,⁵ and on March 29, 1978, it was reported that commercial production had begun.⁶ The question whether Israel may rightfully exploit the oil resources of the Gulf thus came sharply into focus.

The United States and Israel have indicated their respective views on

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¹ Within a month of Israel's victory in 1967, the Israeli Finance Minister had announced that Israel would take oil from Egyptian wells in the Sinai in order to help meet Israel's petroleum needs. 10 MIDDLE EAST ECONOMIC SURVEY, July 14, 1967, at 5.

² Cummings, *Oil Resources in Occupied Arab Territories Under the Law of Belligerent Occupation*, 9 J. INT. L. & ECON. 533, 535 (1974).

³ Agreement between Egypt and Israel on the Sinai and Suez Canal, Sept. 4, 1975, UN Doc. S/11818/Add. 1, reprinted in 14 ILM 1450 (1975). Israel agreed to relinquish the producing Sinai oil fields only after the United States agreed to "make oil available for purchase by Israel" to meet all its "normal requirements," and in the event of an oil embargo against the United States to share available oil with Israel to meet the latter's "essential requirements." Memorandum of Agreement Between the Governments of Israel and the United States, Sept. 1, 1975, reprinted in *Hearings on Memoranda of Agreements Between the Governments of Israel and the United States Before the Senate Comm. on Foreign Relations*, 94th Cong., 1st Sess. 249, 250 (1975). (This agreement has not been published by the Department of State.)

⁴ See Gerson, *Off-Shore Oil Exploration by Belligerent Occupant: The Gulf of Suez Dispute*, 71 AJIL 725 (1977). The eastern Gulf had been the subject of previous Israeli interest in 1968-69, but nothing came of that interest at that time.

⁵ Washington Post, Nov. 26, 1977, at A-10, col. 5.

⁶ N.Y. Times, March 30, 1978, at A-7, col. 1. Israel's Minister of Energy is reported to have stated that production from the eastern Gulf could meet up to one quarter of Israel's oil needs. *Id.*

this question. In January 1977 the U.S. Department of State gave the Government of Israel a legal memorandum which concluded that Israel did not have the right under international law to develop any previously undeveloped oil fields in occupied Egyptian territory.⁷ The Department of State's memorandum also noted that Israel's activities were being conducted in an area of the Gulf that was subject to concessions granted by Egypt to a subsidiary of the Standard Oil Company of Indiana (Amoco)⁸ and concluded that these concessions were valid "and must be respected."⁹ The following October Israel issued a written rebuttal to the Department of State's memorandum in which it took the position that its military control of the eastern Gulf gave it the right to exploit any petroleum resources located therein and that this right was not in any way limited by the Amoco concessions.¹⁰ This article examines the issues thus joined.¹¹

I.

APPLICABLE LAW

We assume, as did the legal memoranda of the Department of State and the Government of Israel, that Israel's status in the eastern Gulf of Suez is that of a belligerent occupant.¹² As such, Israel enjoys not the

⁷ Dept. of State Legal Adviser, Memorandum of Law, Oct. 1, 1976, *reprinted in* 16 ILM 733, 752 (1977) [hereinafter cited as Dept. of State Memorandum].

⁸ *Id.* at 748-52. The area of the Gulf in which Israel made its discovery is part of a concession granted by Egypt in 1974 to the Amoco Egypt Oil Company (Amoco-Egypt), a Delaware corporation and a wholly owned subsidiary of Amoco, and the state-owned Egyptian General Petroleum Corporation (EGPC). South Ghara Marine Area Concession Agreement of Dec. 14, 1974. This concession, as well as one other granted in 1974 and one granted in 1964, gives Amoco-Egypt and EGPC the exclusive right to explore for, develop, and produce petroleum in large parts of the eastern Gulf of Suez and provides for the acquisition by Amoco-Egypt of a share of all crude oil produced. (By assignment from Amoco-Egypt, an affiliate of the Italian firm AGIP is now also a party to the South Ghara agreement.)

⁹ Dept. of State Memorandum, *supra* note 7, at 752.

¹⁰ Government of Israel, Memorandum of Law, *reprinted in* 17 ILM 432 (1978) [hereinafter cited as Israeli Memorandum].

¹¹ It is recognized that the dispute discussed herein might be resolved through negotiations. The principles here involved, of course, have applicability beyond the particular dispute.

¹² Both sides make certain reservations concerning this assumption. The Department of State questions whether marine areas, at least those beyond the territorial sea, are susceptible to belligerent occupation (Dept. of State Memorandum, *supra* note 7, at 748-49); and it appears that Israel in the past has been unwilling to concede the applicability of the international law of belligerent occupation to its presence in the Sinai for fear that this would imply acceptance of Egyptian sovereignty over the area. Gerson, *supra* note 4, at 726-27; Cummings, *supra* note 2, at 541-43.

It seems difficult seriously to deny that the territorial sea can be occupied, as can land areas, by the establishment of control thereover. See Gerson, *supra* note 4, at 727-29. Indeed it would appear reasonable to go further than Gerson and to conclude that a portion of the continental shelf may be occupied, even though the super-jacent high seas clearly may not. Whether Israel has in fact established and maintained an effective occupation of the territorial waters and continental shelf adjacent to the western coast of the Sinai is a question beyond the scope of this article.

rights of the sovereign but only those limited rights granted an occupant by the international law of belligerent occupation.¹³

The 1907 Hague Regulations respecting the Laws and Customs of War on Land¹⁴ are the principal codification of existing international law governing the treatment of both public and private property by belligerent occupants.¹⁵ As stated by the International Military Tribunal at Nuremberg, the rules embodied in the Hague Regulations are "recognized by all civilized nations" and are "regarded as being declaratory of the laws and customs of war."¹⁶ The Regulations are, therefore, binding on all states, including those such as Israel and Egypt that have not ratified the Hague Convention No. IV of 1907.¹⁷

With respect to Israel's concern about sovereignty, it appears inconsistent with the clear intention of the Hague Regulations either to deny their protection to the inhabitants of any occupied territory or to hold that granting such protection constitutes recognition of the displaced government's title to the territory. See Cummings, *supra* note 2, at 541-50. The fact that Israel did not question Egypt's sovereignty over the Sinai in its Memorandum of Law is perhaps a reflection of the insubstantial nature of its concern in this regard. We know of no nonfrivolous ground on which Egypt's sovereignty over the Sinai could be challenged (for Israel's best effort, see Y. BLUM, *SECURE BOUNDARIES AND MIDDLE EAST PEACE* 86, n.175a (1971)); even if there were such a ground, it would not transform Israel's status into something other than that of a belligerent occupant.

¹³ See, e.g., 2 P. FAUCHILLE, *TRAITÉ DE DROIT INTERNATIONAL PUBLIC* 215-16 (1921); E. FEILCHENFELD, *THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION* 87 (1942); C. HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1878* (2d ed. 1945); A. MCNAIR & A. WATTS, *THE LEGAL EFFECTS OF WAR* 368 (4th ed. 1966).

¹⁴ Annex to the Hague Convention No. IV Respecting the Laws and Customs of War on Land, signed Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631 [hereinafter referred to and cited as the Hague Regulations].

¹⁵ The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, dated Aug. 12, 1949, [1955] 6 UST 3516, TIAS No. 3365, 75 UNTS 287, also contains provisions pertaining to the treatment of property in occupied territory. For example, Article 33 prohibits reprisals against the property of protected persons in occupied territory, and Article 53 prohibits

[a]ny destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations . . . except where such destruction is rendered absolutely necessary by military operations.

Both Egypt and Israel are parties to all four Geneva Conventions of 1949.

¹⁶ 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 253-54, 6 F.R.D. 69, 130 (1946).

¹⁷ The courts of Israel and other countries have recognized the declaratory nature and universal applicability of the Hague Regulations. In its opinion in the *Adolph Eichmann* case the Supreme Court of Israel stated:

These acts [war crimes] are deemed to constitute in essence *international crimes*; they involve the violation of the provisions of customary international law which obtained before the Hague Conventions of 1907, the latter merely "declaring" the rules of warfare as dictated by recognized humanitarian principles.

Attorney General v. Eichmann, 36 I.L.R. 277, 293 (1962) (emphasis in original). *Accord*, Coloni v. Ministry of War, 17 I.L.R. 419 (Court of Cassation, Italy 1950) ("Even in the absence of a treaty to this effect between the various States, these

The Government of Israel, however, has suggested in its Memorandum of Law that there is some doubt as to the relevance and validity of the Hague Regulations in a situation, like that in the Sinai and the Gulf of Suez, where the belligerents are no longer engaged in active hostilities.¹⁸ This expression of doubt appears to be based on a statement by one publicist to the effect that that part of the Hague Regulations dealing with belligerent occupation "applies expressly" only to a situation where the belligerent armies "are still fighting in the field."¹⁹ Neither the Israeli Memorandum nor the treatise on which it relies indicates precisely wherein the Hague Regulations "expressly" so limit their applicability, and in fact there is no such limitation. Moreover, the opinions of both courts and scholars make it clear that the cessation of active hostilities does not affect the rights or obligations of a belligerent occupant.²⁰ Indeed, the same writer who provided the basis for the question raised in the Israeli Memorandum states at a later point in the same treatise that, where an occupation continues beyond a cease-fire, "it is generally recognized that the Hague Regulations continue to apply, except so far as deviations result from, or have been stipulated in, the armistice agreement."²¹ Since neither the 1973 nor the 1975 Egypt-Israel Disengagement Agreement provides for any devia-

rules [Articles 52 and 53 of the Hague Regulations] govern the activities of States in time of war."); *Kostoris v. Meini*, 16 ANN. DIG. 471 (Court of Appeals of Trieste 1949) ("[E]ven if it were not applicable as a Convention, [the Hague Convention] should have been applied nevertheless as representing customary international law, of which it was to a great extent a codification."); *Società Italiana v. Mirabella*, 15 ANN. DIG. 606 (Court of First Instance, Rome 1948) (observance of the Hague Regulations held obligatory, even though not ratified by Italy, since "the Convention only re-states the customs observed by civilized nations"); *Italy in Corfu case*, 14 ANN. DIG. 264 (Court of First Instance of Corfu 1947) ("[A]lthough Greece is not a party to the Hague Convention of 1907, the Court must take note of [Article 43], as it is universally accepted.").

¹⁸ Israeli Memorandum, *supra* note 10, at 432-33.

¹⁹ E. FEILCHENFELD, *supra* note 13, at 6.

²⁰ "[I]nternational law knows only two categories of occupation by a conquering state: belligerent occupation properly so-called and assumption of sovereignty over the conquered areas." Freeman, *General Note on the Law of War Booty*, 40 AJIL 795, 796-97 (1946). This view is reflected in *Cobb v. United States*, 191 F.2d 604 (9th Cir. 1951), holding that, despite the fact that hostilities with Japan had long since ceased, U.S. authorities in Okinawa were bound by the Hague Regulations, and Article 43 thereof in particular, "until the terms of peace have been finally settled by treaty, proclamation, or otherwise." *Id.* at 610. See also GREAT BRITAIN, WAR OFFICE, THE LAW OF WAR ON LAND BEING PART III OF THE MANUAL OF MILITARY LAW, §447, at 130 (1958) [hereinafter cited as GREAT BRITAIN, MANUAL OF MILITARY LAW]; E. FRAENKEL, MILITARY OCCUPATION AND THE RULE OF LAW 8-9 (1944); Gerson, *War, Conquered Territory, and Military Occupation in the Contemporary Legal System*, 18 HARV. INT. L. J. 525, 528-29 (1977). Schwarzenberger declares that, whenever the occupying power remains in effective control of the occupied territory, the law of belligerent occupation ceases to apply if "the state of war is terminated by *debellatio* [the complete destruction of the hostile government] or consent." 2 G. SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 317 (1968). Clearly, neither condition has been met in any occupied Egyptian territory.

²¹ E. FEILCHENFELD, *supra* note 13, at 111.

tions from the Hague Regulations,²² the Regulations continue to be fully applicable to Israel's occupation in the Sinai and the Gulf of Suez.

II.

ISRAEL'S RIGHTS UNDER THE HAGUE REGULATIONS

Under Egyptian law, oil and gas in the ground are state property.²³ The Amoco concessions relating to the Gulf of Suez²⁴ do not vest title to any oil or gas in Amoco until it is taken from the ground. Thus the petroleum resources of the Gulf of Suez are state property for the purposes of applying the Hague Regulations.²⁵

Articles 53(1) and 55 of the Hague Regulations govern a belligerent occupant's dealings with state property. For this purpose a distinction is drawn between "movable" property and real estate. Article 53(1) stipulates that an army of occupation may take possession of "all movable property belonging to the State which may be used for military operations." In contrast, Article 55 provides that

[t]he occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

Although supplies of oil and gas that have already been extracted from the earth would be "movable" property and, therefore, within the scope of Article 53, it is clear that oil and gas in the ground constitute "immovable"²⁶ property and real estate. In *N. V. de Bataafsche Petroleum*

²² Egypt-Israel Cease-Fire Agreement, Nov. 11, 1973, 28 SCOR, Supp. (Oct.-Dec. 1973) 98, UN Doc. S/11056/Add. 3, annex (1973), reprinted in 12 ILM 1312 (1973); Agreement Between Egypt and Israel on the Sinai and the Suez Canal, *supra* note 3.

²³ S. SIKSEK, *THE LEGAL FRAMEWORK FOR OIL CONCESSIONS IN THE ARAB WORLD* 9-10 (1960).

²⁴ See note 8, *supra*.

²⁵ If the oil resources of the Gulf were private property for purposes of the Hague Regulations, then Israel's rights with respect to such oil resources would be somewhat different. Article 46 of the Regulations provides that private property "must be respected" and "cannot be confiscated." Articles 43 and 52, however, establish narrow exceptions to the general rule of respect for private property that could be applicable in the Gulf of Suez. Article 43 allows an occupant to expropriate private property if necessary in order to meet its obligation under that article to ensure public order and safety within the occupied territory. *In re Krupp*, 15 ANN. DIG. 620, 623 (United States Military Tribunal at Nuremberg 1948). And Article 52 authorizes an occupant to requisition property and services, but only as necessary to meet "the needs of the army of occupation." Under both exceptions the property owner must be compensated for the taking. (For discussions of the obligation of an occupant to pay compensation in respect of expropriations under Article 43, see E. FEILCHENFELD, *supra* note 13, at 50; M. GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 296 (1959).)

²⁶ Although the word "immovable" is not used in Article 55, discussions of this provision by commentators and courts describe its subject matter as "immovable" public property. *E.g.*, D. GRABER, *THE DEVELOPMENT OF THE LAW OF BELLIGERENT*

Maatschappij v. The War Damage Commission,²⁷ the leading case on the seizure of oil resources by a belligerent occupant, the Singapore Court of Appeal concluded that privately owned oil deposits in the Dutch East Indies that had been exploited by Japanese occupation forces during World War II were immovable property. While other parts of this decision have been criticized by some commentators, the court's classification of oil deposits as immovable property appears to be unchallenged.²⁸ It clearly is the proper classification since oil and gas in place are generally treated as immovable property and as real estate.²⁹ Article 55, therefore, governs an occupant's treatment of state-owned oil and gas deposits in occupied territory.³⁰

OCCUPATION 1863-1914, at 170 (1949); 2 L. OPPENHEIM, INTERNATIONAL LAW §140, at 403 (7th ed. H. Lauterpacht 1952); Cummings, *supra* note 2, at 559; *In re Weizsaecker*, 16 ANN. DIG. 344, 360-61 (United States Military Tribunal at Nuremberg 1949). This characterization is wholly consistent with the authoritative French text and with the different treatment of "movable" property in Article 53(1).

²⁷ 23 I.L.R. 810 (Court of Appeal, Singapore 1956) [hereinafter cited as *Bataafsche*].

²⁸ See Cummings, *supra* note 2, at 557 n.101. One of the principal issues in *Bataafsche* was whether crude oil in the ground, if privately owned, could be seized by occupation forces under Article 53(2) as "ammunition of war" ("*munitions de guerre*"). The court held that it could not on the ground that subterranean crude oil was "immovable" property (Article 53(2) applies only to movables), and also on the ground that such oil was "not susceptible of direct military use." *Bataafsche*, *supra* note 27, at 823-24. The latter basis for this holding has been criticized as unrealistic. See *id.* at 846-47 (concurring opinion of Whitton, J.); M. McDUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 818 (1961). Notwithstanding the implication contained in the Israeli Memorandum, *supra* note 10, at 436, neither Judge Whitton nor Professors McDougal and Feliciano directed their criticism at the ruling in *Bataafsche* that crude oil in the ground constitutes "immovable" property. See *Bataafsche*, *supra* note 27, at 846-47; M. McDUGAL & F. FELICIANO, *supra*, at 818.

²⁹ For example, the French *Code Minier* provides that "mines are immovable property" (Code Minier, Decree No. 58-538, Aug. 16, 1956, Art. 24, [1956] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE 8004, 8006) and that "areas known to contain . . . hydrocarbons in liquid or gaseous form" are regarded as mines (*id.* at Art. 2). In addition, see SCHWEIZERISCHE ZIVILGESETZBUCH, Art. 655 (Switzerland) (I. Williams transl. 1925); CODIGO CIVIL §334 (Spain); BÜRGERLICHES GESETZBUCH [BGB], Arts. 93, 94(1) (German Federal Republic) (I. Forrester, S. Coren, H. Ilgen transl. 1975); R. MEGARRY & H. WADE, THE LAW OF REAL PROPERTY 12 (4th ed. 1975); Yiannopoulos, *Movables and Immovables in Louisiana and Comparative Law*, 22 LA. L. REV. 517, 518 (1962).

Summers summarizes the status of oil and gas under American law as follows:

Oil and gas as they are found in the earth are a part of the total physical aggregate which in law is designated land, and legal relations respecting them are uniformly held to be real property.

W. SUMMERS, THE LAW OF OIL AND GAS §21 (1954) (footnotes omitted). *Accord*, Federal Land Bank of Wichita v. Board of County Comm'rs, 368 U.S. 146, 153 (1961) ("Mineral estates are realty under [Kansas] law."); *Harrington v. Texaco*, 339 F.2d 814, 821 n.15 (5th Cir. 1964) ("In Texas, oil and gas is regarded as realty when in place. . ."); *Kentucky Bank & Trust Co. v. Ashland Oil & Transp. Co.*, 310 S.W. 2d 287, 290 (Ky. App. 1958) ("[I]t is well settled that oil in place is a part of the land itself. . .")

³⁰ To support its contention that Israel enjoys broad rights with respect to state-

The essence of Article 55 is its requirement that an occupant, "safeguard the capital" of public property and administer it "in accordance with the rules of usufruct." Nothing in the text of the article, however, specifies particular "rules of usufruct" to be followed by an occupant or otherwise makes clear how this restriction was intended to affect the exploitation of minerals. Nor do the few cases in which Article 55 has been applied provide, with one exception, significant guidance in this regard.³¹ Therefore, in order to give Article 55 substance and apply it to the

owned property, the Israeli Memorandum quotes from an opinion of the U. S. Attorney General regarding the U.S. rights with respect to public property in Cuba following the Spanish-American War (Israeli Memorandum, *supra* note 13, at 439-40):

[I]t is lawful for the conqueror, in administering the conquered territory, to make such use of the property previously belonging to the former sovereign as he sees fit. There is, therefore, in the President of the United States, acting by virtue of his constitutional authority as Commander in Chief of the Army and Navy, adequate power to use and make disposition of property in Cuba formerly belonging to the Crown of Spain or subject to the Imperial prerogative, and this includes the right to dispose of mining and other property formerly belonging to the Spanish Crown.

23 Op. Att'y Gen. 222, 226-27 (1900). However, this opinion, even if it had been written after the Hague Regulations were adopted, would not support the view that Article 55 grants occupants substantially unrestricted authority over public immovable property. Article 55 defines the rights of a belligerent occupant with respect to immovable property "belonging to the hostile State." In the treaty ending the Spanish-American War (Treaty of Peace Between the United States and Spain, *signed* Dec. 10, 1898, [1899] 30 Stat. 1754, T.S. 343, 11 Bevans 615), Spain relinquished not only "all claim of sovereignty over and title to Cuba" (Art. 1) but also "all the buildings, wharves, barracks, forts, structures, public highways and other immovable property which, in conformity with law, belong to the public domain, and as such belong to the Crown of Spain" (Art. 8). Thus when the Attorney General wrote the opinion in question there was no immovable property in Cuba "belonging to the hostile State," and therefore no property to which Article 55 could apply even if it had been in force at the time. Cf. *Neely v. Henkel*, 180 U.S. 109 (1901).

³¹ The leading case regarding the extent of a belligerent occupant's right to exploit publicly owned natural resources is *Administration of Waters and Forests v. Falck*, 4 ANN. DIG. 563 (Court of Cassation, France 1927). During the German occupation of parts of France in World War I, Falck had cut trees in a public forest pursuant to contracts with the occupation authorities but contrary to French forestry regulations in effect at the commencement of the occupation. The trial court construed Article 55 very loosely, noting the necessities of modern warfare, and ruled in favor of Falck, 3 ANN. DIG. 480 (Court of Nancy, France 1926). The Court of Cassation reversed, holding that Article 55 required a belligerent occupant, and anyone working under a contract with the occupation authorities, to observe the regulations limiting the rate at which forests could be exploited that existed prior to the occupation. Clearly, the decision supports a restrictive interpretation of Article 55.

Other frequently cited cases in which the provisions of Article 55 were interpreted and applied are: *The Lighthouses case* (France v. Greece), 23 I.L.R. 806 (Permanent Court of Arbitration 1956); *French State v. Lemarchand*, 15 ANN. DIG. 597 (Court of Appeal of Rouen, France 1948). In none of these cases was consideration given to the extent of permissible exploitation of state-owned natural resources by belligerent occupants.

The *Guano case* (France v. Chile), 15 R. INT. ARB. AWARDS 125 (1901), was decided before the Hague Regulations took effect but recognized that under customary law the rights of a belligerent occupant to public immovable property were limited to the rights of usufruct. *Id.* at 367. Without determining whether guano was movable or im-

specific situation at hand, it is necessary to review its negotiating history and to examine pertinent rules of usufruct that have developed in the civil-law world—usufruct being a distinctively civil-law concept—and its common-law analogue.

A. *The Negotiating History of Article 55*

The language of Article 55 first appeared as Article 7 of the code drafted at the 1874 Brussels Conference on the Laws and Customs of War³² and was adopted without change or comment by both the 1899 and 1907 Hague conferences.³³ Thus one must look to the records of the 1874 Brussels Conference for guidance as to the intentions of the drafters of Article 55. Although the code produced by the Brussels Conference never was adopted as a treaty, its influence was far reaching in that the authors of subsequent codes on the laws and customs of war, including those drafted at the Hague conferences of 1899 and 1907, used it as a model.³⁴

The language originally proposed (by the Russian delegation) at the Brussels Conference for a provision on public immovable property simply granted an occupant the "use" of such property.³⁵ It did not use the term *usufruct* and did not impose any positive obligations on occupants.³⁶

movable property, the tribunal held that the occupant had a right to exploit the deposits in either event. Since the deposits were under active exploitation prior to the occupation, *id.* at 126–27, the decision bears no implication that a usufructuary may exploit previously unexploited resources.

³² ACTES DE LA CONFÉRENCE DE BRUXELLES DE 1874 SUR LE PROJET D'UNE CONVENTION INTERNATIONALE CONCERNANT LA GUERRE 61 (1874).

³³ See D. GRABER, *supra* note 26, at 170, 189.

³⁴ *Id.* at 26.

³⁵ The draft article read as follows:

§7. The right to use public buildings, real estate, forests and agricultural estates belonging to the hostile State and situated in the occupied country, likewise passes to the army of occupation.

ACTES DE LA CONFÉRENCE DE BRUXELLES DE 1874, *supra* note 32, at 5.

³⁶ *Id.* The only international model to which the delegates could refer in their work was the code (General Orders No. 100) prepared by Francis Lieber to guide the conduct of Union forces in the American Civil War. 2 U.S. WAR DEPT., GENERAL ORDERS OF THE WAR DEPARTMENT, 1861–63, at 104 (1864). Article 31 of the "Lieber Code" provided as follows with respect to public immovable property:

A victorious army . . . sequesters for its own benefit or that of its government all the revenues of real property belonging to the hostile government or nation. The title to such real property remains in abeyance during military occupation, and until the contest is made complete.

Id. at 107. This provision reflected the restrictions of customary international law at that time. See, e.g., D. GRABER, *supra* note 26, at 162 and authorities cited at n.3. The extent to which minerals would be considered "revenues of real property" under this formulation is not clear, although the logical presumption is that "revenues" would not include proceeds from the depletion of capital and that the pre-1874 law thus reflected at least an embryonic usufructuary standard. As is demonstrated *infra*, the final product of the Brussels Conference eliminated this ambiguity by expressly employing the standard of usufruct.

Eventually, this draft was revised to require that occupants "safeguard the capital" of public immovable property and administer it according to the rules of usufruct.³⁷ The initial revision, however, (prepared by the Russian delegation) only required an occupant to fulfill this obligation "as much as possible."³⁸ This qualification was deleted, at the request of Denmark and Austria-Hungary, in the final text of Article 7.³⁹

Two inferences can fairly be drawn from the drafting history of Article 7. First, the delegates intended that occupants be under an absolute obligation to "safeguard the capital" of public immovable property and not be allowed to deviate from the requirements of the rules of usufruct for their own convenience. This is the clear implication of the Conference's acquiescence in the request of Denmark and Austria-Hungary that the qualifying language "as much as possible" be deleted. Second, the delegates to the Brussels Conference employed the term "usufruct" advisedly, aware that it was a legal term of art. The term had not been used previously to define the rights and obligations of occupants with respect to public immovable property⁴⁰ and was not contained in the initial draft of Article 7 presented to the Conference. Therefore, a careful and detailed examination of the rights and obligations associated with the concept of usufruct would seem to be an appropriate, necessary, and indeed determinative part of any effort to interpret and apply the provisions of Article 55.

The Israeli Memorandum asserts that the term "rules of usufruct" as used in Article 55 of the Hague Regulations should not be interpreted "by the application of National Law systems."⁴¹ In support of this assertion the Memorandum refers to the opinion of the Permanent Court of International Justice in the *Exchange of Greek and Turkish Populations* case⁴² and that of the International Court of Justice in the *South-West Africa* case.⁴³ Both opinions discuss whether specific words used in international instruments should be interpreted in accordance with their meaning in municipal law.

In the Greek-Turkish case the PCIJ concluded that the word *établis* ("established") should not be interpreted by reference to the municipal legislation of the two countries concerned because the agreement being interpreted did not contain "any express or implicit reference to national legislation for the purpose of determining what persons are to be regarded as 'established.'"⁴⁴ The Court went on to note that "in regard to this point, the Convention is self-contained" and that reliance should be placed on "the natural meaning of the words. . . ."⁴⁵ Similarly, in the *South-*

³⁷ ACTES DE LA CONFÉRENCE DE BRUXELLES DE 1874, *supra* note 32, at 56, 58.

³⁸ *Id.* at 15, 28, 56, 58.

³⁹ *Id.* at 27, 28.

⁴⁰ See note 36, *supra*.

⁴¹ Israeli Memorandum, *supra* note 10, at 434-35.

⁴² [1925] PCIJ, ser. B, No. 10.

⁴³ [1950] ICJ REP. 127.

⁴⁴ [1925] PCIJ, ser. B, No. 10, at 19.

⁴⁵ *Id.* at 20.

West Africa case the ICJ concluded that the term "mandate," as used in connection with South Africa's mandate over South-West Africa from the League of Nations, had a broader meaning than that attributed to the term in municipal law.⁴⁶ In a concurring opinion in this case, Judge McNair argued that

the duty of international tribunals . . . is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policies and principles rather than as directly importing these rules and institutions.⁴⁷

It cannot fairly be concluded from these precedents that the term "rules of usufruct" in Article 55 of the Hague Regulations should not be interpreted by reference to municipal law. Words such as "establish" and "mandate" are more or less nontechnical and have a general intelligibility; in contrast, it is wholly impossible to understand the words "rules of usufruct" without referring to municipal law, since such rules exist nowhere else. To be sure, this does not mean that all rules of usufruct to be found in municipal law should be read into that term when it is used in an international agreement. Since all possible applications of the terms used in agreements are unlikely to have been considered by their negotiators, there is a good deal of sense to McNair's position that only "policies and principles" should be derived from municipal law. An analysis of the policies and principles embodied in the term "rules of usufruct" leads to the conclusion that Israel's activities in the Gulf of Suez are inconsistent with the Hague Regulations.

B. Usufruct in Civil Law

The concept of usufruct, as it exists in contemporary civil-law systems, has its roots in the law of ancient Rome.⁴⁸ Like the modern codes, Roman law defined usufruct in terms of both general principles and specific applications of those principles.⁴⁹ The underlying principles of usufruct have remained essentially the same since the time of Justinian, but their application to the exploitation of mineral deposits has changed.

The *Institutes of Justinian* defined usufruct as "the right of using and enjoying the property of other people, *without detriment to the substance of the property*."⁵⁰ A usufructuary was not, as such, entitled to consume

⁴⁶ [1950] ICJ REP. at 132.

⁴⁷ *Id.* at 148.

⁴⁸ See 2 C. SHERMAN, *ROMAN LAW IN THE MODERN WORLD* 9 (3d ed. 1937). See also Pugliese, *On Roman Usufruct*, 40 TUL. L. REV. 523 (1966).

⁴⁹ Compare THE DIGEST OF JUSTINIAN 7.1 (2 C. Monro transl. 1909) [hereinafter cited as DIGEST] with CODE CIVIL (C. CIV.) Arts. 582-99 (France) (J. Crabb transl. 1977) and BGB, *supra* note 29, §§1030-1067.

⁵⁰ THE INSTITUTES OF JUSTINIAN 2.4 (J. Abdy and B. Walker transl. 1876) [hereinafter cited as INSTITUTES] (emphasis added). For general discussions of the Roman law of usufruct, see W. BUCKLAND, *A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN* (1963); H. JOLOWICZ, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* (1932); H. ROBY, *ROMAN PRIVATE LAW* (1902); 2 C. SHERMAN, *supra* note

the property that was the subject of the usufruct.⁵¹ In fact, things that were consumed by use did not, according to the *Institutes*, "admit of usufruct either on natural principles or the principles of civil law."⁵² Moreover, while a usufructuary was at liberty to improve the position of the owner, he was prohibited from making it worse.⁵³

The Romans applied these general principles to the exploitation of mineral deposits with anomalous results. By the time of Justinian, Roman usufructuaries had been authorized not only to work mines that had already been opened by the original owners, but also to open new mines, if such would not interfere with, or would be more profitable than, cultivation of the land.⁵⁴ It is, of course, difficult to see how granting a usufructuary the almost unlimited right to deplete a property's mineral resources can be reconciled with general prohibitions against worsening the owner's position and impairing the substance of the property. Roman jurists, however, had no such difficulty, for they believed mineral deposits to be self-renewing, or at least inexhaustible.

A clear indication that parts of the Roman law of usufruct were based on a fundamental misconception of the nature of minerals is found in the following passage from Justinian's *Digest*:

[M]arble is not included in the fruits of the estate, unless it grows on the estate, as happens in some quarries in Gaul and Asia.

Mines for clay, silver, gold, sand, or some other substance, are included in the definition of fruits.⁵⁵

That the Romans' misconception was not limited to the marble of Gaul and Asia is well established. As one writer has noted, "most eminent [Roman] legal experts believed that products from inside the ground renewed themselves like fruits, or that at least they were inexhaustible."⁵⁶

48; A. WATSON, *THE LAW OF PROPERTY IN THE LATER ROMAN REPUBLIC* (1968); Pugliese, *supra* note 48.

⁵¹ H. ROBY, *AN INTRODUCTION TO THE STUDY OF JUSTINIAN'S DIGEST* 27-28 (1884). "A proper usufruct relates only to such things as can be restored entire when the right expires, and not to such things as wine or other fungibles, which perish in the use." T. MACKENZIE, *STUDIES IN ROMAN LAW* 187 (1898).

⁵² *INSTITUTES* 2.4.2. See 1 H. ROBY, *supra* note 50, at 484; A. WATSON, *supra* note 50, at 207. In the reign of either Augustus or Tiberius, the Roman Senate enacted legislation making fungible items consumed by use eligible for a status known as quasi-usufruct. Under this legislation the quasi-usufructuary was required to give security at the commencement of the quasi-usufruct and, upon its expiration, to replace any goods consumed. *INSTITUTES* 2.4.2; 2 C. SHERMAN, *supra* note 48, at 163.

⁵³ *DIGEST*, *supra* note 49, at 7.1.13.4.

⁵⁴ *DIGEST*, *supra* note 49, at 7.1.13.5; H. ROBY, *supra* note 50, at 485; Pugliese, *supra* note 48, at 546; Comment, *Mineral Leases on Land Subject to Usufruct*, 34 *TUL. L. REV.* 784, 792 (1960).

⁵⁵ *DIGEST* 24.3.13-14 (2 B. Rodriguez de Fonseca transl. 1873).

⁵⁶ F. LAURENT, *PRINCIPES DE DROIT CIVIL* 564 (4th ed. 1887). In a somewhat different vein, Demolombe explains the difference between Roman law and French law regarding the extraction of minerals by usufructuaries as follows:

Roman legal experts had other rules on this subject; and they granted the usufructuary in every case the right to extract metals and stones contained in the

Thus, it would be inappropriate to rely upon the specific rules of Roman law regarding the exploitation of minerals by usufructuaries to justify the opening of new mines, or the drilling of new wells, by modern military occupants. The general principles of Roman usufruct, however, remain valid and have been carried forward in modern civil codes.

Modern civil codes do not contain provisions specifically setting forth the rights of usufructuaries with respect to oil and gas deposits. They do, however, state rules that govern the operation of mines and quarries. That these rules also should be applied to oil and gas wells which, like mines and quarries, extract nonrenewable natural resources seems clear.

Surely the most representative codification of the modern law of usufruct is the French Civil Code of 1804. As embodied in the French Code, this law incorporates the basic principles of usufruct from Roman law, but applies them in a manner that reflects, if imperfectly, an understanding of the true nature of minerals.⁵⁷ Thus, Article 578 of the Code defines

earth; the right, we say, not only to continue exploitation that was already begun by the owner, but to begin new development there himself, *ipse instituere*; doubtless . . . because the great abundance of these products made them think they were inexhaustible. . . .

10 C. DEMOLOMBE, *COURS DE CODE NAPOLEON* 376 (1854). And in a chapter of his *Meditationes Ad Pandectas* entitled "Metalla omnia renascuntur" ("All Metals are Renewed"), the 18th-century commentator Leyser provides an indication not only of the nature of the Romans' misconception regarding minerals, but also of its longevity:

Many distinguish between those metals which are renewed and those which are not renewed And yet the quite difficult question again arises as to which metals are renewed. We hold with those who say that all metals are renewed. . . . As it happens Ulpian believed likewise

A. LEYSER, *MEDITATIONES AD PANDECTAS* 427-28 (1741). The Romans' beliefs regarding minerals are discussed at some length in *The Master v. African Mines Corporation, Ltd.*, [1907] *TRANSVAAL L. REP.* 925 (South Africa). The court in this case commented as follows with respect to the appropriateness of applying the permissive Roman rule to modern-day mineral exploitation:

It may have been very well to allow the usufructuary to dig for minerals in days when they were supposed to renew themselves within a century and when the extraction was a slow process; but nowadays, when by the use of high explosives and efficient drills the minerals can be extracted in a short time, it does not seem desirable that the usufructuary should leave the real owner an exhausted farm.

Id. at 931.

⁵⁷ Civil-law commentators have for some time recognized that minerals are not properly considered fruits and that a usufructuary should not, according to the general principles of usufruct, be allowed to exploit them. Planiol and Ripert, for example, comment as follows:

Owners sometime derive from their property certain products that are not fruits. This may be due to the fact either that the element of periodicity is wanting or that, in collecting them, the substance of the thing is exhausted. These products are, on the one hand, trees and on the other, the substances that are extracted from mines, pits and quarries. It follows from the special nature of these products that, in principle, the usufructuary's right of enjoyment cannot apply to them.

1 M. PLANIOL & G. RIPERT, *CIVIL LAW TREATISE* §2790 (Louisiana State Law Institute transl. 1959). In addition, see 6 F. LAURENT, *supra* note 56, at 563-64; 2 C. AUBRY & C. RAU, *DRIT CIVIL FRANÇAIS* §230, at 479 (Louisiana State Law Institute transl. 1966).

usufruct as "the right to enjoy the things of which another has ownership like the owner himself, *but with the responsibility of conserving the substance of it*,"⁵⁸ and Article 598 applies this obligation to the exploitation of minerals by allowing a usufructuary to work only those "mines and quarries *which were being exploited at the opening of the usufruct*."⁵⁹ Clearly, Article 598 represents a not wholly logical compromise between the basic concept of usufruct and a misconceived application of that concept in the law of ancient Rome. It has been justified on the ground that minerals that were being exploited at the commencement of a usufruct constituted a source of income on which the owner lived and to which the usufructuary should be entitled, since he enjoys the property "like the owner himself."⁶⁰

As the nineteenth century progressed, other European jurisdictions adopted comprehensive civil codes and, frequently, their provisions relating to usufruct were strikingly similar to those of the French Code. By 1810 Belgium, the Swiss canton of Geneva, and the German states of Bavaria and Baden had adopted codes that contained provisions substantially identical to those of the French Code regarding the mineral rights of usufructuaries.⁶¹ In 1838, the Netherlands adopted a civil code that denied to usufructuaries "the right, in whatever manner, to mines, stone or coal quarries and peat-cuttings, which have not yet been exploited. . . ."⁶² Similarly, the Italian Civil Code, adopted in 1865, restricted usufructuaries to the enjoyment of "the quarries and turfpits already opened and in operation at the beginning of the usufruct."⁶³ And the Portuguese Civil Code of 1867 stated simply that "the usufructuary cannot open new mines or quarries."⁶⁴

Not all codifications of the law of usufruct adopted during this period followed the French model in its entirety. Some, such as the Civil Code of Prussia and provisions appearing in early constitutions of other German states, were more restrictive than the French in applying the usufruc-

⁵⁸ C. CIV., *supra* note 49, Art. 578 (emphasis added). "Extraction of matter which does not replace itself represents the taking of the substance of the thing." 2 C. AUBRY & C. RAU, *supra* note 57, at 479.

⁵⁹ C. CIV., *supra* note 49, Art. 598 (emphasis added).

⁶⁰ I. M. PLANIOL & G. RIPERT, *supra* note 57, at 650. Laurent is critical of this rationale:

To be sure, the usufructuary enjoys like the proprietor, but he enjoys the fruits, and not the capital. The products of mines and quarries are certainly not a fruit, but a part of the ground. It is therefore the substance of the thing which the exploiter successively depletes; how can the usufructuary have the right to exploit the mines and quarries when he must conserve the substance?

6 F. LAURENT, *supra* note 56, at 563-64.

⁶¹ CODE CIVIL, Arts. 578, 598 (Belgium) (adopted in 1804); CODE CIVIL, Arts. 578, 598 (Geneva) (adopted in 1804); ALLGEMEINES BÜRGERLICHES GESETZBUCH FÜR DAS KÖNIGREICH BAIERN, Arts. 601, 621 (Bavaria) (adopted in 1809); BADISCHE LANDRECHT, Arts. 578, 598 (Baden) adopted in 1810).

⁶² BURGERLIJK WETBOEK, Art. 823 (P. Haanebrink transl. 1921).

⁶³ CODICE CIVILE, Art. 987 (M. Beltramo, B. Longo and J. Merryman transl. 1969).

⁶⁴ CODIGO CIVIL, Art. 2213.

tuary's obligation to preserve the substance of property and permitted usufructuaries only to "use" any minerals removed from the ground, the ownership and capital value of such minerals being reserved to the owner of the property.⁶⁵ Others, such as the civil codes of Austria and the Swiss cantons of Grisons and Zurich, incorporated the Roman principle that the substance of property subject to a usufruct must be preserved but did not state whether new mines could be opened or otherwise specifically limit a usufructuary's rights with respect to minerals.⁶⁶ It seems that of all the civil codes adopted prior to the Brussels Conference of 1874, only

⁶⁵ The Prussian Civil Code of 1794, the *Allgemeines Landrecht* (ALR), provided that the usufructuary of a mine "is only entitled to the use of the yield" of the mine. ALR Pt. I, tit. 21, §37. In 1846, the Supreme Court of Prussia (*Geheimes Obertribunal*) commented as follows with respect to this section:

Usufruct is conceivable not with respect to the right to exploit mines but only with respect to the exploited minerals as the very substance of the right to exploit mines Minerals may not be considered fruits of the land, which are year after year or at all regrowing; exploited minerals are a part of the substance, which is not for the usufructuary to claim. Therefore, the usufructuary may consider the exploited minerals as capital only, the interest of which is due to him.

12 *ENTSCHEIDUNGEN DES KOENIGLICHEN GEHEIMEN OBERTRIBUNALS* 463 (1846), discussed in C. KOCH, *ALLGEMEINES LANDRECHT* Pt. I, tit. 21, note 27 (1886). Similar provisions are found in the Constitution of Kursachsen of 1572 and the Constitution of Saxony of 1616, discussed in C. HAUBOLD, *HANDBUCH DER WICHTIGSTEN SAECHSISCHEN GESETZE VON ALLGEMEINEREM INHALTE* 2 (1837). Both constitutions contain provisions requiring that minerals taken by a usufructuary, or their value, be returned to the owner of the land from which they were taken at the end of the usufruct. *CONSTITUTION OF KURSACHSEN*, Pt. III, Art. 25 (1572); *CONSTITUTION OF SAXONY*, Pt. II, Art. 2, §16 (1616).

Apparently, the same rule prevailed under German common law. In 1610, the Supreme Court of Friesland held that the usufructuary of a tract of land on which turf is exploited enjoyed only a quasi-usufruct with respect to the turf and, therefore, could claim only the interest on the proceeds of the sale of the turf, the proceeds themselves being reserved for the owner of the land. 16 *ERKENNTNIS DER SUPREMA FRISIAE CURIA* (1610), discussed in Schröder, *Ueber das Recht des Niessbrauchers an Mineralischen Produkten, Insbesondere Bergwerkserzeugnissen*, 49 *ARCHIV FÜR DIE CIVILISTISCHE PRAXIS* 246, 360 (1866). In the decision above, the Supreme Court of Prussia took the same view more than 200 years later:

The answer to our question under common law is disputed; we are of the opinion that a usufructuary may not exploit fossils including coal, which are not regrowing, and that he is only entitled to the use of the interest borne by the exploited and capitalized products.

12 *ENTSCHEIDUNGEN DES KOENIGLICHEN GEHEIMEN OBERTRIBUNALS*, *supra*, at 463.

⁶⁶ Article 509 of the Austrian Civil Code of 1811 provides as follows:

The usufruct is the right of using the property of another without any restriction, assuming the use does not injure the substance of the property.

GENERAL CIVIL CODE OF AUSTRIA, Art 509 (P. Baeck transl. 1972). Article 279 of the Zurich Civil Code of 1854 defines a usufruct as "the right to use the thing and to enjoy its fruits in a manner such that its substance remains preserved." *PRIVATRECHTLICHE GESETZBÜCHE DES KANTONS ZÜRICH*, Art. 279. And the 1862 civil code of the canton of Grisons defines a usufruct as "the right to draw, without impairing the substance, all uses and enjoyments from the thing of another which could be drawn from it as proprietor. . . ." *BÜNDERISCHES PRIVATRECHT*, Art. 264.

the code of the German state of Saxony expressly permitted usufructuaries to open new mines.⁶⁷

While the common law does not incorporate the concept of usufruct as such, the obligations of a common-law life tenant are virtually identical with those of a civil-law usufructuary.⁶⁸ Like a usufructuary, a life tenant ordinarily "is not entitled to extract oil, gas or other minerals from the land, for the reason that the extraction of such substances depletes the corpus or inheritance and amounts to waste."⁶⁹ The life tenant, however, enjoys the same right as most usufructuaries to exploit open mines. In his *Commentaries* Blackstone stated this exception to the common-law principle of waste as follows:

To open the land to search for mines of metal, coal, etc. is waste; for that is a detriment to the inheritance: but if the pits or mines were open before, it is no waste for the tenant to continue digging them for his own use; for it has now become the mere annual profit of the land.⁷⁰

In summary, by the time the Brussels Conference on the Laws and Customs of War was convened in 1874, eight of its fifteen participants⁷¹ had adopted national civil codes. Of these eight codes, five (those of Belgium, France, Italy, the Netherlands, and Portugal) expressly denied usufructuaries the right to open new mines;⁷² one (that of Austria) required that usufructuaries preserve the substance of property but did not expressly prohibit the opening of new mines, and two (those of Russia and Turkey⁷³) contained no provisions concerning the rights of usufructuaries. Of the seven participants that did not have national civil codes in 1874, the principal political subdivisions of one (Germany) had codes

⁶⁷ BÜRGERLICHES GESETZBUCH §609 (Saxony) (adopted in 1865). Apparently, the Saxon code also allowed usufructuaries to enjoy the full proceeds of minerals taken from land subjects to the usufruct. E. SIEBENHAAR, *LEHRBUCH DES SACHSISCHEN PRIVAT-RECHTS* 6 (1872). Thus, the Saxon code differed from the Prussian code, the 17th-century Saxon constitution, and German common law.

⁶⁸ See McClean, *The Common Law Life Estate and The Civil Law Usufruct: A Comparative Study*, 12 INT. & COMP. L.Q. 649, 662-63 (1963); 2 J. WESTLAKE, *INTERNATIONAL LAW* 119 (1913).

⁶⁹ 1 E. KUNTZ, *A TREATISE ON OIL AND GAS* 169 (1962).

⁷⁰ W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 281-82 (1884). *Accord*, *Saunders's Case*, 77 ENG. REP. 66 (K.B. 1599); *Viner v. Vaughn*, 48 ENG. REP. 1262 (1840); *Dashwood v. Magniac*, [1891] 3 Ch. 306. The open-mine rule has long been followed in the United States as well. 1 E. KUNTZ, *supra* note 69, at 174-75 and cases cited at n.3.

⁷¹ The Brussels Conference was attended by delegates from Austria-Hungary, Belgium, Denmark, France, Germany, Great Britain, Greece, Italy, the Netherlands, Norway and Sweden (then united), Portugal, Russia, Spain, Switzerland, and Turkey. *ACTES DE LA CONFÉRENCE DE BRUXELLES DE 1874*, *supra* note 32, at 19.

⁷² Argentina and Colombia did not attend the Brussels Conference, but by the time it was held they also had adopted civil codes that prohibited usufructuaries from opening new mines. *CODIGO CIVIL*, Art. 2900 [2866] (Argentina) (adopted in 1869); *CODIGO CIVIL NACIONAL*, Art. 843 (Colombia) (adopted in 1873).

⁷³ See *SVOD ZAKONOV GRAZHDANSKIKH* (Civil Code) (1857) (Russia); *MEDJELLE* (Civil Law) (W. Grigsby transl. 1895) (Turkey).

that were *at least* as restrictive as the national codes that prohibited the opening of new mines; the principal subdivisions of another (Switzerland) had codes that either prohibited new mines or simply required that the substance of property be preserved; one participant (Spain) subsequently adopted a national code that prohibited the opening of new mines,⁷⁴ while another (Greece) eventually adopted a code on the Austrian model;⁷⁵ and three participants (the unified Norway and Sweden, Denmark, and Great Britain) did not incorporate the concept of usufruct into their law,⁷⁶ although Great Britain applied the analogous common-law concept of life tenancy in a manner that prohibited life tenants from opening new mines.

Thus, when the delegates to the 1874 Brussels Conference chose the term "rules of usufruct" to define the rights and obligations of an occupant with respect to public immovable property, they were choosing a well-defined legal term of art that included within its meaning (1) general principles that had remained essentially unchanged for thousands of years and that, once the true nature of minerals is understood, are plainly inconsistent with *any* mineral exploitation by a usufructuary and (2) a widely shared practice of applying those principles in a manner that *at least* prohibited usufructuaries from opening new mines.

In 1900, twenty-six years after the Brussels Conference, Germany adopted its civil code, the *Bürgerliches Gesetzbuch* (BGB). This was a significant development in the modern law of usufruct for two reasons. First, the BGB did not incorporate the basic principle contained in Roman law and previous European codes that the substance of property subject to a usufruct was to be preserved. Instead, the German code allowed the usufructuary to take the "emoluments" or "profits"⁷⁷ of the property subject only to the condition that he "preserve the former economic objective of the thing"⁷⁸ and "deal with it according to the principles of proper management."⁷⁹ Second, as a logical result of this modification of the concept of usufruct, the German code specifically authorized usufructuaries to

set up new installations for the extraction of stone, gravel, sand, clay, . . . and other earth component parts of the soil, to the extent that the economic objective of the piece of land is not substantially changed thereby.⁸⁰

⁷⁴ CODIGO CIVIL, Arts. 467, 476, 477 (adopted in 1888).

⁷⁵ CIVIL CODE, Arts. 1142 *et seq.* (adopted in 1946).

⁷⁶ See K. ILLUM, *DANSK TINGSRET* (Danish Property Law) (1952); M. INGSTAD, *OM LEIE EFTER ROMERSK RET—OVERSAETTELSE OG FORKLARING AF DIGESTERNE 19DE BOGS 2DEN TITEL DELVIS UNDER SAMMENLIGNING MED NORSK RET* (Lease in Roman Law—Translation and Explanation of the Digests 19th Book 2nd Title Partly Compared to Norwegian Law) 66 (1911).

⁷⁷ BGB, *supra* note 29, at §1030. "Emoluments are defined . . . as the fruits plus the advantages which the use of the thing affords." 1 E. COHN, *MANUAL OF GERMAN LAW* 207 (1968).

⁷⁸ BGB, *supra* note 29, at §1036.

⁷⁹ *Id.*

⁸⁰ *Id.* at §1037(2).

Therefore, by 1900 it could no longer be said that there was a consensus among the principal civil-law countries with respect to the essential principles of usufruct or with respect to the mineral rights of usufructuaries.⁸¹

This latter-day lack of complete consensus, however, does not mean that the drafters of the Hague Regulations intended that their reference in Article 55 to "the rules of usufruct" should require only that occupants refrain from "wantonly dissipating or destroying the public resources," as claimed in the Israeli Memorandum.⁸² In the first place, even the German code imposes a more restrictive obligation on usufructuaries by requiring that they observe "principles of proper management" in their use of property.⁸³ Moreover, as noted above, a substantial consensus *did* exist among the countries represented at the Brussels Conference when the language of Article 55 was drafted—both with respect to principles and with respect to the application of those principles to mineral exploitation. Finally, and most importantly, by separately requiring that occupants "safeguard the capital" of public property, the drafters of Article 55 clearly stated their intention that occupants be held to the traditional obligation of usufructuaries to "preserve the substance" of the property—an obligation that logically prohibits *any* exploitation of minerals.⁸⁴ It is, therefore, simply inconceivable that, had they considered the specific question, the drafters of Article 55 would have said that a military occupant could

⁸¹ See also SCHWEIZERISCHE ZIVILGESETZBUCH, *supra* note 29, at §769 (usufructuary permitted to open new mines so long as "the industrial character of the land be not materially changed thereby").

⁸² Israeli Memorandum, *supra* note 10, at 433, *paraphrasing* M. McDUGAL & F. FELICIANO, *supra* note 28, at 812. The Israeli Memorandum omits significant portions of these authors' views: "As a practical matter, the applicable specific prohibitions are simply that the occupant may not wantonly dissipate or destroy the public resources and *may not permanently . . . alienate them . . .*" (emphasis added). In the case of nonrenewable resources, any exploitation amounts to the permanent alienation which McDougal and Feliciano condemn. Moreover, their reference to wanton dissipation would be meaningless if applied to mineral exploitation, for it suggests no standard whatsoever with respect to the exploitation of nonrenewable resources; as applied to fruits (timber, crops, other renewable resources), however, it suggests a measurable maximum rate of exploitation: the rate at which the fruit renews itself. Application of that standard to mineral exploitation would, of course, forbid all such exploitation.

⁸³ BGB, *supra* note 29, at §1036. A usufructuary's right to open new mines under German law also is limited by section 1038 of the code which provides that "the owner [of the land] may request that the degree of exploitation and the mode of economic management be regulated by an economic plan." If the owner and usufructuary cannot agree on a plan, one may be imposed by a court on application by either party. 4 H. SOERGEL & W. SIEBERT, BÜRGERLICHES GESETZBUCH 537 (1968). Obviously, the displaced sovereign of occupied territory is not in a position to insist that the exploitation of its territory comply with a mutually acceptable or judicially imposed plan. It seems a reasonable assumption that Germany would not have granted usufructuaries broad authority to open new mines absent the safeguards against abuse of such authority contained in section 1038. The fact that those safeguards are unavailable in an occupation situation constitutes an additional reason why it is inappropriate to define the rights of belligerent occupants in terms of the modern German law of usufruct.

⁸⁴ See note 60, *supra*, and accompanying text.

initiate, for its own benefit, exploitation of state-owned mineral deposits that were not being exploited by the sovereign at the commencement of the occupation.⁸⁵

In its Memorandum of Law the Government of Israel has suggested that Article 55 should be read as allowing occupants to exploit oil deposits by means of new wells because the discovery of oil in an occupied area "enhances the value of the land on it [sic] being eventually restored to the sovereign State."⁸⁶ This reasoning is unpersuasive for several reasons. First, new wells increase the value of an area only if they strike oil. New *dry* wells *decrease* an area's value. Since one can never know in advance whether or not a new well will be successful, it cannot be said that allowing occupants to drill new wells would be beneficial to the displaced sovereign or the occupied territory.

More important, however, is the fact that nothing in the Hague Regulations supports the proposition that an occupant's obligation under Article 55 to "safeguard the capital" of state-owned property and to administer it "in accordance with the rules of usufruct" is in any way affected by changes in the market value of such property. Clearly, the capital represented by a mineral deposit is depleted to the extent minerals are extracted therefrom. Moreover, the civil-law prohibition against the opening of new mines by usufructuaries makes no exception for mines that would increase the value of the land involved.⁸⁷ Therefore, the extraction of state-owned oil from occupied territory by means of new wells constitutes an impermissible taking of the capital of property protected by Article 55 whether or not the oil taken is newly discovered.

Commentators on the law of land warfare take a position consistent with

⁸⁵ The Israeli Memorandum asserts that under a rule prohibiting such exploitation an occupant would be prevented from exploiting state-owned oil resources even if such exploitation were necessary to preserve the economic well-being of the occupied territory. Israeli Memorandum, *supra* note 10, at 433. Occupants may avoid this result, however, by exercising their authority under Article 43 of the Hague Regulations. In *In re Krupp*, 15 ANN DIG. 620 (United States Military Tribunal at Nuremberg 1948), it was held that Article 43 "permits the occupying power to expropriate either public or private property in order to preserve and maintain public order and safety [provided he respects], unless absolutely prevented, the laws in force in the occupied country." *Id.* at 623. E. Lauterpacht provides the following example of a situation in which the expropriation of raw materials might be justified:

Such a situation might arise, for example, in areas where the extraction of minerals constituted the sole or principal occasion for the employment of labour. However, where such circumstances do not exist, the situation would appear to be that an Occupant is not entitled compulsorily to purchase the raw materials he seeks.

Lauterpacht, *The Hague Regulations and Seizures of "Munitions de Guerre,"* 32 BRIT. Y.B. INT. L. 218, 236 (1955-56). See also E. FEILCHENFELD, *supra* note 13, at 50-51; M. GREENSPAN, *supra* note 25, at 295-96.

⁸⁶ Israeli Memorandum, *supra* note 10, at 434. In fact the area in question was already recognized to be very likely oil bearing, and Amoco would have undertaken exploration and made the discovery if the Israeli occupation had not intervened. In such circumstances, to reward a trespasser for making the discovery first would be unconscionable.

⁸⁷ See notes 57-85, *supra*, and accompanying text.

the above analysis in emphasizing the occupant's duty to preserve the capital of public immovable property. Von Glahn, for example, states that an occupant "is not permitted to exploit immovable property beyond normal use [and] may not impair the capital value of the property in any way" ⁸⁸ Moreover, those writers who specifically address the matter of mineral exploitation by occupants refer only to the right to "work mines," implying that the right applies only to existing mines. Thus, Stone holds that a belligerent occupant's authority to use "public lands and buildings, sell crops on public land, cut and sell timber, and work mines" is, at least with respect to nonmilitary property, "measured not by his own needs but by the duty to maintain integrity of the corpus." ⁸⁹

Both the general duty to preserve the capital of property and the limited authorization to "work the mines" are apparent in the U.S. and British military manuals. Paragraph 502 of the U.S. manual provides as follows:

The occupant does not have the right of sale or unqualified use of [public immovable] property. As administrator or usufructuary he should not exercise his right in such a wasteful or negligent manner as seriously to impair its value. He may, however, lease or utilize public lands or buildings, sell the crops, cut and sell timber, and work the mines. . . . ⁹⁰

Similarly, the British manual allows occupants to "work the mines" subject to the condition that such mining "must not exceed what is necessary or usual." ⁹¹

Thus there is broad support for the view that the responsibility imposed on occupants with respect to public immovable property is meaningful and real. Moreover, the authorities strongly suggest, ⁹² and at least one specifically states, ⁹³ that the rate of exploitation may not exceed that existing prior to the occupation, which in the case of new mines or wells would, of course, be zero.

C. Policy Considerations

The underlying policy of Article 55 is that in their use of state-owned immovable property belligerent occupants should "safeguard the capital" of such property. Admittedly, a rule that allows occupants to work mines

⁸⁸ G. VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY* 177 (1957). *Accord*, E. CASTRÉN, *THE PRESENT LAW OF WAR AND NEUTRALITY* 230 (1954) (the capital value of immovable property must be conserved); 2 G. SCHWARZENBERGER, *supra* note 20, at 248 (exploitation limited to "natural and legal fruits").

⁸⁹ J. STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT*, 714 (1954). In addition, see 2 P. FAUCHILLE, *supra* note 13, at 253-54 (occupant must not exploit mines or forests at a rate greater than that previously established); M. GREENSPAN, *supra* note 29, at 288 ("exploitation may not exceed what is usual or necessary").

⁹⁰ DEPT. OF THE ARMY, *THE LAW OF LAND WARFARE* (FM 27-10), para. 402 (1956) [hereinafter cited as *FM 27-10*].

⁹¹ GREAT BRITAIN, *MANUAL OF MILITARY LAW*, *supra* note 20, at §610.

⁹² M. GREENSPAN, *supra* note 25, at 288; G. VON GLAHN, *supra* note 88, at 177; GREAT BRITAIN, *MANUAL OF MILITARY LAW*, *supra* note 20, at §610.

⁹³ 2 P. FAUCHILLE, *supra* note 13, at 253-54.

or wells that were being exploited at the commencement of the occupation is not wholly consistent with this policy, since any removal of nonrenewable minerals reduces the capital of the property from which the minerals are taken. But such a rule is much more consistent with the policy of Article 55 than would be a rule allowing unrestricted mineral exploitation.⁹⁴ It is also more consistent with principles of broader application.

Surely the primary function of international law is to order relations among states in a manner that protects their legitimate interests and minimizes both the potentiality for armed conflict and, in the event such conflict occurs, the suffering caused thereby.⁹⁵ International law cannot, consistently with this overriding purpose, hold out to potential belligerents the prospect of acquiring unrestricted access to, and use of the resources and raw materials of any territory they might succeed in occupying. Such a rule would put in jeopardy the legitimate interest that all states have in controlling both their territory and their natural resources⁹⁶ and would constitute an incentive to countries needing raw materials to take and hold territory by force of arms.

It has been argued that, while allowing an occupant to exploit the mineral resources of occupied territory may prolong a conflict by giving the occupant a vested interest in continued occupation, prohibiting such exploitation could have the same effect since the sovereign of the occupied territory would feel less pressure to reach a settlement if it were known that the territory's mineral wealth would remain intact for the duration of any occupation.⁹⁷ There are at least three answers to such an argument.

⁹⁴ The Israeli Memorandum argues that "since . . . adjacent oil fields and oil wells often derive their oil from the same underground source" restricting occupants to the exploitation of existing wells would "be an arbitrary and illogical distinction." Israeli Memorandum, *supra* note 10, at 433. As noted above, however, Article 55 seeks to preserve the capital of publicly owned immovable property. Prohibiting an occupant from exploiting oil deposits by means of wells not in existence at the commencement of the occupation serves this purpose, regardless of whether one or several deposits are involved, since pools of oil, like veins of solid minerals, can be exploited more rapidly and more thoroughly if one increases the number of extractive facilities devoted to the task. Thus the prohibition against new wells cannot fairly be labeled either arbitrary or illogical. Where different pools are involved, the Israeli argument can of course have no relevance whatever.

⁹⁵ Cf. *e.g.*, H. HALLECK, *INTERNATIONAL LAW* 42 (1861); J. Stone, *supra* note 89, at 36 n.51.

⁹⁶ This interest has repeatedly been recognized by various organs of the United Nations in resolutions concerning the "permanent sovereignty" of states over their natural resources. For example, as early as 1962 the General Assembly declared that

[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.

GA Res. 1803, para. 1, 17 GAOR, Supp. (No. 17) 15, UN Doc. A/5217 (1962). See also Charter of Economic Rights and Duties of States, Art. 2, GA Res. 3281, 29 GAOR, Supp., (No. 31) 52, UN Doc. A/9631 (1975); SC Res. 330, UN Doc. S/INF./28 (1973).

⁹⁷ See Gerson, *supra* note 4, at 730-31. This argument simply attempts, unsuccessfully in our view, to neutralize a presumed policy argument in favor of a restrictive rule. Neither Gerson nor any other authority appears to have offered any affirmative policy argument supporting a loose construction of Article 55.

First, and most fundamentally, it is an argument that could justify the most heinous war crimes. If the sovereign of occupied territory will negotiate more seriously because the mineral wealth of the territory is being depleted, no doubt he would negotiate even more seriously if the territory's population were being systematically exterminated. Moreover, toleration by international law of excesses by occupying powers seems at least as likely to induce the displaced sovereign to attempt recovery of the land through renewed hostilities as to seek a peaceful settlement.

Second, the argument does not take into account the incentive to initiate, rather than to prolong, conflict. The prospect of gaining access to another country's natural resources has been a clear motivating factor in instances of armed aggression in this century.⁹⁸ It cannot seriously be contended that substantially denying such access to belligerents constitutes a similar and countervailing incentive to aggression.

Finally, the argument fails even on its own terms, since it would be a rare case indeed in which a dispossessed sovereign would not have extremely strong motives to recover its own territory without regard to whatever rules governed mineral exploitation by the occupant.

Thus, both the obligation of an occupant to "safeguard the capital" of public immovable property and fundamental policy considerations stand in opposition to granting occupants substantially unrestricted access to the mineral wealth of occupied territory. Indeed, both would support a complete denial of such access.

D. The Amoco Concessions

Although subsurface oil and gas is state property under Egyptian law,⁹⁹ Egypt is not the only party that would be injured by Israel's exploitation of Suez oil in violation of Article 55 of the Hague Regulations. As noted at the beginning of this article, a large part of the eastern Gulf, including the area in which Israel has made its strike, is subject to concessions granted by Egypt in 1964 and 1974 to Amoco and the Egyptian General

Gerson attempts to minimize the incentive to prolonged occupation of a rule allowing mineral exploitation by pointing to Israel's "peaceful transfer of the oil wells at Abu Rhodeis . . . to Egypt in 1975" Gerson, *supra* at 731. This ignores the fact that in return for that transfer Israel extracted a guarantee of oil supplies from the United States. Note 3, *supra*. Such guarantees by third states will not normally be available.

⁹⁸ For example, the court in *Bataafsche* specifically held this to be the purpose of the Japanese invasion of the Dutch East Indies. In the court's view, the evidence established that

the seizure of the appellants' oil installations in Sumatra by the invading army was carried out as part of a larger plan prepared by the Japanese State to secure the oil resources of the Netherlands Indies, not merely for the purpose of meeting the requirements of an army of occupation but for the purpose of supplying the naval, military and civilian needs of Japan, both at home and abroad, during the course of the war against the Allied Powers.

Bataafsche, *supra* note 27, at 821.

⁹⁹ S. SIKSEK, *supra* note 23.

Petroleum Corporation.¹⁰⁰ These are production-sharing concessions under which Amoco acquires a substantial portion of all crude oil produced.¹⁰¹ Thus, any Israeli exploitation in the Amoco concession areas directly injures Amoco (and thereby the United States) by reducing the amount of oil that Amoco will eventually¹⁰² be able to take pursuant to its concession rights.

The United States and Israel seem to agree that a displaced sovereign may take action affecting occupied territory so long as such action does not conflict with the legitimate rights of the occupant.¹⁰³ If, as has been concluded, Israel has at all times been prohibited by Article 55 of the Hague Regulations from exploiting the oil of the eastern Gulf of Suez, it is impossible to see how Egypt's creation of concession rights with respect to such oil could conflict with any rights enjoyed by Israel as occupant. It

¹⁰⁰ See note 8, *supra*, and accompanying text.

¹⁰¹ See note 8, *supra*.

¹⁰² Whether Israel may, without undertaking any exploitation itself, prevent Amoco from exploiting its concessions in the eastern Gulf of Suez for the duration of the occupation is a question not considered herein.

¹⁰³ Compare Israeli Memorandum, *supra* note 10, at 441 with Dept. of State Memorandum, *supra*, note 7, at 751-53. In *State of the Netherlands v. the Federal Reserve Bank*, 201 F.2d 455 (1953), the U.S. Court of Appeals for the Second Circuit held that "the legitimate sovereign should be entitled to legislate over occupied territory insofar as such enactments do not conflict with the legitimate rule of the occupying power." *Id.* at 462. Foreign courts generally have reached the same conclusion. Thus, in *Ammon v. Royal Dutch Co.*, 21 I.L.R. 25 (Federal Tribunal, Switzerland 1954), decrees of the Dutch Government in exile issued in London during World War II that prohibited the payment of certain dividends were held to be "constitutionally laws of the Netherlands [that] applied *ab initio* to the territory occupied by the German army even though they could not be effectively implemented there until the liberation of that territory in the autumn of 1944" *Id.* at 27. *Accord*, *Agrocide v. Arsocid*, 13 ANN. DIG. 349 (Court of Appeal of The Hague, Netherlands 1946); *Rotterdamsche Bank, Ltd. v. Nederlandsch Beheers-Institut*, 15 ANN. DIG. 530 (Court of Appeal of The Hague, Netherlands 1948), *aff'd*, 16 ANN. DIG. 428 (Supreme Court, Netherlands 1950); *Public Prosecutor v. Reidar Haaland*, 12 ANN. DIG. 444 (Supreme Court, App. Div. Norway 1945); *Re Hoogeveen*, 12 ANN. DIG. 432 (Court of Cassation, Belgium 1944). It appears that only the courts of Greece have taken a different view of the decrees of displaced sovereigns. See *e.g.*, *Occupation of Cavalla Case*, 5 ANN. DIG. 496 (Court of Thrace, Greece 1930); *Re X.Y.*, 12 ANN. DIG. 431 (Council of State, Greece 1945). The court in *State of the Netherlands v. Federal Reserve Bank*, *supra*, specifically rejected the Greek cases as contrary to the weight of authority. 201 F.2d at 462. Furthermore, the report of the court's decision in *Re X.Y.* implies that more than one Greek government-in-exile claimed sovereignty at the time of the decree at issue.

The all-but-unanimous judicial view of the displaced sovereign's rights also is endorsed by commentators. Von Glahn, for example, states that

[t]he currently accepted principle appears to be that the legitimate sovereign may legislate for an occupied portion of his territory, *provided* that his laws do not conflict with the powers of the occupant as outlined in conventional international law.

G. VON GLAHN, *supra* note 88, at 35 (emphasis in original). *Accord*, A. McNAIR & A. WATTS, *supra* note 13, at 446; E. FEILCHENFELD, *supra* note 13, at 145.

follows that Amoco's concession rights are valid and must be respected by Israel.¹⁰⁴

Even if one assumes that Amoco enjoys no presently exercisable right of exploitation with respect to subsurface oil in the Gulf of Suez,¹⁰⁵ Amoco is nonetheless injured by Israeli exploitation of that oil because such exploitation diminishes the value of Amoco's undeniable right to exploit the same oil when Israel's occupation ends.¹⁰⁶ Thus Israel's exploitation is an international delinquency not only against Egypt but against the United States as well.

III.

A GENERAL LIMITATION: THE NUREMBERG JUDGMENTS

Faced with the task of passing judgment on the wholesale economic exploitation of occupied territories in World War II, the International Military Tribunal at Nuremberg chose not to define the war crime of "plunder of public or private property"¹⁰⁷ in terms of specific provisions of the Hague Regulations. Rather, it attempted to state in general terms the outermost limits of permissible exploitation of such territories by belligerent occupants.¹⁰⁸ One of the limits that emerged from this effort was the rule that an occupant may only take so much property, whether publicly or privately owned, as is necessary to meet the costs of the occupation.¹⁰⁹ In its judgment in the trial of the major German war criminals, the International Military Tribunal held that such a broad restriction was implicit in the various articles of the Hague Regulations dealing with the rights and obligations of occupants with respect to property in occupied territory:

Article 49 of the Hague Convention provides that an occupying power

¹⁰⁴ *Accord*, Dept. of State Memorandum, *supra* note 7, at 749-52.

¹⁰⁵ See note 102, *supra*.

¹⁰⁶ It is indisputable that any rights Israel may create during the occupation with respect to public immovable property, would terminate when the occupation ends. See, e.g., E. FEILCHENFELD, *supra* note 13, at 55; M. GREENSPAN, *supra* note 25, at 606-07; J. STONE, *supra* note 89, at 714; FM 27-10, *supra* note 90, at para. 402; GREAT BRITAIN, *MANUAL OF MILITARY LAW*, *supra* note 20, at §610.

¹⁰⁷ Article 6(b) of the Charter of the International Military Tribunal (Aug. 8, 1945, 59 Stat. 1544, 1547) specifies several war crimes, including "plunder of public or private property," that were subject to the jurisdiction of the Tribunal.

¹⁰⁸ 2 G. SCHWARZENBERGER, *supra* note 20, at 250.

¹⁰⁹ Even before the Nuremberg trials, it appears that there was a consensus among international jurists to the effect that an occupant could take property only for purposes of the occupation:

The rights of the occupant do not include any right to dispose of property, rights or interests for purposes other than the maintenance of public order and safety in the occupied territory. In particular, the occupant is not, in international law, vested with any power to transfer a title which will be valid outside that territory to any property, rights or interests which he purports to acquire or create or dispose of; this applies whether such property, rights or interests are those of the State or of private persons or bodies.

Resolution of the London International Law Conference of 1943, reprinted in G. VON GLAHN, *supra* note 88, at 194-96.

may levy a contribution of money from the occupied territory to pay for the needs of the army of occupation, and for the administration of the territory in question. Article 52 of the Hague Convention provides that an occupying power may make requisitions in kind only for the needs of the army of occupation, and that these requisitions shall be in proportion to the resources of the country. These articles, together with Article 48, dealing with the expenditure of money collected in taxes, and Articles 53, 55, and 56 dealing with public property, make it clear that under the rules of war, *the economy of an occupied country can only be required to bear the expenses of the occupation*, and these should not be greater than the economy of the country can reasonably be expected to bear.¹¹⁰

To be sure, no article of the Hague Regulations expressly limits an occupant's rights with respect to private and public property in terms of the expenses of the occupation. Nonetheless, this limitation has been characterized as "a justifiable generalisation" from the Hague Regulations regarding contributions and requisitions.¹¹¹ Moreover, it is a limitation that has been adopted, along with the specific restrictions of the Hague Regulations, by both the United States and Britain in their respective military manuals.¹¹² Thus, even if Israel's exploitation of the new Suez oil fields

¹¹⁰ 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 239, 6 F.R.D. 69, 120 (1947) (emphasis added). Judgments rendered in the subsequent trials of lesser war criminals also endorsed the principle that an occupied area could only be required to bear the costs of its own occupation. See, e.g., *In re Krupp* 15 ANN. DIG. 620 (United States Military Tribunal at Nuremberg 1948); *In re Flick*, 14 ANN. DIG. 266 (United States Military Tribunal at Nuremberg 1947).

The decisions of the Nuremberg tribunals in this regard were applied to the exploitation of oil resources by a belligerent occupant in the *Bataafsche* case, *supra* note 27. In this case, as noted previously, the Singapore Court of Appeal held that the exploitation of the oil resources of the Dutch East Indies by Japanese occupation forces went beyond that necessary to meet the requirements of those forces and was "for the purpose of supplying the naval, military and civilian needs of Japan." *Id.* at 821. The Court went on to hold that, in view of the Nuremberg decisions, such exploitation "was in violation of the laws and customs of war and consequently did not operate to transfer . . . title to the belligerent occupant." *Id.* at 822.

¹¹¹ 2 G. SCHWARZENBERGER, *supra* note 20, at 251. In a more general vein, Stone summarizes the power of an occupant as follows:

In positive terms, and broadly stated, the Occupant's powers are (1) to continue orderly government, (2) to exercise control over and utilise the resources of the country so far as necessary for that purpose and to meet his own military needs. He may thus, under the latter head, apply its resources to his own military objects, claim services from the inhabitants, use, requisition, seize or destroy their property, *within the limits of what is required for the army of occupation and the needs of the local population.*

J. STONE, *supra* note 89, at 697 (emphasis added).

¹¹² Paragraph 364 of the United States Army Field Manual on the Law of Land Warfare provides as follows:

The economy of an occupied country can only be required to bear the expenses of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear.

FM 27-10, *supra* note 90. The British Military Manual contains an almost identical provision. GREAT BRITAIN, MANUAL OF MILITARY LAW, *supra* note 20, at §526.

577

were consistent with the applicable specific provisions of the Hague Regulations—which it is not—the general limitation stated at Nuremberg would prevent Israel from taking any more oil than is necessary, when combined with all other property it has taken in the course of the Sinai occupation, to meet the “expenses of the occupation.”

The Israeli Memorandum states that “the military costs of maintaining the Israel Defense Forces in the occupied areas . . . far exceed any income derived from the oil wells in question.”¹¹³ In view of the recent report that the eastern Gulf could supply as much as one quarter of Israel’s oil needs,¹¹⁴ there may be reason to question the accuracy of this statement. But even if it is true it is beside the point, for two reasons. First, it fails to distinguish between “expenses of the occupation” and the total costs of maintaining all Israeli armed forces stationed in the Sinai.¹¹⁵ Second, it ignores the enormous amounts of oil that have already been taken by Israel from Abu Rhodeis and other Sinai oil fields and which must be included in any accounting of Israel’s economic exploitation of this occupied territory.

While the term “expenses of the occupation” is nowhere precisely defined, it is clear that it does not include the cost of waging war against the sovereign of the occupied territory or against its allies. As stated by the tribunal in *In re Krupp*:

Just as the inhabitants of the occupied territory must not be forced to help the enemy in waging the war against their own country or their own country’s allies, so must the economic assets of the occupied territory not be used in such a manner.¹¹⁶

If the economic assets of an occupied territory cannot be used to wage war against the displaced sovereign, it follows that they also cannot be used to meet the costs of preparing for war. Thus, only those expenses incurred as a result of an occupation, rather than the general costs of maintaining a high level of military preparedness, should be considered in determining whether an occupant’s level of economic exploitation is within the general limitation established at Nuremberg. Put differently, it is apparent that the bulk of Israel’s expenditures to maintain its troops and equipment in the Sinai would have been spent, were there no occupation, to maintain the same troops and equipment on the Egyptian-Israeli border. This money is spent on Israel’s first line of defense, wherever located, and not on occupation of the Sinai at all.¹¹⁷ And there is no

¹¹³ Israeli Memorandum, *supra* note 10, at 437.

¹¹⁴ N.Y. Times, *supra* note 6.

¹¹⁵ It is not clear whether the reference in the language quoted above to “occupied areas” was intended to include areas other than the Sinai Peninsula. Since there is no basis in the Nuremberg decisions for using expenses incurred in connection with the occupation of one area to justify additional economic exploitation of another, it will be assumed that the quoted language refers only to the costs of maintaining Israel Defense Forces in the Sinai Peninsula.

¹¹⁶ 15 ANN. DIG. at 623.

¹¹⁷ Indeed, it has been reported that Israel wants the United States to pay the

logical or equitable reason why Israel should be allowed to charge the occupied territory with the former, as opposed to the latter, category of expenditure.

It is unlikely that Israel's Sinai occupation costs have been substantial. Although it is a relatively large area of land, the Sinai Peninsula is sparsely populated.¹¹⁸ Also there appear to have been no significant instances of internal resistance to Israeli authority in the Sinai since the occupation was established.¹¹⁹ Therefore, there would seem to be no need for Israel to devote a significant portion of its armed forces to the task of occupying this area. If Israel has nonetheless stationed large numbers of troops and heavy weapons in the Sinai,¹²⁰ their mission must be to wage war against Egypt should the need arise, not to maintain an effective occupation. As noted above, the costs of waging war, or preparing to wage war, against the displaced sovereign are not properly considered "expenses of the occupation."

Whatever Israel's actual occupation expenses have been over the last eleven years, it is inconceivable that they could have exceeded the value of the oil that Israel has already taken from the Sinai. It has been reported that Israel exploited the Abu Rhodeis and other Sinai fields at a rate of 90,000 to 120,000 barrels of oil per day from 1967 until late 1975, when these fields were returned to Egypt.¹²¹ Prior to 1974 this production had a yearly value of approximately \$80 million.¹²² Oil taken in 1974 and 1975, after the great increase in the world price of oil, should have been worth approximately \$500 million per year.¹²³ Thus, Israel's total

costs of moving its defense lines to whatever borders are established by an Egypt-Israel peace agreement. N.Y. Times, Mar. 8, 1978, at A-1, col. 1, A-6, col. 2.

¹¹⁸ In 1966 the Sinai Peninsula had a population of 130,000. 16 *ENCYCLOPEDIA BRITANNICA* 779 (1974).

¹¹⁹ See ISRAEL INFORMATION CENTER, *HUMAN RIGHTS IN THE ADMINISTERED AREAS* 11 (1976).

¹²⁰ Israel will not release information on the type and size of its forces stationed in the Sinai Peninsula. One writer, however, has described the Israeli ground forces that were available in the Sinai when Egyptian forces crossed the Suez Canal in the October 1973 war:

On the ground, facing the Egyptian army immediately at the waterline, were the strong points of the Barlev line manned by 456 troops and 7 tanks. Behind them, within a distance of 30 miles were three armored brigades with 276 tanks . . . , artillery units with 48 field guns, plus a few thousand infantry.

Safran, *Trial by Ordeal: The Yom Kippur War, October 1973*, 2 *INT. SECURITY* 133, 142 (1977). In 1973, the Israeli Army was estimated to have a total strength of 310,000 and to possess approximately 2,000 tanks and 570 major artillery pieces. Cordesman, *How Much is Too Much?* *ARMED FORCES J. INT.*, Oct. 1977, at 32, 34. If these assessments are correct, it would appear that, at least in 1973, Israel did not assign a total of more than five to ten percent of its armed forces to the Sinai Peninsula.

¹²¹ Stauffer, *Israel's Hold on Sinai: Tel Aviv Sees Another Reason to Keep Peninsula*, *Christian Science Monitor*, Jan. 10, 1974, at 2, col. 1.

¹²² *AMERICAN PETROLEUM INSTITUTE, BASIC PETROLEUM DATA BOOK* §4, Table 6 (1977).

¹²³ *Id.*

Sinai occupation costs since the end of the 1967 war would have to exceed \$1.5 billion in order for Israel to justify any exploitation in the Gulf of Suez under the Nuremberg limitation. When it is considered that Israel's *total* defense expenditures from mid-1967 through 1976 were less than \$20 billion,¹²⁴ it becomes especially difficult to see how Sinai occupation costs, properly defined, could have reached so large a figure.¹²⁵

It must be emphasized that the overall ceiling on economic exploitation of occupied territory articulated at Nuremberg cannot be construed as an authorization for an occupant to ignore any of the specific restrictions of the Hague Regulations. The tribunal in *In re Krupp* made this point with unmistakable clarity when, after referring to the general restriction discussed above, it commented as follows:

However, it will hardly be necessary to refer to these more general rules. The Articles of the Hague Regulations . . . are clear and unequivocal. Their essence is: if, as a result of war action, a belligerent occupies a territory of the adversary, he does *not*, thereby, acquire the right to dispose of property in that territory, except according to the strict rules laid down in the Regulations.¹²⁶

Therefore, even if Israel could justify some oil exploitation in the Gulf of Suez in terms of its occupation costs, such exploitation would still be prohibited as contrary to Article 55 of the Hague Regulations.

CONCLUSION

In its legal memorandum the Department of State concluded that "the oil development plans of Israel in Sinai and the Gulf of Suez . . . are

¹²⁴ U.S. ARMS CONTROL AND DISARMAMENT AGENCY, *WORLD MILITARY EXPENDITURES AND ARMS TRANSFERS 1966-1975*, at 27 (1977).

¹²⁵ Israel's national budget for 1977, as released by the Bank of Israel, allocated approximately \$44 million for civil defense and "administered areas." BANK OF ISRAEL, MINISTRY OF FINANCE, *NATIONAL BUDGET FOR 1977*, at Table 2.1 (1977). Since this item is one of only two under the heading labeled "Defense" in this budget summary, it seems reasonable to assume that it includes all military expenditures that arise as a result of Israel's occupation of the administered areas. Even if this total amount were attributable solely to the Sinai occupation, it would be many years before occupation costs would equal the value of the oil that has been taken.

¹²⁶ 15 ANN. DIG. at 622 (emphasis added). Cases decided since the Nuremberg judgments also have required that occupants comply with particular provisions of the Hague Regulations. *E.g.*, *Colomi v. Ministry of War*, 17 I.L.R. 419 (Court of Cassation, Italy 1950) (Arts. 52 and 53 applied); *French State v. Lemarchand*, 15 ANN. DIG. 597 (Court of Appeal of Rouen, France 1948) (Art. 55 applied); *Andersen v. Christensen and the State Committee for Small Allotments*, 14 ANN. DIG. 275 (Western Appellate Court, Denmark 1947) (Art. 52 applied); *Mortier v. Lauret*, 14 ANN. DIG. 274 (Court of Appeal of Rouen, France 1947) (Art. 53 applied). Indeed, in the *Bataafsche* case, *supra* note 27, both the specific requirements of Article 53 regarding seizures and the Nuremberg principle were applied as restrictions independent of each other. See notes 28 and 110, *supra*.

Without exception, commentators writing after the Nuremberg judgments hold that in their economic exploitation of occupied territory occupants must abide by the specific restrictions set forth in the Hague Regulations. See, *e.g.*, E. CASTRÉN, *supra* note 88, at 229-41; M. GREENSPAN, *supra* note 25, at 286-305; A. MCNAIR & A. WATTS, *supra* note 13, at 392-99; 2 G. SCHWARZENBERGER, *supra* note 20, at 249-53, 259-307.

contrary to international law.”¹²⁷ This conclusion would appear to be well founded. The newly discovered oil is Egyptian public property, and Israel is violating its obligation under Article 55 of the Hague Regulations to “safeguard the capital” of this property and to administer it “in accordance with the rules of usufruct.” In addition, and wholly independently of the conclusion just stated, Israel would appear to be violating the prohibition articulated at Nuremberg against exploiting the economic resources of an occupied territory to an extent beyond that necessary to meet the expenses of the occupation.

¹²⁷ Dept. of State Memorandum, *supra* note 7, at 753.

THE PALESTINIAN REFUGEES: THE RIGHT TO RETURN IN INTERNATIONAL LAW

By Kurt René Radley

I.

INTRODUCTION

In 1975 the UN General Assembly established a 20-member Committee on the Exercise of the Inalienable Rights of the Palestinian People¹ to prepare a program of implementation to enable the Palestinians to exercise the rights recognized in Resolution 3236 adopted by the General Assembly the previous year.² Among the rights affirmed in that resolution is "the inalienable right of the Palestinians to return to their homes and property from which they have been displaced and uprooted . . ." The Committee's report³ and recommendations were completed and submitted to the Secretary-General for transmittal to the Security Council in June 1976.⁴

The Committee recommended a Palestinian return in two phases. The first phase would involve refugees of the Six Days' war of 1967 who had fled areas of the West Bank and Gaza now occupied by Israel. In the second phase, Arab refugees would be permitted to return to areas in Israel from which they had fled during the original hostilities of 1947-48. The so-called "Palestinian refugee problem" includes, therefore, both "old" refugees, who fled in 1947-48, and "new" refugees of the 1967 war. Many of the "new" refugees, however, fled their homes twice in their lives and in so far as they may wish to return to their former places of residence in Israel, they may be considered "old" refugees as well. The legal issues differ according to whether the claimed right is one to return to territories merely occupied by Israel or to territory comprising part of Israel itself. This article will be concerned only with the asserted right of Palestinian refugees to return to Israel proper.

Two general lines of argument for a Palestinian right of return can be discerned. The first—the "liberation" theory—proceeds from the claim that the state of Israel was an illegal creation, and that as such that state has no legal basis from which to oppose a Palestinian return. The arguments against, and in defense of, the legitimacy of the state of Israel have been thoroughly examined by others and will not be reviewed here.⁵ The

¹ GA Res. 3376. 30 GAOR, Supp. (No. 34) 3, UN Doc. A/10034 (1975).

² GA Res. 3236. 29 GAOR, Supp. (No. 31) 4, UN Doc. A/9631 (1974).

³ Report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People [hereinafter referred to as Report of the Committee], 31 GAOR, Supp. (No. 35) 5, UN Doc. A/31/35 (1976).

⁴ The recommendations of the Committee were submitted to the Security Council in the form of a draft resolution which, however, failed of adoption by the Council because of a U.S. veto. UN Doc. S/PV. 1938 at 62 (1976).

⁵ See, e.g., Bassiouni, *The "Middle East": The Misunderstood Conflict*, 2 THE ARAB-ISRAELI CONFLICT 175 (Moore ed. 1974); Nakhleh, *The Liberation of Palestine is*

second theory, which is properly based on a concept of repatriation, argues that the displaced Palestinians have a right to return, sanctioned in international law, which Israel is obliged to recognize. It follows, therefore, that to inquire into Palestinian rights vis-à-vis Israel is in effect also to pose the question of Israel's obligations toward the refugees under international law. The precise question for consideration here can thus be formulated as follows: Has Israel a duty under international law to allow the return to its territory of Palestinian refugees, from which a corresponding right of repatriation might be derived?

II.

THE PALESTINIAN EXODUS OF 1947-48

A. *The Arab-Jewish War*

In the aftermath of the exodus of refugees, each side accused the other of having caused the Palestinian flight by calculated means. On one side it was argued that Arab leaders themselves encouraged the refugees to leave in order to clear the way for the advancing Arab armies and to demonstrate their opposition to the establishment of a Jewish state, while, on the other side, it was alleged that the refugees were driven from their homes by Jewish terrorism as part of a "campaign calculated to make Palestine as free of its Arab population as possible."⁶ Although the first theory (which ironically seems to have originated among the Arabs themselves)⁷ has by now been generally discounted, the belief persists that the refugees were expelled and, if it were true, would undoubtedly provide a moral argument for repatriation and arguably a legal one as well. We begin, therefore, with a brief recital of the events which took place in Palestine in 1947-48, giving rise both to the Jewish state and the Palestinian refugee problem.⁸

War began in Palestine on November 29, 1947 when the UN General Assembly voted in favor of a plan to partition Palestine into separate states, one Jewish and the other Arab.⁹ In Cairo, the *Ulema* of the al-Azhar

Supported by International Law and Justice, 1 *id.* 566; H. CATTAN, *PALESTINE, THE ARABS AND ISRAEL* (1969). For a reply to Cattat and the Israeli point of view, see N. FEINBERG, *ON AN ARAB JURIST'S APPROACH TO ZIONISM AND THE STATE OF ISRAEL* (1971).

⁶ I. F. Stone, *THE NEW YORK REVIEW OF BOOKS* (Aug. 3, 1967) at 10, col. 3, reprinted as *Holy War* in *THE ISRAEL-ARAB READER* 308 (Laqueur ed. 1971). For a reply to Stone, see Syrkin, *I. F. Stone Reconsiders Zionism*, *id.* at 327.

⁷ See, e.g., C. SYKES, *CROSSROADS TO ISRAEL* 420 (1965). "When the war was over, Arab journalists and broadcasters asserted on several occasions that the exodus was a planned Arab manoeuvre, the main object being to clear the land and thus give freedom of action to the invading armies."

⁸ On the "First Arab-Israeli War" and events leading thereto, the following sources were consulted: SYKES, *supra* note 7; E. O'BALLANCE, *THE ARAB-ISRAELI WAR 1948* (1956); KIMCHE, *A CLASH OF DESTINIES* (1960); J. BELL, *THE LONG WAR* (1969); A. KOESTLER, *PROMISE AND FULFILLMENT* (1949); N. LORCH, *EDGE OF THE SWORD* (1961).

⁹ GA Res. 181, UN Doc. A/519, at 322 (1947).

Moslem University declared *jihad* (holy war) against the Jews, and Arab riots against Jews spread throughout Palestine.¹⁰ In its opening phase, the conflict was characterized mainly by Arab attacks on Jewish convoys destined for Jerusalem and outlying settlements in Galilee and the Negev. Through December, an average of fifty Jews per week were killed, mostly when travelling in unprotected convoys.¹¹ Although the British continued to search Jewish convoys for arms, the mandatory government refused to provide escorts for the convoys because, as a senior government official informed the Jewish Agency on December 3, "that might be interpreted as British implementation of partition."¹²

On January 9, 1948, the first Arab "volunteers" recruited in Damascus and Beirut to fight in Palestine crossed the frontier into Palestine.¹³ British troops prevented them from attacking two Jewish settlements and subsequently found them to be trained soldiers commanded by regular officers of the Syrian army.¹⁴ After waiting for the British reaction, which took the form of a diplomatic protest to Syria, a second force was sent into Palestine. No move was made by the mandatory government against the invaders, although the Arab Liberation Army, as it was by then known, consolidated and made its headquarters at Tubas in central Palestine, less than twenty miles from British headquarters.¹⁵

Through the end of February, Arab forces retained their advantage. Zionist settlements throughout Palestine had been attacked and besieged, and, while none had yet fallen, it seemed that the Arab strategy of isolating and starving out the scattered Jewish settlements in Palestine would succeed. Throughout this period, Jewish defense was hampered by a

¹⁰ SYKES, *supra* note 7, at 395.

¹¹ BELL, *supra* note 8, at 76 and KOESTLER, *supra* note 8, at 154. See also F. GERVASI, *THE CASE FOR ISRAEL* 82 (1967).

¹² BELL, *supra* note 8, at 78; KIMCHE, *supra* note 8, at 93; KOESTLER, *supra* note 8, at 153.

¹³ BELL, *supra* note 8, at 80; KIMCHE, *supra* note 8, at 82; KOESTLER, *supra* note 8, at 155; SYKES, *supra* note 7, at 401.

¹⁴ R. WILSON, *CORDON AND SEARCH* 166 (1949) cited in KIMCHE, *supra* note 8, at 85, and also in SYKES, *supra* note 7, at 401.

¹⁵ The reasons for the failure of the mandatory government to take action against the invaders are discussed by Sykes.

The British insisted that the geographical complication of the North Palestine Frontier made supervision impossible. To some extent the excuse (which was not new) had always been valid, but least so at this time when Great Britain had a large force in the country, capable of dealing swiftly with any except minute secret bands. Nearer to the truth, in all probability, was the remark of the then Iraq Prime Minister in an interview with the Egyptian newspaper *Al Misri*. "The Arabs ought not to be afraid of the British. I can assure you that the British forces in Palestine would not try to oppose or fight the Arabs, because Britain is a real friend of the Arabs."

Supra note 7, at 401.

Note however the following:

British behaviour towards Arabs and Jews during this critical period, could only be explained that the British Government was determined to the last moment to fulfil its obligation to the Jews in helping them to transfer the "national home" into a "state" before they pulled out of the country. ("Britain hands over authority to the Zionists.")

S. HADAWI, *BITTER HARVEST* 101-02 (1961).

British policy that imposed an arms embargo on Palestine while providing for the supply to neighboring Arab states of war materiel which, as could be expected, found its way to the Arab forces in Palestine.¹⁶

At the end of March, however, the first shipment of clandestine arms destined for Jewish forces arrived in Palestine.¹⁷ Beginning in April, the British began their phased withdrawal from Palestine, and both Jewish and Arab forces made ready to take over the cities and towns evacuated by the British. An unusual feature of this stage of the conflict was the complete and apparently voluntary evacuation by the Arabs of their towns and villages. This occurred in the larger cities and towns of Haifa, Jaffa, Tiberias, and Safad, and in numerous other smaller places.

In Tiberias, the first large town with a mixed Arab and Jewish population to be evacuated by the British, there had been intermittent fighting for weeks. But when on April 18 Tiberias was finally evacuated by the British, instead of fierce battle breaking out for possession of the town, the whole Arab population fled. Similarly in nearby Safad, when Jewish forces of the Haganah attacked Iraqi irregulars holding the two police fortresses evacuated by the British, the whole Arab population fled as soon as the battle started.¹⁸

Although Zionist claims of having pleaded with the Arab population to remain have been exaggerated, in Haifa at least this was true. The battle for Haifa began on April 18, when it was announced that the British had begun their withdrawal from the city, and continued through the morning of the 22nd, when Haganah headquarters received an Arab request for surrender terms. At four o'clock that afternoon, Jewish and Arab representatives met at the Haifa Town Hall with the British regional commander, Major-General Stockwell, and the Jewish Mayor, Shabtai Levy. Levy began the meeting with the plea that not a single Arab inhabitant of the city leave. Haganah leaders then explained their surrender terms, consisting of the demand that the Arabs give up their arms and hand over all foreign fighters in their ranks. The Arab delegation requested a recess in which to make its decision, but, when the delegates returned, they asked only that the Jews permit the Arab population to leave the city. The Arabs refused to live for a single day under Jewish rule declaring: "We do not recognize you and we shall return when you are no longer here."¹⁹

The Jewish offensive against Jaffa, the largest purely Arab city in Palestine, began on April 25. On the 28th, British artillery began shelling Jewish positions, and British troops moved into position between Jewish and Arab lines, thereby creating a deadlock which lasted until their final evacuation on May 12. When the British finally did depart, nearly the

¹⁶ KOESTLER, *supra* note 8, at 157; LORCH, *supra* note 8, at 51; SYKES, *supra* note 7, at 402ff.

¹⁷ BELL, *supra* note 8, at 166 and SYKES, *supra* note 7, at 403-04, 414.

¹⁸ KOESTLER, *supra* note 8, at 160-61 and O'BALLANCE, *supra* note 8, at 46.

¹⁹ KIMCHE, *supra* note 8, at 122. See also: GERVASI, *supra* note 10, at 109 ff; O'BALLANCE, *supra* note 8, at 49-52; SYKES, *supra* note 7, at 419-20.

whole of the Arab population left with them. Of the city's 70,000 Arab inhabitants, less than 4,000 remained behind.²⁰

The British mandate over Palestine ended on May 14, when there were already some 200,000 Arab refugees. The following day, the Jewish community of Palestine proclaimed the state of Israel, and with that the regular armies of Egypt, Iraq, Syria, Lebanon, and Transjordan entered Palestine. In the ensuing "official" war, nearly the entire Palestine Arab community was swept away. In Jewish-controlled areas, where according to one estimate some 700,000 to 900,000 Arabs had lived, only some 170,000 Arabs remained.²¹

B. *Causes of the Arab Exodus*

The large number of Arab refugees already existing prior to the "official" intervention of the Arab states has given rise to extreme claims that "it would be truer to say that the refugees were the cause of the first Arab-Israeli war and not the result,"²² as well as to more moderate speculation that the Arab states might not have committed their armies to Palestine

²⁰ The British War Office in London reacted to the Arab defeat in Jaffa by ordering General MacMillan, G.O.C. Palestine, to "[r]ecapture Jaffa, and hand it back to the Arabs." Quoted in BELL, *supra* note 8, at 113. See also KOESTLER, *supra* note 8, at 161; LORCH, *supra* note 8, at 111; and O'BALLANCE, *supra* note 8, at 61-62. Here, too the Arab version regarding the role played by the British frequently differs:

It is an historical fact that prior to the month of April, 1948, Palestine Arabs were winning the fight against the Jews throughout the country. . . . The British then carried out their part of the bargain by supplying Jews with all types of the most modern weapons, including Centurion tanks. British forces disarmed Arabs in every city, town and village throughout Palestine. The British military forces took part in battles between Jews and Arabs, insuring victory for the Jews.

Nakhleh, *supra* note 5, at 570.

²¹ Figures for the number of refugees are taken from D. PERETZ, *ISRAEL AND THE PALESTINE ARABS* 95 (1958). Exact figures for the number of casualties incurred during this phase of the conflict, December 1, 1947 to May 14, 1948, do not exist but a general idea is provided by a UN report of February 16, 1948. In the two-month period between December 1, 1947 and February 1, 1948, there were a total of 2,778 casualties including 1,462 Arabs, 1,106 Jews, and 181 British. (UN Doc. A/AC.21/9, at 5 (1948) cited in F. KHOURI, *THE ARAB-ISRAELI DILEMMA* 59 (1968).) Given a total Palestine population in 1948 of some 2,000,000, the number of casualties incurred during this two-month period would be equivalent to casualties of approximately 300,000 for a country like the United States with a population above 200,000,000.

²² For example:

The Israelis have also attempted to disclaim liability for the exodus of the Palestinians by alleging that the refugee problem was the result of the war between the Arab States and Israel. There is nothing farther from the truth. . . . In fact, the exodus had already reached considerable proportions before the outbreak of the war. It was estimated that before the outbreak of the Arab-Israeli war on 15 May 1948 the number of Palestine refugees had reached about 300,000. As Anthony Nutting has remarked: "it would be truer to say that the refugees were the cause of the first Arab-Israeli war and not the result."

H. CATTAN, *PALESTINE AND INTERNATIONAL LAW* 105 (1973).

See also, Tomeh: "Before any Arab soldier set foot on the soil of Palestine, 400,000 Arabs had fled their Palestinian homeland in terror." *Legal Status of Arab Refugees*, 33 L. & CONTEMP. PROB. 122 (1969) reprinted in 1 *THE ARAB-ISRAELI CONFLICT*, *supra* note 5, at 679.

but for the Arab flight. Khouri, for example, whose work is one of the best on the subject, writes that:

... the Arab governments had hoped that the Palestine Arabs, with the aid of a few thousand armed and trained "volunteers," would be able to take over control of Palestine without the intervention of regular Arab armies. But the fighting in April and May revealed that the Jewish forces were too strong and too determined for the Palestine Arabs to contain, much less defeat. The Arab masses, aroused over the increasingly grave plight of the Palestine Arab military situation and the flight of tens of thousands of Palestine Arabs, began to press their governments to take more active measures on behalf of the Palestine Arab cause."²³

The facts concerning the intentions of the Arab states toward Palestine are complex, and it is difficult to say under what circumstances, if any, their armies might not have intervened.

On the one hand, declarations of the Arab League that it would oppose by force any form of Jewish sovereignty in Palestine were public knowledge.²⁴ As early as September 15, 1947, the Secretary-General of the Arab League, Abdur Rahman Assam, told a press conference in London that "any attempt to impose [the] recommendations [of the UN Special Committee on Palestine], or any similar scheme, would be implacably resisted by the Arabs. Let there be no doubt that the Arabs, if compelled, would fight for Palestine."²⁵ On the other hand, while the Arab League, or its Political Committee, had met several times to discuss a military solution in Palestine—first at Aley, Lebanon in October, then at Cairo in December, February, and early April—it was not until a meeting of April 30 that it was finally agreed that the Arab armies should jointly prepare for an invasion of Palestine.²⁶ Nevertheless, the Egyptians still hesitated. As late as early May, the Egyptian Minister of Defense, General Haidar, is quoted as saying: "We shall never even contemplate entering an official war. We are not mad. We shall allow our men and

²³ KHOURI, *supra* note 21, at 69.

²⁴ The *London Times* of this period reported the following regarding Arab plans for Palestine: "The Arab League Council met again today to discuss further military measures to resist the formation of a Jewish State in Palestine. . . . At the meeting of the Arab League Council on Thursday night it was thought that preparations should be made for military action against the Jews and it was decided to ask Arab States to mobilize forces on the frontiers of Palestine." (Oct. 11, 1947, at 4, col. 6); "The Lebanese Prime Minister announced that the heads of the Arab States had already made decisions and would meet as soon as possible to execute the liberation plans for Palestine." (Dec. 6, 1947, at 4, col. 3); "According to *Al Misry*, the Syrian guerilla leader, Fauzi Kawakji, will lead the first detachment of 2,000 Arab volunteers into Palestine next week." (Dec. 15, 1947, at 4, col. 3.); "The 'war council' of the Arab League which had been meeting in Cairo for the past 10 days announced that the Arabs are determined 'to enter the battle against the United Nations' decision to partition Palestine, and by the will of God to carry it to a successful conclusion.'" (Dec. 18, 1947, at 4, col. 5.)

²⁵ SYKES, *supra* note 7, at 393.

²⁶ KIMCHE, *supra* note 8, at 109.

officers to volunteer for service in Palestine, and we shall give them weapons, but no more."²⁷

The disparity between public declarations of the League and its failure in private to agree, until the last moment, upon an invasion policy can be accounted for, to some degree, by disunity within the League. There were, in the words of one authority, "deep fissures in the ostensible solid rock of Pan Arabism."²⁸ Each of the Arab states had its own ambitions, which could be achieved only at the expense of the others. These national goals were further complicated by dynastic rivalries held over from the days of the Arab revolt against the Turks.

In any case, the suggestion that the May 15 invasion was the result of the Arab flight of previous weeks and that the Arab states might have otherwise limited their intervention to the activities of the Arab Liberation Army is based on a questionable premise: that civil war in Palestine—an event made inevitable with the entry of the Arab Liberation Army in early January 1948—did not itself necessarily entail wholesale flight by the Arab civil population. The structure of Palestine Arab society and subsequent examples of Arab flight in the Middle East suggested otherwise.²⁹

The first stage of the Arab exodus occurred immediately after the passage of the partition resolution by the General Assembly on November 29, 1947, when some 30,000 Arabs of the upper and middle classes left Palestine for safer parts.³⁰ The loss of so many key people led to a serious breakdown in communications and economic and administrative services among the Palestine Arab community once the British began to leave.³¹ In addition, many of those taking flight were leaders of the Arab community so that those remaining were invariably left to the mercy of rumor, anxiety, and fear. As long as the Arab irregular war was going well, these fears had been minimal but, with the beginning of the Haganah offensive in April and mounting Jewish victories, Arab flight among all classes increased.

One event in particular seems to have been critical to the final collapse of Arab morale. On April 9, Jewish forces belonging to the Irgun and Sternists attacked the Arab village of Deir Yassin. Jewish authorities attempted to prevent an impartial inspection and reported one Arab killed. The following day, the chief Red Cross representative in the area made

²⁷ BELL, *supra* note 8, at 127.

²⁸ *Id.* at 59.

²⁹ In their study of samples of 1967 refugees, Dodd and Barakat found that, in addition to direct "situational" causes of flight, there were indirect causes connected with the social structure and values of the communities from which the refugees departed. See, P. DODD & H. BARAKAT, *RIVER WITHOUT BRIDGES* (1969), cited in E. BUEHRIG, *THE UN AND THE PALESTINIAN REFUGEES* 33 (1971).

³⁰ BELL, *supra* note 8, at 104; KHOURI, *supra* note 21, at 123; SYKES, *supra* note 7, at 415.

³¹ The Palestine Jewish community had over the years created its own quasi-governmental institutions and therefore was better prepared than the Arab community to maintain essential public services in the wake of the British withdrawal. See PERETZ, *supra* note 21, at 6-7; also KHOURI, *supra* note 21, at 68.

a personal investigation and discovered some 250 corpses, including women and children. Although Deir Yassin is most often cited as proof of Zionist atrocities, its notoriety is in large part due to its rarity in the history of Jewish relations toward Arabs in Palestine, something which cannot be said in reverse.³² In itself the fact that Jewish authorities attempted to conceal the atrocity is significant, since Arab propaganda, to the contrary, tended not only to boast of those atrocities already committed but to threaten future atrocities as well.³³

If as is alleged, Deir Yassin was part of a conspiracy to rid Palestine of its Arab population, Arab propaganda was an all too willing accomplice in that design. A message of sympathy sent by Ben-Gurion of the Jewish Agency to King Abdullah of Transjordan was portrayed by Arab propaganda as confirmation of all the atrocity tales previously circulated. For the next forty-eight hours following the massacre, Arab radio stations in Palestine engaged in nonstop broadcast descriptions of the lurid details of Deir Yassin to which they added some of their own; the effect was to spread terror among the Arab populace.³⁴ It has been rightly observed, perhaps, that "the terror was all the more because many Palestine Arabs had a bad conscience about atrocity toward Jews."³⁵

However, scare propaganda directed at the Arab population came not only from the Arabs themselves but from Zionists as well. Official Jewish policy toward the Arab civil population was that expressed in Israel's Proclamation of Independence calling upon "the Arab inhabitants of the State of Israel to preserve the ways of peace and play their part in the development of the State, on the basis of full and equal citizenship."³⁶ But various accounts attest to the Haganah's use of "psychological warfare" against the Arabs. Even in Haifa, where the decision of Arab leaders to abandon the city is uncontroverted, reports also tell of Haganah loud-speaker vans and radio warning of the coming battle and promising the

³² The Deir Yassin massacre was itself followed by an Arab reprisal three days later. On April 12, a Red Cross convoy travelling to the Jewish Hadassah Hospital and the Hebrew University was ambushed and seventy-seven doctors, nurses, teachers, and students were killed. See BELL, *supra* note 8, at 113-14 and SYKES, *supra* note 7, at 417.

³³ At a press conference in Cairo, Azzam Pasha, then Secretary-General of the Arab League boasted: "This will be a war of extermination and a momentous massacre which will be spoken of like the Mongolian massacres and the Crusades." B.B.C. News broadcast, May 15, 1948, *quoted in* BELL, *supra* note 8, at 118; GERVASI, *supra* note 10, at 94; SYKES, *supra* note 7, at 416.

³⁴ BELL, *supra* note 8, at 105-06 and SYKES, *supra* note 7, at 417-18. But see GERVASI, *supra* note 10, at 87, who quotes the following from *Al Urdun* (April 9, 1953) by a former inhabitant of Deir Yassin:

The Jews never intended to hurt the population of the village, but were forced to do so after they met enemy fire from the population, which killed an Irgun commander. The Arab exodus from other villages was not caused by the actual battle, but by exaggerated descriptions spread by Arab leaders to incite them to fight the Jews.

³⁵ SYKES, *supra* note 7, at 417.

³⁶ State of Israel Proclamation of Independence, in *THE ISRAEL-ARAB READER*, *supra* note 6, at 127.

city's Arabs "escort to Arab territory." The Middle East scholar George Kirk writes that:

The Jewish combatants there [in Haifa] and elsewhere made skillful use of psychological warfare to break their opponents' morale, and the effect upon the civilians was only what was to be expected.³⁷

It is doubtful, however, that Jewish use of "psychological warfare" amounts to a "brutal . . . barbarous . . . process of intimidation by a Zionist terror machine."³⁸ While the Jews certainly played on Arab fears, this was no more and probably far less, given the fact of civil war, than was to be expected. As one authority has observed, "the structure of Palestinian Arab society was too feeble to ensure its own protection in the face of spreading terror. Arab pride and confidence collapsed before vague threats."³⁹

If there is any basis for Arab charges made through the years, it would seem not to exist in a general campaign of terror, but rather in a number of *de facto* expulsions which took place in several Arab villages in the latter stages of the war. Although the military exigencies have generally been given scant attention in the accounts of these incidents, they are attested to by a number of reliable authorities, including Christopher Sykes. Sykes concludes that "there is no evidence of a long standing and agreed Jewish policy to evict the settled population,"⁴⁰ but he also notes that, with the resumption of fighting after the first truce, Jewish forces adopted a new aggressiveness toward the Arab population, particularly in Lydda and Ramleh, where some 60,000 Arab inhabitants were "encouraged" (according to the Zionist euphemism) to leave. According to Sykes, "if the exodus was by and large an accident of war in the first stage, in the later stages it was consciously and mercilessly helped on by Jewish threats and aggression toward the Arab population."⁴¹ However the above-quoted passage from Sykes' work appears more damning than would seem to have been the author's intent, since he goes on to make the following qualification: "It is to be noted, however, that where the Arabs had leaders who refused to be stampeded into panic flight, the people came to no harm."⁴²

³⁷ G. KIRK, *THE MIDDLE EAST 1949-50* at 264 (1954). See also SYKES, *supra* note 7, at 419.

³⁸ CATTAN, *supra* note 22, at 102.

³⁹ BELL, *supra* note 8, at 106.

⁴⁰ SYKES, *supra* note 7, at 419.

⁴¹ *Id.* at 420. See also KIMCHE, *supra* note 8, at 227-28 and O'BALLANCE, *supra* note 8, at 147 & 172.

⁴² SYKES, *supra* note 7, at 422. The case of Nazareth—today the largest Arab city in Israel—is cited by Sykes as evidence of the effect that the presence of Arab leadership might have had in Palestine. When Nazareth fell to Jewish forces, its Arab mayor was not easily intimidated and succeeded in keeping his people together. But in Nazareth, Sykes notes, "there was what was lacking almost everywhere else: a leading man of public spirit." Arab writers, too, have called attention to the lack of effective Arab leadership and its responsibility for the resulting catastrophe:

Four months passed . . . while most of the rich families and those of the leaders were quitting the country for tranquility in Egypt, Syria and Lebanon, leaving

It is perhaps the refugees themselves who most bear witness against the existence of the so-called "Zionist terror machine," since it is not plausible that the survivors of acts of terror—as these are commonly understood—would wish to return to the putative source of the terror. It is estimated that immediately following the cessation of hostilities in 1948 (when presumably the memory of the "Zionist terror machine" would still be most vivid) as many as 30,000 Arab refugees infiltrated Israeli-held territory and remained.⁴³ There is, then, something of a contradiction between the primary Arab claim that the refugees on the whole insist upon the right to return and the secondary claim, on which a right of return is largely based, that the refugees fled as a result of a campaign of terror directed against them by Jewish armed forces.

III.

GENEVA CONVENTION NO. IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR OF AUGUST 12, 1949⁴⁴

Like most other large dislocations of modern times, the exodus of Palestinian Arabs arose in the context of warfare. Therefore, this inquiry into possible sources of a Palestinian right of return begins by examining existing standards and norms designed to protect civilian populations in time of war, particularly those found in Geneva Convention No. IV. It might be noted at the outset that, while Israel is a signatory to the Fourth Geneva Convention, the Convention is not as such applicable to the events of 1947–48 (it's not having come into force until October 21, 1950) and therefore its provisions are examined here only as regards the general issue of the right of uprooted civilians to return.⁴⁵

the burden of struggle and sacrifice to the workers, villagers and middle class. . . . These factors, the collective fear, moral disintegration and chaos in every domain, were what displaced the Arabs from Tiberias, Haifa, Jaffa and scores of cities and villages.

1 W. AL QAMHAWI, *DISASTER AND CONSTRUCTION IN THE ARAB FATHERLAND* 69–70 quoted in Y. HARKABI, *PALESTINIANS AND ISRAEL* 4 (1974).

⁴³ PERETZ, *supra* note 21, at 55.

⁴⁴ Dated at Geneva, Aug. 12, 1949, 6 UST 3516, TIAS No. 3365, 75 UNTS 287.

⁴⁵ Only one reference to Geneva Convention No. IV as authority for a right of return for "old" as well as "new" refugees could be found, that by Quincy Wright:

The Arab states appear to have a good claim under international law to repatriation or compensation for the Arab refugees from Palestine resulting from the hostilities of 1949 [sic?] and 1967. . . . The rules of war of humanitarian character designed to protect "human rights" are applicable to all *de facto* hostilities, and require the occupant to spare the civil population. Refusal to allow repatriation or compensation would therefore violate the law of war.

THE MIDDLE EAST: PROSPECTS FOR PEACE 24 (Background Papers and Proceedings of the Thirteenth Hammarskjöld Forum, 1969), reprinted in 2 THE ARAB-ISRAELI CONFLICT, *supra* note 5, at 119. A slightly different version appears as Wright, *Legal Aspects of the Middle East Situation*, 33 L. & CONTEMP. PROB. 5 (1969).

Although Professor Wright purports to defend the "good claim under international law" of the Arab states, he in fact understates that claim which is not one merely for "repatriation or compensation" but one rather for repatriation as an absolute right, with compensation as an alternative only for those not insisting on a right to return. This

Although Geneva Convention No. IV is directed specifically to the problem of protecting civilians in time of war, the Convention on the whole has very little to say on the question of postwar refugees. The term "refugee," in fact, is found only in Article 44 and applies to refugees already existing at the onset of hostilities.⁴⁶ The lack of provision in the Convention for the disposition of postwar refugees is all the more striking due to the presence of Part II, "General Protection of Populations Against Certain Consequences of War," in which one might expect to find such provision, if any. But the only one of the fourteen articles in this section, "intended to alleviate the sufferings caused by war" (Art. 13), which pertains at all to displaced persons is the last, Article 26 "Dispersed Families." This article requires that "[p]arties to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible." But Article 26 is concerned only with reestablishing family ties and thus applies solely to members of dispersed families, not to all "displaced persons."⁴⁷ The article is intended to safeguard the family unit and to enable contact to be restored among family members; there is no suggestion, however, on which of the belligerents' territories renewed contact is to be made.

Two additional articles are of interest, although they do not pertain to refugees in general, but only to those who have been forcibly transferred or expelled. Article 45, "Transfer to Another Power," and Article 49, "Deportations, Transfers, Evacuations," both pertain to the forcible transfer of protected persons but differ in their result according to whether the protected persons at issue are "Aliens within the Territory of a Party to the Conflict" (in which case Article 45 is applicable) or are protected persons in "Occupied Territories" (when Article 49 applies). Article 45 conforms in general to classical international law permitting, within limits, the deportation or expulsion of aliens when state security demands such measures.⁴⁸ Article 49, however, permits only a temporary evacuation of

is also, apparently, the view adopted in the Report of the Committee:

The opinion was expressed that whatever the modalities or procedure were envisaged for the implementation of the right of return of the Palestinians . . . that right should be absolute for every Palestinian and must have priority over any other form of substitute arrangements, such as compensation.

Supra note 3, at 5.

⁴⁶ Article 44 reads as follows:

In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not, in fact, enjoy the protection of any government.

In drafting Article 44, the Diplomatic Conference had in mind the many Jewish refugees of World War II who, though *de jure* nationals of Axis powers, were expatriates no longer having a connection with their state of origin. See 4 J. PICTET, COMMENTARY (Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949) 263 (1958).

⁴⁷ *Id.* at 196.

⁴⁸ *Id.* at 266. See also, P. VAN PANHUYS, THE ROLE OF NATIONALITY IN INTERNATIONAL LAW (1956) and sources cited therein at 56; J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 446 n.187 (1954). Also Article 31 of the Convention re-

a given occupied area (if military exigencies so require) and further stipulates that persons thus evacuated "be transferred back to their homes as soon as hostilities in the area in question have ceased." Briefly then, a belligerent is permitted to expel persons in its own territory, but only temporary transfer is permitted with respect to persons in territory occupied by a belligerent—the essential difference being that between what a party can do in its own territory and what it can do in territory of which it is only the occupant.⁴⁹

It is doubtful that the rules of the Convention governing expulsion can be applied, even hypothetically, to the present case, since the treatment of expulsion therein presupposes conditions of international conflict which were absent from the conflict in Palestine in 1948. Although the Arab-Jewish war was militarily most significant as a conflict between the new state of Israel and the surrounding Arab states, it had also the dimensions (significant from a political standpoint) of a civil conflict between Palestinian Jews and Palestinian Arabs. Consequently, the question of rights and duties as between Palestinian Arabs and Palestinian Jews does not easily lend itself to analysis within the pattern of international conflict, to which Geneva Convention No. IV is principally addressed.⁵⁰

As has already been mentioned, the concept of belligerent occupation is critical to the treatment of expulsion under the Convention. However, the traditional rules of international law governing belligerent occupation were grounded in the assumption that it was the legitimate sovereign that was ousted from the territory in question.⁵¹ Since neither Palestinian Jews nor Palestinian Arabs had, prior to the conflict itself, established a sovereign presence in the disputed territory, the question whether the legitimate sovereign was ousted is not here even reached. Apart then from the strictly legal considerations, "belligerent occupation," as a conceptual matter, presupposes at least two warring sovereigns, each acknowledging the sovereignty of the other in its own "well-defined" territory so that, when one of the belligerents establishes effective control over

lating to the Status of Stateless Persons; *done* Sept. 28, 1954, 360 UNTS 117, permits expulsion on grounds of "national security or public order."

⁴⁹ Professor Stone points out that the heading, "Aliens in the Territory of a Party to the Conflict" is somewhat misleading since

[b]y definition . . . all "protected persons" are aliens *vis-à-vis* the Power against whom they are protected. The distinction . . . is not between *aliens* and *other protected persons*, but as to *where the alien protected persons are found*.

STONE, *supra* note 48, at 688 n.31.

⁵⁰ The difficulty of applying many of the provisions of the Convention in a civil war context was one of the objections raised at the Diplomatic Conference to full and unconditional extension of the Convention to internal conflicts. It was pointed out that many of the articles could not be applied in case of civil war or would at least have to be modified to a considerable extent. See 4 PICTET, *supra* note 46, at 43. On the subject of international regulation of civil conflict and problems pertaining thereto, see generally: INTERNATIONAL ASPECTS OF CIVIL STRIFE (Rosenau ed. 1968); THE INTERNATIONAL REGULATION OF CIVIL WARS (Luard ed. 1972).

⁵¹ See G. VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION 273 (1957); D. GRABER, THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 64-69 (1949).

the territory of the other, it attains the status of a belligerent occupant of the territory it controls. The obstacle to adapting the notion of belligerent occupation to Palestine in 1948, or internal conflicts in general, is the absence of mutually recognized sovereignty. Indeed the opposing claims of sovereignty of the parties are precisely the source of the conflict. Therefore, the question whether the Palestinian refugees (those who were "encouraged" by Israeli forces to leave) were expelled from territory in which Israel had only the status of a belligerent occupant would seem to depend (to the extent that is answerable at all) on whether one accepts the Jewish-Israeli or Arab view of the conflict.

Beyond the conceptual problems inherent in the notion of belligerent occupation, the underlying rationale discernible in the treatment of expulsion in the Convention would seem to be inapplicable when applied to internal conflicts. The Convention in Article 45 recognizes a party's legitimate interest in protecting itself against an internal enemy.⁵² This rationale might then very well apply to Israeli security concerns as to the local Palestinian Arab population in 1948, except that the assumption here is that the expellees in question are nationals of a foreign power, or at least that they are in some sense newcomers to the territory in question. Neither was the case with the expelled Palestinian Arabs. While Article 45 permits a belligerent the means with which to protect itself against the threat of a "third column," Article 49 forbids the forced and permanent removal of persons from territory to which they are native. The dual concerns expressed here are for obvious reasons not easily reconcilable within the framework of internal conflicts.⁵³

⁵² Referring to the difficulty of applying many of the provisions of the Convention in a civil war context, Pictet suggests that those dealing with "Occupied Territories" might apply (see *infra* note 53) but those relating to "Aliens within the Territory of a Party to the Conflict" would be more difficult, since "in a civil war the struggle takes place in a territory whose citizens are all of the one nationality." *Supra* note 46, at 43. But uniform nationality can be assumed only where the parties in a civil conflict do not themselves disagree as to national identity. Agreement is most likely to be the case where the civil conflict arises out of political or ideological differences, e.g., the Angolan civil war. But where the internal conflict is itself over the question of nationality (e.g., the Biafran war, the Bangladesh war, and the Arab-Jewish war in Palestine in 1947-48) to assume that the parties are of the same nationality is arbitrarily to choose the majority or present government's view of the conflict. Moreover the use of the term "aliens" in "Aliens in the Territory of a Party to the Conflict" would not appear to be significant as meaning "aliens as opposed to nationals," since it can be fairly assumed that there is no intention here to protect persons from their own government. (This contrasts with provisions under the heading "General Protection of Populations Against Certain Consequences of War" which *do* include the relationship of a belligerent to its own citizens. R. MILLER, *THE LAW OF WAR* 73-74 (1975).) The thrust then of Article 45 is not to distinguish between aliens and nationals as such for purposes of expulsion, but rather to acknowledge the right of a party to protect itself from the threat of an internal enemy. For an analysis of the term "alien enemy" and a criterion thereof in terms of "permanent allegiance," see A. McNAIR & A. WATTS, *THE LEGAL EFFECTS OF WAR* 77 (1966).

⁵³ Pictet suggests an *ad hoc* distinction drawing upon the concept of belligerent occupation in internal conflicts where "each of the Parties is in possession of a portion

It might be noted, finally, that one article of the Convention does apply specifically to civil conflicts. However, Article 3 (the "convention in miniature" applicable to "conflicts not of an international character") embodies only the minimum standards of conduct long recognized by civilized nations⁵⁴ and does not treat the issue of refugees or expulsion. With respect to noncombatants, Article 3 prohibits specifically (a) violence to life and person, in particular murder, mutilation, cruel treatment, and torture; (b) taking of hostages; (c) outrages upon personal dignity; and (d) sentences or executions without due process; it requires that the wounded and sick be collected and cared for. In general, Article 3 requires that noncombatants "shall in all circumstances be treated humanely." The requirement of humane treatment invites broad interpretation and would not, therefore, as a logical matter preclude a right of return for refugees. As noted above, however, Article 3 prescribes only a minimum standard of treatment for noncombatants, and, as broad as "humane treatment" may be conceptually, it is here necessarily limited by the provisions of the Convention as a whole, and the Convention does not require repatriation generally.

IV.

RESOLUTION 194(III) OF DECEMBER 11, 1948⁵⁵

In 1948 Israel had no fixed position concerning an Arab return.⁵⁶ Replying to an appeal from Count Folke Bernadotte (then UN Mediator in Palestine) for the return of the Arab refugees, the Minister for Foreign Affairs of the Provisional Government of Israel, Moshe Shertok (later Sharett), declared in a letter of August 1, 1948 that:

the return during the truce of thousands of displaced Arabs to the State of Israel which is still beset by enemy armies . . . would in fact gravely prejudice our rights and position. . . . When the Arab States are ready to conclude a peace treaty with Israel, the question will come up for a constructive solution as a part of the general settlement, with due regard to our counterclaim. . . .⁵⁷

of the national territory, and there is . . . some sort of front." *Supra* note 46, at 36. One might imagine such a possibility in connection with, for example, the Biafran and Bangladesh conflicts. However, the demographics peculiar to Palestine in 1948, where Jewish and Arab communities were intermingled within what was itself a relatively small area, would seem to rule out such a distinction even as a practical matter. For a demographic survey of Palestine in 1947, see Report of the UN Special Committee on Palestine, 2 GAOR, Supp. (No. 11), UN Doc. A/364 (1947).

⁵⁴ 4 PICTET, *supra* note 46, at 36.

⁵⁵ GA Res. 194, UN Doc. A/810, at 21 (1948).

⁵⁶ PERETZ, *supra* note 21, at 33. But Khouri, *supra* note 21, at 127, indicates that as early as June 16, 1948, Prime Minister Ben-Gurion took the position before the Israeli cabinet that "no Arab refugee should be admitted back."

⁵⁷ Progress Report of the UN Mediator, 3 GAOR, Supp. (No. 11) 27-28, UN Doc. A/648 (1948). According to Peretz, *supra* note 21, at 35, the Israeli Foreign Minister unofficially told the UN Mediator that, while Israel was unwilling to accept a mass Arab return before peace, it would consider repatriation of certain categories of in-

Before his assassination by Jewish terrorists, Bernadotte sent a comprehensive report to the General Assembly. The recommendations in his report formed the basis for key resolution 194 of December 11, 1948. The resolution established a Conciliation Commission for Palestine and instructed it to "take steps to assist the Governments and authorities concerned to achieve a final settlement of all questions outstanding between them." Regarding the refugee issue, paragraph-11, subparagraph 1 of the resolution declared that

The General Assembly,

Resolves that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for the loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible.

The Arab view toward Resolution 194 has always been ambiguous, sometimes regarding it as a legal nullity and, at other times, as the source of an absolute right of Palestinian repatriation. Palestinian political organizations, on the one hand, have always repudiated the resolution as illegal, being itself based upon the illegality of the state of Israel.⁵⁸ According to this point of view, the issue is not whether Israel has a legal duty to repatriate the refugees but rather by what right can the illegitimate Jewish state prevent the return of the rightful "indigenous population." By contrast, the overwhelming number of Palestinians living in the "refugee camps" have always viewed Resolution 194 as an affirmation of their right to return to their homes within Israel.⁵⁹ For their part, the

dividuals who deserved special treatment, including members of broken families. See also *infra* note 66.

⁵⁸ In October 1966, Mr. Al-Ghouri, chairman of the Palestine Arab Delegation, invited for the first time to attend meetings of the Special Political Committee of the UN General Assembly, categorically rejected Resolution 194 in his address before the Committee:

He [Al-Ghouri] wished to make clear the views of the Palestine Arab delegation on the implementation of paragraph 11 of General Assembly resolution 194 (III) of 11 December 1948. It considered the implementation of that paragraph tantamount to an acceptance of the partition resolution 181 (II) and the liquidation of the Palestine problem, which it had always rejected. . . . The indigenous Arab people of Palestine had an inalienable right to return to their homes and homeland. That right could never be a *matter of option or permission*, nor could it be waived or bartered away (emphasis added).

²¹ GAOR, Special Political Committee (501st mtg.) 23, UN Doc. A/SPC/SR. 501 (1966). See also the more recent statement by the PLO representative in 28 GAOR, Special Political Committee (882d mtg.) 124, UN Doc. A/SPC/SR. 882 (1973).

⁵⁹ Henry Labouisse, then Director of the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), reported in February 1957 that the situation respecting the Palestine refugees was almost unchanged. The reason, he said, did not, lie simply in the field of economics. UNRWA can, to be sure, enable some hundreds of refugees to become self-supporting each year . . . But it cannot overcome the fact that the refugees as a whole insist upon the choice provided for them in the General Assembly resolution [of December 11, 1948], that is repatria-

Arab states originally voted against the resolution, but by spring 1949 they began to reverse their position and soon became its strongest advocates. They have since invoked paragraph 11 as authority for an immediate, unconditional, and wholesale repatriation of the refugees.

The interpretation of paragraph 11 of Resolution 194 by the Arab states has been provided by Georg Tomeh, Permanent Representative of Syria to the United Nations, in an article titled, *Legal Status of Arab Refugees*. According to Tomeh,

[T]he provisions of paragraph 11, sub-paragraph 1, of the General Assembly Resolution 194 of December 11, 1948 affirm the right of the refugees to return to their homes and their right to compensation, classified as compensation to refugees *not* choosing to return, and compensation to refugees for loss of or damage to property. These rights, according to paragraph 11, are to be implemented "under principles of international law or in equity."⁶⁰

Although Tomeh fails anywhere in his article to give the actual text of paragraph 11, he makes the following claims regarding the paragraph:

1. The paragraph affirms a "right" of refugees to return to their homes, if they choose.
2. The paragraph affirms a "right" to compensation for those refugees choosing not to return.
3. These "rights," both to return or, in the alternative, to compensation, are to be implemented under principles of international law or in equity.

The first observation to be made is that, while Tomeh refers to "right" or "rights" three times in his analysis, these terms are nowhere to be found within the paragraph itself. There is no suggestion in the paragraph that the principle of "return" is a right under international law. The text simply states that they, the refugees, "should be permitted" to return. It would seem clear enough that the phraseology "should be permitted" does not amount to "must be permitted." Moreover, if paragraph 11 intended to establish a "right of return," would such a "right" be a matter of permission?⁶¹

Equally objectionable is Tomeh's contention that "[t]hese rights [to compensation and repatriation], according to paragraph 11, are to be implemented 'under principles of international law or in equity.'" The reader may discern for himself that the phrase, "under principles of inter-

tion or compensation. In the absence of that choice, they bitterly oppose anything which has even the semblance of a permanent settlement elsewhere. Quoted in WAINES, *THE UNHOLY WAR* 128-29 (1971).

⁶⁰ Tomeh, *supra* note 22, at 687. In accord with Tomeh's interpretation is General Assembly Resolution 3089 D: "... enjoyment by the Palestine Arab refugees of their right to return to their homes and property, recognized by the General Assembly in resolution 194 (III) of 11 December 1948" For text of Resolution 3089 D, see 28 GAOR, Supp. (No. 30) 27, UN Doc. A/9030 (1973). Resolution 194 is also cited as authority for a Palestinian right of return in the Report of the Committee, *supra* note 3, at paras. 19, 29, 66, and 69.

⁶¹ See the statement by Al-Ghouri, *supra* note 58, condemning Resolution 194 for its use of the term "permitted."

national law or in equity," refers only to the issue of compensation, not to both compensation and repatriation. Tomeh's interpretation to permit reference to both is disallowed by the most elementary rules of English construction. Paragraph 11 does not attempt itself to create a "right" of repatriation, nor is there any implication that such a "right" already exists in international law.

Paragraph 11 does, however, call attention to a general humanitarian principle that persons who have fled their homes *ought* to be allowed to return but, in keeping with this humanitarian approach, the paragraph adds that those refugees wishing to return should also wish "to live at peace with their neighbours." An additional proviso is to be found in the determination that repatriation should be implemented "at the earliest *practicable* date" (*emphasis added*). The use of the term "practicable" is significant, since it involves the only change made by the General Assembly to the Mediator's original recommendation on refugees. At the suggestion of Guatemala, the proposed return of the refugees was changed from the "earliest possible date" to the "earliest practicable date."⁶²

Thus far, this discussion of Resolution 194 has been limited to paragraph 11. It is worth noting, however, that paragraph 11 is only one in a 15-paragraph resolution which established a Conciliation Commission for Palestine (CCP) and gave it broad terms of reference to "assist the Governments and authorities concerned to achieve a final settlement of all questions outstanding between them." The failure of the CCP to achieve such a "final settlement" was largely due to the stalemate that developed over the refugee issue and so is worth recounting briefly here.

The CCP launched its activities by convening a general meeting of the Arab states in Beirut from March 21 to April 5, 1949.⁶³ The Arab delegations were unanimous in insisting that absolute priority be given to the refugee question. Later in Tel Aviv, the Commission urged Israeli Prime Minister Ben-Gurion to endorse the repatriation principle enunciated in Resolution 194. The Prime Minister gave no direct answer but referred to the passage in the resolution which stated that the refugees who wished to return should "live at peace with their neighbours." As long as the Arab states refused to end the conflict with Israel, Ben-Gurion declared that his country could have little confidence in declarations of the peaceful intentions of the refugees.⁶⁴ Although the possibility of repatriating a limited

⁶² PERETZ, *supra* note 21, at 38.

⁶³ On the work of the Conciliation Commission for Palestine, see generally PERETZ, *supra* note 21, and BUEHRIG, *supra* note 29, at 10-38.

⁶⁴ It is often said that by making the question of repatriation dependent upon a final settlement, Israel linked two issues that had no moral connection. But if Israel drew a connection between its security and a Palestinian return, the connection was not lost on Arab leaders either. In 1949, Mohammed Sala el Din Bin Bey, then Foreign Minister of Egypt, declared that "it should be known and well understood that in demanding the return of the refugees to Palestine the Arabs mean their return as master of their country and not as slaves. More clearly, they envisage the liquidation of Israel." Al Misri (Oct. 11, 1949) quoted in GERVASI, *supra* note 10, at 115 and in Talmon, *Israel and the Arabs*, THE ISRAEL-ARAB READER, *supra* note 6, at 284. Still later, Egyptian President Nasser was quoted as saying: "If the Arabs return to Israel,

number of the refugees was not excluded, Ben-Gurion made it clear that Israel considered resettlement of the refugees in the Arab states the ideal solution.

At the end of April 1949, the Commission convened once more at Lausanne, Switzerland, from April 27 to July 1 and from July 19 to September 15. All efforts of the CCP during the initial phase to extract simultaneous concessions from both sides continued to be unsuccessful. In the second phase, however, Israel, under pressure from the United States,⁶⁵ agreed to the return of 100,000 of the refugees, subject to the limitation that "the refugees would be settled in areas where they would not come in contact with possible enemies of Israel." The Israeli Government also "reserved the right to resettle repatriated refugees in specific locations, in order to ensure that their reinstallation would fit into the general plan of Israel's economic development." The Arab delegations challenged Israel's contention that the settlement of Arab refugees would have to be subordinated to economic and strategic considerations. Instead they repeated their demand for repatriation of all Arabs from Israeli controlled areas that had been allocated to an Arab state or to the international zone (Jerusalem) outlined in the November 1947 partition plan, the compromise plan which they originally rejected. The Arabs added that, if the 100,000 refugees in question were to return to areas originally allocated to a Jewish state by the partition plan, they "would not object" to adopting Israel's proposal "as a basis for discussion." Internal opposition also developed in Israel to the proposal which was perceived as less a "good will gesture" than acquiescence in response to U.S. pressure, and finally the offer was withdrawn. Despite later efforts of the CCP, matters remained there except for some progress in negotiating the reunion of Arab families in Israel with relatives who had fled.⁶⁶

V.

HISTORY OF GENERAL ASSEMBLY RESOLUTIONS ON THE PALESTINIAN REFUGEES FROM 1952 TO 1973

For many years following the adoption of Resolution 194 in 1948, the focus of General Assembly attention with respect to the Palestinian problem drifted from repatriation toward resettlement as a solution. In addi-

Israel will cease to exist." *Zürcher Woche* (Sept. 1, 1961) quoted in *THE ISRAEL-ARAB READER*, *supra* note 6, at 331.

⁶⁵ In a strongly worded note to Ben-Gurion on May 21, 1949, President Truman expressed his "deep disappointment" at the failure of Israel to make concessions on the refugee issue and insisted on tangible concessions as a condition for a general settlement. The note threatened, further, that "the United States would reconsider its attitude toward Israel." See PERETZ, *supra* note 21, at 41 and KHOURI, *supra* note 21, at 127.

⁶⁶ On an individual basis, the Israel Government considered appeals made by Arabs still in Israel for the return of family members. The number of officially approved reunions totaled about 8,000. In addition, an estimated 20,000 to 30,000 infiltrators were unofficially granted permission to stay. See PERETZ, *supra* note 21, at 50-56 and BUEHRIG, *supra* note 29, at 15.

tion to a perfunctory reaffirmation of Resolution 194, the General Assembly in the years 1952 through 1968 annually reaffirmed Resolution 513,⁶⁷ emphasizing public works projects by which the refugees might be resettled and reintegrated into the Arab communities where they were.⁶⁸ In 1966 the representative of Liberia called for a negotiated settlement and economic absorption of the refugees by the Arab world, urging moreover that Resolution 194 be reconsidered in view of its implication for the sovereignty of a member state, Israel.⁶⁹

The Six Days' War of 1967, which ended with Israel's occupation of Arab territory, radically changed the mood of many UN members. In 1967, significantly, when members of Palestinian groups were invited to address the Special Political Committee of the UN General Assembly, they rejected the General Assembly's partition resolution of 1947 and all subsequent recommendations by the United Nations as a violation of the UN Charter, the Universal Declaration of Human Rights, the Declaration on the Granting of Independence to Colonial Countries and Peoples, and the right to self-determination.⁷⁰

In the following session of the General Assembly in 1968, representatives of the Arab states themselves raised the issue, introduced the previous year, of the "legitimate rights of the Palestinian people and the right to self-determination." They insisted that until the great injustice that had been done to the Arabs of Palestine by the creation of Israel in 1948 was finally settled by recognizing the legitimate right of the refugees to return to their homeland and to self-determination, the question would continue to be a source of tension which might degenerate into a new conflagration. The Palestinians, they warned, would never accept a compromise.⁷¹

Beginning in 1969, the General Assembly's approach to the Palestinian problem took a new turn. Third-world sponsored resolutions, subsequently adopted by the General Assembly, raised not only the issue of Palestinian repatriation but also that of Palestinian self-determination, in terms such as to raise in the minds of many observers the question whether these resolutions were consistent with Israeli sovereignty and independence and even Israel's right to exist.

The first of these resolutions, Resolution 2535B of 1969, began by "recognizing" that "the problem of the Palestine Arab refugees has arisen from the denial of their inalienable rights under the Charter of the United

⁶⁷ 6 GAOR, Supp. (No. 20) 12, UN Doc. A/2119 (1951).

⁶⁸ For a study of the phenomenon of "re-citation," the citation of previous resolutions in later resolutions of the General Assembly, see Bleicher, *The Legal Significance of Re-Citation of General Assembly Resolutions*, 63 AJIL 444 (1969).

⁶⁹ 21 GAOR, Special Political Committee (501st mtg.) 24, UN Doc. A/SPC/SR.501 (1966).

⁷⁰ 22 GAOR, Special Political Committee (587th mtg.) 257, UN Doc. A/SPC/SR.587 (1967); *id.* (589th mtg.) 271, UN Doc. A/SPC/SR.589 (1967); *id.* (590th mtg.) 276, UN Doc. A/SPC/SR.590 (1967).

⁷¹ See, e.g., 23 GAOR, Special Political Committee (620th mtg.) 2 (Libya), UN Doc. A/SPC/SR.620 (1968); *id.* (621st mtg.) 36 (Syria), UN Doc. A/SPC/SR.621 (1968).

Nations and the Universal Declaration of Human Rights.”⁷² The references to the Charter and the Universal Declaration heralded the dual theme, urged by later resolutions, of the refugees’ right to return to their homes and property (by virtue, presumably, of Article 13(2) of the Universal Declaration) and of the right of the “people of Palestine” to self-determination (by virtue, presumably, of the UN Charter). Resolution 2672 C passed in 1970 was the first to use the phrase “people of Palestine” and to acknowledge their right to self-determination.⁷³ Similar resolutions were passed in 1971 and 1972.⁷⁴

The question raised by these resolutions is whether the right of self-determination proclaimed generally for the “people of Palestine” is consistent with continued self-determination by the people of Israel. Since these resolutions refer only vaguely to the “people of Palestine,” without specifying what is intended by “Palestine,” it is, arguably, only areas of the former British-mandated Palestine not included in the present Israeli state (e.g., the West Bank and Gaza) that is intended. Such an interpretation is no longer plausible in the light of Resolution 3089D of 1973 which declares as follows:

3. . . . that the enjoyment by the Palestine Arab refugees of their right to return to their homes and property, recognized by the General Assembly in resolution 194 (III) of 11 December 1948, which has been repeatedly reaffirmed by the Assembly since that date, is indispensable for the achievement of a just settlement of the refugee problem and for the exercise by the people of Palestine of its right to self-determination.⁷⁵

If in the words of the resolution, “the enjoyment by the Palestine Arab refugees of their right to return . . . is indispensable . . . for the exercise by the people of Palestine of its right to self-determination,” and this is intended to include the “old” refugees of 1948, as well as the “new” refugees of 1967—as would seem to be indicated by the reference to Resolution 194—then it follows that Resolution 3089D must include all or part of the existing Israeli state in its concept of “Palestine.”

VI.

GENERAL ASSEMBLY RESOLUTION 3236 OF 1974⁷⁶

In 1974 the General Assembly adopted the most complete statement to date of its conception of Palestinian rights. In relevant part, Resolution

⁷² 24 GAOR, Supp. (No. 30) 25, UN Doc. A/7630 (1969).

Note the attempt here to preempt the principle, stated in Security Council Resolution 242 (22 SCOR, Res. & DEC. 8 (1967)), of the necessity “[f]or achieving a just settlement of the refugee problem,” which in General Assembly Resolution 3089D [*supra* note 60] becomes “the enjoyment by the Palestine Arab refugees of their right to return . . . is indispensable for the achievement of a just settlement of the refugee problem. . . .”

⁷³ 25 GAOR, Supp. (No. 28) 36, UN Doc. A/8028 (1970).

⁷⁴ GA Res. 2792D. 26 GAOR, Supp. (No. 29) 47, UN Doc. A/8429 (1971) and GA Res. 2963E. 27 GAOR, Supp. (No. 30) 29, UN Doc. A/8730 (1972).

⁷⁵ *Supra* note 60.

⁷⁶ *Supra* note 2.

3236 of 1974 states that:

The General Assembly,

Recalling its relevant resolutions which affirm the right of the Palestinian people to self-determination,

1. *Reaffirms* the inalienable rights of the Palestinian people in Palestine, including:

- (a) The right to self-determination without external interference;
- (b) The right to national independence and sovereignty;

2. *Reaffirms* also the inalienable right of the Palestinians to return to their homes and property from which they have been displaced and uprooted, and calls for their return.

Substantively, Resolution 3236 makes no significant additions to Resolution 3089D of the previous year. As a matter of style, though, Resolution 3236 is the first Assembly resolution to eschew the term "refugee," in accord with the view, long urged by Palestinian groups, that the problem of displaced Palestinians is essentially one of a people who have been denied their national rights, not a problem of refugees.

One other departure ought to be noted as between Resolutions 3089D and 3236. Paragraph 2 of the latter, pertaining to a right of return, does not contain the reference to self-determination which is found in corresponding paragraph 3 of Resolution 3089D. While this might then seem to be a retreat by Resolution 3236 from the position taken by Resolution 3089D—that the displaced Palestinians have not only the right to return but to return within the overall context of a right of self-determination—the change already noted of the designation "Palestine Arab refugees" to simply "Palestinians" obviates the necessity of specifically reiterating "self-determination" as a right in paragraph 2 since, as a textual matter, the displaced "Palestinians" referred to in paragraph 2 are already covered by paragraph 1. It would appear then that Resolution 3236 reaffirms the position taken by the Assembly in Resolution 3089D that the displaced Palestinians have not only the right to return to areas they fled in Israel, but have the right to do so within an overall context of self-determination.

Apart from the issue, whether resolutions of the General Assembly are competent to confer new rights or to abolish preexisting rights,⁷⁷ Resolution 3236 gives rise to a serious problem of validity as a General Assembly "recommendation" in view of its implications for the sovereignty of a UN

⁷⁷ On the issue of the legal competence of the General Assembly, see Sloan, *The Binding Force of a "Recommendation" of the General Assembly of the United Nations*, 25 BRIT. Y. B. INT. LAW 1 (1948); Johnson, *The Effect of Resolutions of the General Assembly of the United Nations*, 32 *id.* at 97 (1955-56); R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963); J. CASTAÑEDA, *LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS* (1969). For a recent study of Article 2(7) of the UN Charter with broad implications on the issue of General Assembly competence generally, see Watson, *Autointerpretation, Competence, and the Continuing Validity of Article 2(7) of the UN Charter*, 71 AJIL 60 (1977).

member state.⁷⁸ At the very least, the resolution proposes that the displaced Palestinians have an absolute right to return to Israeli territory despite any objections that that state might interpose. Such a proposition would alone render meaningless the concept of "sovereign equality" of states upon which, according to Article 2(1) of the Charter, the United Nations is based.⁷⁹ But Resolution 3236 goes even further to state that the displaced Palestinians have not only an absolute right to return to the Israeli state but also have the right to do so for the purpose of pursuing their separate nationalist identity. It is difficult to imagine how much closer the General Assembly could have come to endorsing the destruction, in part or whole, of a member state.⁸⁰

The debate which preceded the Assembly's vote on Resolution 3236 centered upon the question whether the resolution was consistent with the

⁷⁸ Some recognition of this problem is given in the Report of the Committee, *supra* note 3, at para. 29:

It was suggested that certain legal questions could be clarified through an advisory opinion of the International Court of Justice; more specifically . . . (a) Whether the recognition by the General Assembly of the inalienable right to return of the displaced Palestinians and the demand by the General Assembly that they be permitted to return were, in fact, an infringement of Israel's sovereignty The Report suggests, though, that Israel's sovereignty might be limited "in light of the provisions of General Assembly resolution 181 (II) recommending the Plan of Partition, with its built-in safeguards for the rights of the Palestinian Arab inhabitants of the then proposed Jewish State. . . ." (*id.*).

⁷⁹ The competence of the General Assembly under the Charter to make "recommendations" (Arts. 10, 11, 13, 14, 58, 64, 105) is quite broad but not unlimited. In general, the scope of Assembly resolutions is circumscribed by the Principles and Purposes of the Organization set forth in Chapter I, Articles 1 and 2 of the Charter. Article 2, paragraph 1, states that "[t]he Organization and its members . . . shall act in accordance with the following principles" among which is "the principle of the sovereign equality of all its members." Although the principle of "sovereign equality" in the Charter is not without its ambiguity, the following clarifying statement appears in the Report of the Rapporteur of Committee I to Commission 1, approved ultimately by the Commission and the San Francisco Conference in Plenary Session:

The Committee voted to use the terminology "sovereign equality" on the assumption that it includes the following elements:

- (1) that states are juridically equal;
- (2) that each state enjoys the right inherent in full sovereignty;
- (3) that the *personality of the state is respected, as well as its territorial integrity and political independence* (emphasis added).
- (4) that the state should, under international order, comply faithfully with its international duties and obligations.

Doc. 944, I/1/34 (1), 6 UNCIO Docs. 446, 457 (1945).

⁸⁰ Resolution 3236, (*supra* note 2), the text of which refers only to "the rights of the Palestinian people in Palestine," would appear to be entirely consistent with the Palestine Liberation Organization's idea of a "democratic secular" Palestinian state to replace Israel. But the Report of the Committee, *supra* note 3, at para. 18, suggests a more "moderate" solution when it states that,

the exercise of the individual right of the Palestinian to return to his homeland [is] a *conditio sine qua non* for the exercise by this people of its rights to self-determination, national independence and sovereignty.

Repeated references in the Report to the partition plan, Resolution 181 (II), as well as acknowledgement of Israel itself, suggests that a Palestinian state along the lines proposed in the plan of partition of 1947 is envisaged, and thus only a partial dismantling of the Israeli state.

principle of respect for the sovereignty and political independence of every state in the Middle East, as provided for specifically by Security Council Resolution 242⁸¹ of 1967 (later reaffirmed in Resolution 338 in 1973) and, more generally, by the UN Charter itself. All states either voting against or abstaining on the draft resolution gave as their reason the failure of the text to take into account the rights of all the parties concerned or, more specifically, that the text ignored Israel's right to exist as a sovereign state.⁸² In addition, seven of the states voting in favor of the draft resolution felt it necessary to qualify their vote by stating either that Israel had a right to exist (Argentina, Liberia, Cyprus),⁸³ or that the rights of all states must be taken into account (Thailand, Bhutan),⁸⁴ or that their vote was given without prejudice to the rights of any state in the region (Ghana),⁸⁵ or that their vote was given on the understanding that no one intended to erase Israel from the map (Mauritius).⁸⁶ Of the eighty-nine UN members voting in favor of the draft resolution, only two (Cyprus and the Philippines⁸⁷) defended the draft on this point, arguing that respect for the sovereign equality of all nations was "implicit" in the general provisions of the resolution referring to observance of the purposes and principles of the UN Charter. It hardly needs stating, though, that a pro forma reference to the principles of the Charter will not redeem a resolution the substantive parts of which are at variance with those very same principles.

Of all the delegates, perhaps the representative of Barbados expressed most clearly the difficulty in reconciling Palestinian rights, as formulated by Resolution 3236, with the rights of Israel. He declared that he knew that the Palestinian people existed, but where was Palestine? If Palestine did not exist, what was meant by "the Palestinian people in Palestine"? If that meant the state of Israel, Barbados insisted that the state of Israel had the right to exist, that the Palestinian people had the right to have a state, and both should be allowed to exist side by side. Barbados recognized the inalienable rights of the Palestinian people, but, when the draft dealt with their return, the question was their return to where?⁸⁸

⁸¹ *Supra* note 72.

⁸² See, e.g., UN Doc. A/PV.2296 (1974) Denmark at 66; Bolivia at 82; Canada at 91; Federal Republic of Germany at 93-95.

The right to exist has always been the most fundamental right of every state, so much so that explicit reference to this right was excluded by the International Law Commission in its Draft Declaration on the Rights and Duties of States. Most of its members "deemed it to be tautological to say that an existing State has the right to exist; that right is in a sense a postulate or presupposition underlying the whole draft Declaration."

Report of the International Law Commission to the General Assembly, 4 GAOR, Supp. (No. 10) 9, UN Doc. A/925 (1949), reprinted in [1949] Y. B. INT. L. COMM. 289, UN Doc. A/CN.4/SER.A/1949.

⁸³ UN Doc. A/PV.2296 (1974) Argentina at 7; Liberia at 11; Cyprus at 106.

⁸⁴ *Id.* Thailand at 103; Bhutan at 88.

⁸⁵ *Id.* at 68.

⁸⁶ *Id.* at 16.

⁸⁷ *Id.* Cyprus at 106; Philippines at 92.

⁸⁸ *Id.* at 58.

VII.

THE CONVENTION ON THE STATUS OF REFUGEES OF 28 JULY 1951⁸⁹

The chief difficulty in determining the legal status of the Palestinians, and hence their rights, is that, as a group, they defy easy description. As a result, a number of false problems have been created leading one jurist, at least, to conclude that "the Palestinian refugee cannot be defined legally."⁹⁰ In recent years, the Palestinians have themselves rejected the term "refugee" in the apparent belief that "refugeehood" and "nationhood" are mutually exclusive:

Between 1948 and 1969, Palestinians were almost uniformly treated by West European and American spokesmen as "refugees," and from that time on the "misunderstanding" was perpetuated. Even the United Nations in its annually reaffirmed resolution granting the "refugees" a right to return to their former homeland and to compensation for their lost property did not admit to the reality that these refugees constitute a "people."⁹¹

In fact the issue of Palestinian nationality is irrelevant as regards Palestinian refugee status. A person may possess a nationality or be stateless at the time when he becomes a refugee, and a refugee of the former kind may retain or lose his nationality without effect on his status as a refugee. The relation between refugee status and statelessness is thus expressed in general terms by Simpson: "Not all stateless people are refugees, nor are all refugees technically stateless. . . . Statelessness is not the essential quality of a refugee, though many refugees are in fact stateless people."⁹² The same general idea is found in the definitions of the term "refugee" in several postwar international instruments: the Constitution of the International Refugee Organization, the Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR), and the Convention Relating to the Status of Refugees of July 28, 1951.

According to Article I, paragraph A(2) of the Refugee Convention, the term "refugee" applies to any person who:

As a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the

⁸⁹ Done July 28, 1951, 189 UNTS 137.

⁹⁰ Dimitrijevic, *Legal Position of Palestine Refugees*, 19 REV. OF INT. AFFAIRS 18 (1968).

⁹¹ Bassiouni, *supra* note 5, at 177. See also Bassiouni, *The Palestinians: Refugees or a People*, THE CATHOLIC WORLD 252-62 (Sept. 1970).

⁹² J. H. SIMPSON, THE REFUGEE PROBLEM 232 (1939) quoted in 1 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 77 (1972). In fact, with the exception of those refugees who enjoy Jordanian citizenship, the displaced Palestinians fit the definition of "stateless person." See Convention Relating to the Status of Stateless Persons, done Sept. 28, 1954, 360 UNTS 117.

country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

It makes little difference, then, whether one considers the Palestinians as stateless or not since, according to the Convention, a refugee may either be "outside the country of his nationality" or "not having a nationality" be "outside the country of his former habitual residence."⁹³

Yet another dubious distinction, one between "refugee" and "expellee," is suggested by Dimitrijevic who argues that:

Although the Palestinian refugees themselves decided to leave the territory on which they had been living, they did so out of fear of the Israeli armed forces and, in this respect, they may be considered to have been expelled by force, exiled. Even the banishment of aliens is not permitted without reason.⁹⁴

Even if the above equation can legitimately be made, it is irrelevant as regards Palestinian refugee status. Like the question of Palestinian nationality or statelessness, whether one regards Palestinians as having been expelled or not does not affect their refugee status. The Refugee Convention, as well as relevant provisions of the UNHCR Statute, define a "refugee" as one who is "unable or . . . unwilling" to return to the country of his nationality or former habitual residence. It is not required that a refugee be "unable *and* unwilling."⁹⁵

The various relationships between stateless and nonstateless persons and refugees as well as escapees, expellees and refugeehood are summarized by Grahl-Madsen as follows:

The "international refugee" is . . . outside the country of his nationality or, if he is stateless, outside the country of his former regular or habitual residence. This is also what Paragraph 6 A (ii) and B of the UNHCR Statute and Article 1A(2) of the Refugee Convention provide. It does not matter in what way or in which circumstances he has left the said country. The main thing is that the person concerned is outside his country of nationality or, in appropriate cases, the country of his former habitual residence.

He may have left the said country clandestinely, that is by sneaking across the frontier or stowing away on a ship. He may have left by means of a false passport or by bribing or overpowering a frontier guard. He may have left the country openly, by virtue of an ordinary, valid passport, with or without the intention of claiming to be a refugee

⁹³ It should be noted, though, that the Refugee Convention does not as such apply to the Palestinian refugees since Article I (D) excludes "persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance." The Palestinians, of course, have since 1949 been under the protection of the UNRWA. According to Grahl-Madsen, however, "[t]here can be no doubt that the Arab refugees from the [sic] Palestine are truly refugees in a general sense, they may even, as a group; *prima facie* satisfy the requirement of Article I A(2) of the Convention." 2 GRAHL-MADSEN, *supra* note 92, at 141.

⁹⁴ Dimitrijevic, *supra* note 90, at 18.

⁹⁵ See 1 GRAHL-MADSEN, *supra* note 81, at 78 & 83.

as soon as he has set foot on foreign soil. Or he may have been expelled, exiled, or banished from his home country.⁹⁶

There can be little doubt then that the Palestinians are truly refugees in a general sense; however, they are unique in their desire to return to their country of origin while the general political conditions that caused them to become refugees persist. Refugees usually have no desire to be repatriated, and, typically, the concern of the refugee is the exact contrary of repatriation—to receive asylum and protection against refoulement.⁹⁷ Much can be said in explanation of the Palestinian phenomenon, but it is enough to note here that the consequence of the uniqueness of the Palestinian claim is that it finds little support in international law, since the protection of refugees has been invariably perceived as a problem of asylum and nonrefoulement, not of repatriation.

Thus the Refugee Convention of 1951, hailed as the “Magna Carta for Refugees,” affords protection against expulsion or refoulement and also establishes minimal standards for the treatment of refugees by host countries.⁹⁸ The aim of the Refugee Convention is to insure that refugees will, at the very least, be accorded the same treatment as is generally granted to other aliens in a state, and that they be treated the same as nationals with respect to certain basic rights.⁹⁹ Among these rights owed by the country of refuge to the refugee are those of nondiscrimination (Art. 3), freedom of religion (Art. 4), acquisition of movable and immovable property (Art. 13), the right to engage in wage-earning employment (Art. 17), housing as favorable as possible (Art. 21), public education (Art. 22), and public relief (Art. 23). In short, the Refugee Convention focuses upon duties and obligations of the host country and, in so doing, enumerates a program of resettlement.

The international law of refugees, codified and defined in the Convention, thus confirms the general rule that persons who have fled their country are resettled elsewhere. In a study of refugee problems, *Century of the Homeless Man*, Dr. Elfan Rees, Advisor on Refugees to the World Council of Churches, addressed the Palestinian refugee problem and summarized international experience in the following terms:

No large scale refugee problem has ever been solved by repatriation, and there are certainly no grounds for believing that this particular problem [of the Palestinians] can be so solved. . . . The facts we must

⁹⁶ *Id.* at 94.

⁹⁷ After World War II, the issue of repatriation arose most prominently in connection with refugees from the Soviet Union and the Eastern European states. Repatriation was not then urged by the refugees, but rather by the governments of the states from which the refugees had fled. These governments interpreted repatriation in terms equivalent to forcible return. See 1 L. HOLBORN, *REFUGEES: A PROBLEM OF OUR TIME: THE WORK OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES* 325 ff. (1975).

⁹⁸ *Id.* at 163.

⁹⁹ *Id.* at 158–59.

face force us to the conclusion that for most of the world's refugees the only solution is integration where they are.¹⁰⁰

It is worth reemphasizing that the question of Palestinian nationality is not dealt with here, one way or the other. As stated at the outset, Palestinian claims to sovereignty over the former mandate are distinguishable from their claims to repatriation which, as a legal concept, necessarily looks to the Palestinians *qua* refugees.

VIII.

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS,¹⁰¹ Article 13(2)

Every attempt to make a case for a right of Palestinian repatriation invariably cites the Universal Declaration of Human Rights for support.¹⁰² Article 13, paragraph 2, of the Declaration proclaims as follows: "Everyone has the right to leave any country, including his own, and to return to his country" (emphasis added). It might be observed at the outset that the Universal Declaration does not by its own terms posit absolutes. Thus Article 29, paragraph 2, of the document subjects all the preceding rights and freedoms to such limitations as are necessary to meet "the just requirements of morality, public order and the general welfare in a democratic society."¹⁰³ While it is not suggested that interpretation of the article is wholly within the discretion of the invoking state, it has been observed that,

[a] provision of this kind necessarily allows governments a significant degree of freedom to curtail human rights in the face of real or

¹⁰⁰ Quoted in FEINBERG, *supra* note 5, at 89-90. Cattan (*supra* note 22, at 107) cites the Bangladesh experience, where some twelve million refugees from East Pakistan eventually returned, as precedent for a principle of repatriation. The return of these refugees, though, was not accomplished through repatriation but as a result of India's successful armed intervention in the conflict. Had the Arab states been similarly successful in their invasion of Palestine in 1948, the Palestine Arab refugees would have presumably also returned.

¹⁰¹ GA Res. 217. UN Doc. A/810, at 71 (1948).

¹⁰² Article 13, paragraph 2, of the Universal Declaration, is cited as authority for a Palestinian right of return by Dimitrijevic, *supra* note 90, Hadawi, *The Arab Refugees*, in CRESCENT AND STAR 201 (Alexander and Kittrie eds. 1973); *Seminar of Arab Jurists on Palestine*, in 1 THE ARAB-ISRAELI CONFLICT, *supra* note 5, at 363; WRIGHT, *supra* note 45, at 120 n. 91; Report of the Committee, *supra* note 3, at para. 19.

¹⁰³ The relationship between Article 13(2) and Article 29(2) was elaborated upon in a study of Article 13(2) commissioned by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities as follows:

[f]or purposes of our study . . . we shall regard as permissible limitations to the right of everyone to leave any country, including his own, and to return to his country, only those which are provided by law and which are necessary to protect national security, public order, health or morals, or the rights and freedoms of others.

J. Ingles, Study of Discrimination in Respect of the Right of Everyone to Leave any Country, including His Own, and to Return to His Country. UN Doc. E/CN.4/Sub.2/220/Rev.1, at 38 (1963).

The phrase "national security" is used above in its narrow rather than broad sense. *Id.* at 39 & 40.

perceived threats to the national welfare, and provides a potential defense to the claim that a state has violated the provisions of the Universal Declaration.¹⁰⁴

The necessary balance then between Article 29, paragraph 2, and Article 13, as well as between other articles, awaits further jurisprudence in this area. At any rate, the present case would seem to be of limited value for determining the limits of the qualifying clause of the Declaration, since it can be fairly stated that the return of potentially some one and one-half million Palestinians of doubtful allegiance to a state whose population itself numbers only somewhat more than three million is as valid a threat to that state's "general welfare" as there is likely to exist.¹⁰⁵

There is, moreover, a serious problem whether the right of a person "to return to his country" under Article 13 is even applicable as such to the Palestinian case. The right of "[e]veryone . . . to return to his country" is the right of *nationals* to return to their country. In other words, Article 13, paragraph 2, "obliges" states to permit the return of their citizens or nationals only.¹⁰⁶ The Palestinian refugees are, of course, not Israeli nationals, not by that state's definition,¹⁰⁷ and significantly, also, not according to the refugees' own self-identity; they make no claim to Israeli nationality or

¹⁰⁴ Bleicher, *supra* note 68, at 459.

¹⁰⁵ There is a certain amount of contradiction in the Arab position regarding the effect that a refugee return would have on Israel's security. On the one hand, it is taken as axiomatic that the refugees on the whole insist on returning. But when the question of Israeli security is raised, the number of refugees who would return if given the choice is minimized. For example, Khouri (*supra* note 21, at 137) stresses that:

UNRWA reports repeatedly emphasized that the refugees' desire to return to their homes had not only not "diminished," but that it had actually been "strengthened and encouraged by the General Assembly's resolutions on repatriation."

Similarly, he states that:

[s]ince for 2,000 years the Jews had been able to keep alive their hope of returning to Israel, it should not have been difficult for them to understand the Arab refugees' unquenchable yearning to return to their homes (at 163).

The above, though, is followed by the statement that,

[m]ost authorities agreed that Israel's acceptance of repatriation would not inevitably have brought about, as Israelis frequently had contended, a sudden mass movement into Israel of one million hostile refugees determined to undermine her social and political structure and her security (at 165).

¹⁰⁶ Ingles, *supra* note 103 *passim*.

¹⁰⁷ Israel's nationality laws are themselves a subject of controversy, particularly Israel's "Law of Return" of July 5, 1950 which grants to every Jew in the world the right to claim Israeli citizenship and residence. The Israeli state, though, is not wholly unique in granting citizenship as of right based on ethnicity. The law of the German Federal Republic also provides for the admission of "ethnic Germans," though they may have never set foot on German territory, to full citizenship. 1 Gesetz zur Regelung von Fragen der Staatsangehörigkeit of February 22, 1955 (1955 BGBl. i.65). It can be observed also that Article 1 of the International Convention on Certain Questions relating to the Conflict of Nationality Laws, adopted at The Hague on April 12, 1930 (179 LNTS 89), provides that "it is for each State to determine under its own law who are its nationals." Article 2 provides, further, that "any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State."

allegiance. The right of a national under Article 13, paragraph 2, to return to "his country" is, therefore, irrelevant to the question whether a right exists on the part of the Palestinian refugees to return to Israel.

The meaning in Article 13, paragraph 2, of the phrase "his country" is considered by Dimitrijevic, who observes that "[a]t the moment when the refugees left their part of Palestine, it was still 'their land'" in the sense of the article.¹⁰⁸ However, Palestinian claims to sovereignty in the former British mandate are beside the point, since the article is not a formula for determining state legitimacy or for resolving territorial disputes. If it were, Israelis (who also regard the former mandate as "their country") could invoke the article in the same way that the Palestinians could. Without disparaging the importance of this article in the viewpoint of human rights, its aims are in fact more modest. It is a recognition of a simple moral truism that under usual circumstances the relationship of a national to his state is such that he ought to be able to leave freely and to return.¹⁰⁹

¹⁰⁸ Dimitrijevic, *supra* note 90.

¹⁰⁹ Interestingly enough, the "right of return" of Article 13(2) was regarded by its drafters as important as a way of assuring the "right to leave," rather than being significant in itself. Thus the words, "and to return to his country" at the end of paragraph 2 were added much as an afterthought by a Lebanese amendment which was adopted without opposition and which, according to its sponsor, was submitted so that, "... the right to leave a country, already sanctioned in the article, would be strengthened by the assurance of the right to return. Such was the object of [the] amendment." See *supra* note 103, at 87.

EDITORIAL COMMENT

BRUNSON MACCHESNEY

Professor Brunson MacChesney of Northwestern University Law School died on March 9, 1978. A member of the Board of Editors of this *Journal* since 1957, he had served as its Acting Editor-in-Chief for a year in 1971-1972. He was the President of the American Society of International Law from 1964 to 1966 and Chairman of the Section of International and Comparative Law of the American Bar Association in 1954 to 1955. A life-long interest in international affairs manifested itself in various assignments abroad for the United States Government, in teaching at the Naval War College and Cambridge University, as well as at Northwestern, in service to the American Society and other organizations, and in scholarly writings about international law.

Brunson MacChesney's charm of manner and good judgment made him a valued colleague in anything having to do with international law. These qualities and his capacity for leadership were such that he was often called upon to direct the affairs of the various organizations in which he interested himself.

He will be mourned by his colleagues of the *American Journal of International Law*, by whom he was held in high regard. The writer owes him a particular debt of gratitude for assuming the office of Acting Editor-in-Chief during the absence of the Editor-in-Chief in 1971 to 1972 and for having conducted the affairs of the *Journal* easily and wisely—as was only to be expected from his performance in other posts of responsibility.

R.R.B.

CORRESPONDENCE

The American Journal of International Law welcomes short communications from its readers. It reserves the right to determine which letters shall be published and to edit any letters printed.

TO THE EDITOR-IN-CHIEF

In Defense of Lawyers

April 21, 1978

William D. Rogers' generally excellent article on investment disputes in the Americas¹ begins by quoting Sir Harold Nicolson on the undesirability of entrusting diplomacy to "missionaries, fanatics and lawyers." The phrase is apparently meant to equate the three categories. I leave the missionaries and fanatics to their own defenders, but rise to challenge the blanket denigration of lawyers and the credentials of Harold Nicolson as an arbiter of competence in the conduct of diplomatic endeavor.

As to lawyers as diplomats (or, in British usage, diplomatists):

The Nicolson canard has been echoed by others, among them, George Kennan, who has condemned what he calls the "rigid legal norms" which he considers characteristic of American diplomacy. The thesis is apparently that lawyers are inclined to believe overmuch in the application in the international world of those standards of conduct which govern domestic affairs. This inclination (plus allegedly excessive deference to popular views) has led, Walter Lippmann has charged, to the kind of mistakes said to have been committed by Wilson at Versailles. Nicolson thus condemns what he has called the "American method" in diplomacy, contrasting its amateurism and failure with the glories achieved by the "French method," which would leave diplomacy to the "experts," i.e., the professional foreign service elite.

The equating of lawyers with "missionaries and fanatics" (as well as with amateurism) is based upon a highly stylized and uninformed concept of lawyers. Nicolson (as well as such critics as Lippmann and Kennan) seem to have taken their ideas about lawyers straight out of *Bleak House*. There are of course good and bad lawyers, pettifoggers and broadminded and competent individuals. A good many of the lawyers who have been responsible for American diplomacy have clearly been as competent as the most professional of career foreign service officers. Mr. Rogers himself is, of course, an example. The well-trained lawyer resembles little the caricature suggested by Nicolson. He (or she as well) is first and foremost an analyst, able to separate the important from the trivial, and able to use language as an instrument of conciliation. As has been demonstrated in the recent Panama Canal negotiations, these are not skills irrelevant to successful diplomacy. And many have had much more expertise, both in the substance of the issues and in the tactics of negotiation, than most foreign service professionals. Nicolson, who has little idea of what a lawyer really does, sets up a straw man, contrasts it with an idealized calm, cool, competent diplomatist, and draws the obvious—but wrong—conclusion.

¹ Rogers, *Of Missionaries, Fanatics, and Lawyers: Some Thoughts on Investment Disputes in the Americas*, 72 AJIL 1 (1978).

One may thus be pardoned for inquiring into Nicolson's own qualifications, as measured by his attainments. An elegant style and ability to use words he certainly possessed, plus membership in an elite segment of British society which has not always covered itself with glory. According to his son, he accepted an assignment to Berlin in 1927 only gloomily. By 1929 he had opted out of the British Foreign Service, and said, as his train left Berlin: "I am presented with a cactus. It symbolizes the end of my diplomatic career." Questions existed as to his "soundness" and about his "too clever" despatches among his colleagues and superiors. He was apparently above many of the occupations which might have pleased a less elegant person; his son reveals that, though he left diplomacy for a staff position on the *Evening Standard*, he thought journalism "sordid." Nonetheless, he was neither above nor possessed of sufficient sense to refrain from association with some of the worst elements of British society: in 1931 he became closely associated with Sir Oswald Mosely's Fascist New Party. Nor did his distaste for the "sordid" pursuit of journalism deter him from editing its newspaper, *Action*. He stood for Parliament as a New Party candidate, was rejected by the electorate, and gained a seat in Parliament in 1935 as a member of the National Labour party, which he lost in 1945. He rose no higher than Parliamentary Secretary to the Ministry of Interior and was generally regarded as a lightweight with a flair for phraseology. He did perform one useful task—speaking against the Munich settlement in 1938. Commendable though this action was, especially against his earlier background, it must raise some questions, as indeed does his entire career, about that steadiness of purpose which he always considered to be the hallmark of effective diplomacy.

One need not be starry-eyed about lawyers and their competence either in the courts or in the international fora to believe that their being coupled with fanatics (whatever one may say about missionaries, who have their purposes) is a distortion. And his own record raises doubt that Nicolson had a very good sense of to whom diplomacy should be entrusted.²

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*Delimitation of the
Aegean Continental Shelf*

TO THE EDITOR-IN-CHIEF:

At least insofar as the Aegean example is concerned, the article by Mr. Donald E. Karl, "Islands and the Delimitation of the Continental Shelf" (71 AJIL 642 (1977)), adopts an inconsistent approach and advances untenable positions:

1. The primary function of the proposed model is to provide a framework for the resolution of continental shelf delimitation controversies affecting

² Sources for the factual statements made in these paragraphs are to be found in: H. NICOLSON, *THE EVOLUTION OF DIPLOMATIC METHOD* (1953); W. LIPPMANN, *THE PUBLIC PHILOSOPHY* (1956); S. J. RUBIN, *American Diplomacy: The Case for "Amateurism,"* 45 YALE REV. 321 (1956); N. NICOLSON, *PORTRAIT OF A MARRIAGE* (1973).

islands according to "equitable principles." However this model is simply built on the basis of an island's relative location and size in relation to the delimiting states and the more cogent historic criteria, which to quote Mr. Karl "must be preserved under any scheme of delimitation which purports to be based on equitable principles," are ignored. In the case of the Aegean, this results in the rejection of four millennia of Greek patrimony without comment.

2. The Aegean continental shelf is divided "in a ratio of approximately 2:1 in favor of Greece" on the theory that this is "comparable to the ratio of Greek and Turkish coastlines bordering the Aegean and as such, would seem to be representative of a delimitation according to such equitable principles." In order to reach this tortured result, the Aegean is arbitrarily divided into three sectors and every island in the Aegean, with the exception of Crete, is denied a continental shelf even though it is recognized that "[i]t is undisputed that islands have continental shelves." Moreover, to reduce the Greek coastline bordering on the Aegean further, the Greek insular coastline, excepting that of Crete, is excluded. Admittedly, Mr. Karl concedes that Lesbos, Rhodes, and Karpathos might be included but it is argued that this would not make that much of a difference. That is not the case, however, when the discussion is extended to cover all of the approximately 3,000 Greek islands in the Aegean.

3. The justification for these subjective computations is "substantiality" but factors such as the substantial international economic activity generated by tourism and shipping are overlooked even though they both have become legendary and associated with the Greek islands. What is more, the determination of "substantiality" is made with respect to each island individually and not to the group as a whole—a concept that Mr. Karl also recognizes—thereby avoiding the limitation of the Turkish claims to areas east of the Greek islands.

4. Finally, Mr. Karl proposes to position Turkey in the middle of the Cyclades and the Dodecanese. It would make more sense to consider whether the Aegean is a Greek archipelagic body of water from which Turkey is excluded altogether.

It is submitted that such proposals do not serve objective legal analysis and international justice. It remains that the Aegean has been woven with the fate of the Greek people since the dawn of history on a continuous and exclusive basis barring periodic infringements. Indeed, there are not many examples of such well-established customary rights as those that the Greeks have in this archipelago. Unless might is right, definition of these sovereign rights is not required at this point in time, under any formula, let alone the one proposed in this article. It goes without saying that the establishment of a binational resource zone in the Aegean, which may be equitable in other cases, would abrogate the exclusive Greek rights. Moreover, a true balancing of the equities would necessitate the consideration of other factors such as Cyprus, drug controls on Turkey, and the protection of the remaining Greek minority and Orthodox Patriarchate in Constantinople with which the Greco-Turkish controversy is inextricably linked, and, of course, waiver by Turkey and laches with respect to its newly asserted claims to the Aegean.

SERGE B. HADJI-MIHALOGLOU
of the New York and Michigan Bars

Mr. Karl replies:

Mr. Hadji-Mihaloglou misinterprets the substance and purpose of my article and particularly Section III thereof. First, the article explicitly recognizes the importance of historic rights in the proposed model governing the delimitation of the continental shelf. However, the examples of the model's application contained in Section III involve only the primary and secondary phases of the model, and it is expressly stated that historic rights—the subjective “third” phase of the model—will not be discussed in connection with those examples (see note 93). Further, the application of the model to the Aegean controversy results in one “possible” and “representative” delimitation which was certainly not meant to be, nor was it characterized in any way as, final or definitive. Rather, the application of the model produces the basic features of a delimitation to which the effects of historic rights and perhaps other factors must yet be added, although I must admit that I did not, and do not, envision the consideration of some of the factors mentioned in Mr. Hadji-Mihaloglou's letter.

Second, Mr. Hadji-Mihaloglou attacks my use of the “proportionality of coastline” criterion and the related “substantiality” test for insular coastlines. However, he advances no concrete rationale as to why maritime resource zones should *not* be delimited according to criteria based on proportionality or why my formulation of such criteria is inappropriate or incorrect. His dissatisfaction with the model appears to stem solely from the model's “failure” to produce the result which Mr. Hadji-Mihaloglou would desire in a particular situation and, as such, is certainly not characteristic of the “objective legal analysis” that he so fervently espouses.

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

MARIAN L. NASH *

The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

PROTECTION OF HUMAN RIGHTS (U.S. *Digest*, Ch. 3, §6)

On February 23, 1978, President Carter transmitted four treaties pertaining to human rights to the U.S. Senate for advice and consent to ratification.

(1) The International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the UN General Assembly on December 21, 1965, entered into force on January 4, 1969, and signed on behalf of the United States on September 28, 1966;

(2) The International Covenant on Economic, Social and Cultural Rights, adopted by the UN General Assembly on December 16, 1966, entered into force on January 3, 1976, and signed on behalf of the United States on October 5, 1977;

(3) The International Covenant on Civil and Political Rights, adopted by the UN General Assembly on December 16, 1966, entered into force on March 23, 1976, and signed on behalf of the United States on October 5, 1977; and

(4) The American Convention on Human Rights, adopted on November 22, 1969, by the Organization of American States and signed on behalf of the United States on June 1, 1977 (not yet entered into force).

President Carter's letter of transmittal included the reports of the Department of State concerning these treaties and explained why certain reservations, understandings, and declarations were being recommended to the Senate:

The great majority of the substantive provisions of these four treaties are entirely consistent with the letter and spirit of the United States Constitution and laws. Wherever a provision is in conflict with United States law, a reservation, understanding or declaration has been recommended. The Department of Justice concurs in the judgment of the Department of State that, with the inclusion of these reservations, understandings and declarations, there are no constitutional or other legal obstacles to United States ratification. The reports of the Department of State on these four treaties describe their provisions and set forth the recommended reservations, understandings and declarations.

Should the Senate give its advice and consent to ratification of the Convention on the Elimination of All Forms of Racial Discrimina-

* Office of the Legal Adviser, Department of State.

tion, I would then have the right to decide whether to make a declaration, pursuant to Article 14 of the Convention, recognizing the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals. Such a declaration would be submitted to the Senate for its advice and consent to ratification.

Should the Senate give its advice and consent to ratification of the International Covenant on Civil and Political Rights, I intend upon deposit of United States ratification to make a declaration, pursuant to Article 14 of the Covenant. By that declaration the United States would recognize the competence of the Human Rights Committee established by Article 28 to receive and consider "communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Covenant."

Should the Senate give its advice and consent to ratification of the American Convention on Human Rights, I intend upon deposit of United States ratification to make a declaration pursuant to Article 45 of the Convention. By that declaration the United States would recognize the competence of the Inter-American Commission on Human Rights established by Article 33 to receive and examine "communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention."¹

The report of the Department of State on the UN treaties was submitted on December 17, 1977, by Deputy Secretary of State Warren Christopher, with the following explanation of the general purpose of the proposed reservations, understandings, and declarations:

In view of the large number of States concerned and the disparity of view on some questions, it was not possible to negotiate treaties which were in perfect accord with the United States Constitution and law. The treaties contain a small number of provisions which are or appear to be in conflict with United States law. The most serious examples are paragraphs (a) and (b) of Article 4 of the Convention on Racial Discrimination, and Article 20 of the Covenant on Civil and Political Rights, which conflict with the right of free speech as protected by the Constitution. Reservations to these and other provisions, discussed below, along with a number of statements of understanding, are designed to harmonize the treaties with existing provisions of domestic law. In addition, declarations that the treaties are not self-executing are recommended. With such declarations, the substantive provisions of the treaties would not of themselves become effective as domestic law. The Department of Justice is of the view that, with these reservations, declarations and understandings, there are no constitutional or other legal objections to United States ratification of the treaties.²

The report on the Convention on the Elimination of All Forms of Racial Discrimination summarized the provisions of this convention and proposed one understanding concerning the U.S. obligation to enact legislation to eliminate racial discrimination, one declaration to the effect that certain provisions are not self-executing, and two reservations. The first reserva-

¹ S. EXEC. C, D, E, and F, 95th Cong., 2d Sess., III-IV (1978).

² *Id.* at VI.

tion deals with the right of free speech and the second pertains to the implementation of the Convention by state and local governments. Excerpts from Deputy Secretary Christopher's statement concerning this Convention follow:

The Convention is designed to forbid racial and ethnic discrimination in all fields of public life. For the most part, its terms closely parallel United States constitutional and statutory law and policy. The Convention is divided into three parts: Part I (Articles 1 through 7) contains the substantive provisions; Part II (Articles 8 through 16) contains administrative and enforcement clauses; Part III (Articles 17 through 25) sets forth the final clauses.

Article 1 defines "racial discrimination" broadly, but specifies that the Convention does not apply to distinctions, exclusions, restrictions or preferences made by a State Party between citizens and non-citizens. Paragraph (4) of Article 1 and paragraph (2) of Article 2 also permit, but do not require, what have come to be known in the United States as "affirmative action" programs.

Article 2 specifies steps to be taken to eliminate racial discrimination, including nullification of discriminatory laws at all levels of political organization and prohibition of racial discrimination by "any persons, group or organization." Article 3 condemns and prohibits racial segregation and apartheid. These provisions, along with those of Article 5, require equality in several areas of economic, social and cultural rights, and the right of access to public places. They require a statement preserving United States distinctions between various governmental and private activities. The following understanding is recommended:

"The United States understands its obligation to enact legislation and take other measures under paragraph (1) of Article 2, subparagraphs (1)(c) and (1)(d) of Article 2, Article 3, and Article 5 to extend only to governmental or government-assisted activities and to private activities required to be available on a non-discriminatory basis as defined by the Constitution and laws of the United States."

Article 4 condemns propaganda and organizations based on racial hatred or superiority. Paragraph (c) of Article 4 requires that States Parties forbid public authorities or institutions, national or local, from promoting or inciting racial discrimination. This obligation is consonant with United States law and policy. Paragraphs (a) and (b), however, provide for restrictions on the dissemination of ideas, or participation in organizations based on those ideas, and as such would clearly violate the freedom of expression and association guaranteed by the Constitution and United States law and practice. With respect to paragraphs (a) and (b) of Article 4, the following reservation is recommended:

"The Constitution of the United States and Article 5 of this Convention contain provisions for the protection of individual rights, including the right to free speech, and nothing in this Convention shall be deemed to require or to authorize legislation or other action by the United States which would restrict the right of free speech protected by the Constitution, laws, and practice of the United States."

Article 5 enumerates certain fundamental rights the enjoyment and exercise of which must be protected against abridgment by racial dis-

crimination. These rights include the basic civil and political rights guaranteed in the United States, such as rights to personal security, universal suffrage, freedom of movement, and freedom of thought and expression. The rights also include economic, social and cultural rights, including the right to form and join trade unions, the right to housing, the right to employment, and the right of access to any place or service intended for use by the general public. The obligation assumed under Article 5 is not designated primarily to protect or guarantee the several enumerated rights as such, but rather to assure equality and non-discrimination in the enjoyment of those rights.

Article 6 requires the provision of effective protection and remedies, through the competent tribunals and other government institutions, against acts of racial discrimination which violate the Convention. Article 7 commits States Parties to undertake active programs to combat racial discrimination and prejudice.

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In addition to the general understanding and reservation recommended above, the following reservation is recommended:

"The United States shall implement all the provisions of the Convention over whose subject matter the Federal Government exercises legislative and judicial administration; with respect to the provisions over whose subject matter constituent units exercise jurisdiction, the Federal Government shall take appropriate measures, to the end that the competent authorities of the constituent units may take appropriate measures for the fulfillment of this Covenant."

This reservation is designed to deal with a number of provisions, notably subparagraphs (1)(a) and (1)(c) of Article 2, paragraph (c) of Article 4, Article 6 and Article 7, which impose obligations whose fulfillment is dependent upon the legal power of state and local governments as well as that of the Federal Government.

It is further recommended that a declaration indicate the non-self-executing nature of Articles 1 through 7 of the Convention. Absent such a statement, the terms of the Convention might be considered as directly enforceable law on a par with Congressional statutes. While the terms of the Convention, with the suggested reservations and understanding, are consonant with United States law, it is nevertheless preferable to leave any further implementation that may be desired to the domestic legislative and judicial process. The following declaration is recommended:

"The United States declares that the provisions of Articles 1 through 7 of this Convention are not self-executing."³

In his report summarizing the International Covenant on Economic, Social and Cultural Rights, Deputy Secretary Christopher recommended six statements to eliminate possible conflicts with U.S. law. These statements, also in the form of understandings, declarations, and reservations, deal, *inter alia*, with the right to own property, free speech, constituent units of the Federal Government, the non-self-executing nature of certain articles, and the progressive, as opposed to immediate, implementation of the

³ *Id.* at VI-VIII.

goals of the Covenant. The portion of Secretary Christopher's report dealing with this Covenant follows:

The International Covenant on Economic, Social and Cultural Rights sets forth a number of rights which, while for the most part in accord with United States law and practice, are nevertheless formulated as statements of goals to be achieved progressively rather than implemented immediately.

Parts I, II, and III of the Covenant (Articles 1 through 15) contain the substantive provisions; Part IV (Articles 16 through 23) sets forth the administrative provisions; and Part V (Articles 26 through 31) contains the final clauses.

Article 1 affirms in general terms the right of all peoples to self-determination, and the right to freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. This is consonant with United States policy.

Paragraph (1) of Article 2 sets forth the basic obligation of States Parties "to take steps," individually and through international assistance and cooperation, "to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized" by the Covenant "by all appropriate means, including legislative measures." In view of the terms of paragraph (1) of Article 2, and the nature of the rights set forth in Articles 1 through 15 of the Covenant, the following statement is recommended:

"The United States understands paragraph (1) of Article 2 as establishing that the provisions of Articles 1 through 15 of this Covenant describe goals to be achieved progressively rather than through immediate implementation."

It is also understood that paragraph (1) of Article 2, as well as Article 11, which calls for States Parties to take steps individually and through international cooperation to guard against hunger, import no legally binding obligation to provide aid to foreign countries.

Paragraph (2) of Article 2 forbids discrimination of any sort based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. United States and international law permit certain limited discrimination against nonnationals in appropriate cases (*e.g.*, ownership of land or of means of communication). It is understood that this paragraph also permits reasonable distinctions based on citizenship. Paragraph (3) of Article 2 provides that developing countries, with due regard to human rights and their national economy, may determine to what extent they will guarantee the economic rights recognized in the Covenant to nonnationals. Of related significance is Article 25, which provides that nothing in the Covenant is to be interpreted as impairing the "inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources." With respect to paragraph (3) of Article 2 and to Article 25, the following declaration is recommended:

"The United States declares that nothing in the Covenant derogates from the equal obligation of all States to fulfill their responsibilities under international law. The United States understands that under the Covenant every-

one has the right to own property alone as well as in association with others, and that no one shall be arbitrarily deprived of his property."

This declaration and understanding will make clear the United States position regarding property rights, and expresses the view of the United States that discrimination by developing countries against nonnationals or actions affecting their property or contractual rights may only be carried out in accordance with the governing rules of international law. Under international law, any taking of private property must be nondiscriminatory and for a public purpose, and must be accompanied by prompt, adequate, and effective compensation.

Article 3 provides that the Parties undertake to ensure the equal rights of men and women with respect to the rights set forth in the Covenant. Article 4 permits derogation from the rights enumerated in the Covenant only by law for the general welfare and only insofar as such limitations may be compatible with the nature of the rights.

Paragraph (1) of Article 5 provides that nothing in the Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized in the Covenant, or at their limitation to a greater extent than provided for in the Covenant. This clause raises in indirect fashion the problem of freedom of speech, and accordingly, the following statement is recommended:

"The Constitution of the United States and Article 19 of the International Covenant on Civil and Political Rights contain provisions for the protection of individual rights, including the right to free speech, and nothing in this Covenant shall be deemed to require or to authorize legislation or other action by the United States which would restrict the right of free speech protected by the Constitution, laws, and practice of the United States."

Paragraph (2) of Article 5 provides that existing rights may not be restricted because they are not recognized in the Covenant or recognized to a lesser extent.

Articles 6 through 9 of the Covenant list certain economic rights . . .

Similarly, Articles 10 through 14 detail certain society rights . . .

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Articles 26 through 31 are the final clauses. Article 28 states that "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions." In view of the nature of the United States federal system, this Article is not acceptable as formulated. With respect to Article 28, the following reservation is recommended:

"The United States shall progressively implement all the provisions of the Covenant over whose subject matter the Federal Government exercises legislative and judicial jurisdiction; with respect to the provisions over whose subject matter constituent units exercise jurisdiction, the Federal Government shall take appropriate measures, to the end that the competent authorities of the constituent units may take appropriate measures for the fulfillment of this Covenant."

In addition, it is further recommended that a declaration indicate the non-self-executing nature of Articles 1 through 15 of the Covenant. For the same reasons as set forth above with regard to the Convention on the Elimination of All Forms of Racial Discrimination,

the following declaration is recommended:

"The United States declares that the provisions of Articles 1 through 15 of this Covenant are not self-executing."⁴

Deputy Secretary Christopher recommended eight understandings, reservations, and declarations concerning the International Covenant on Civil and Political Rights. These deal with free speech, capital punishment, unlawful arrest, penalties for committing a criminal offense, certain prison practices, court-appointed counsel, double jeopardy, the exercise of rights over natural resources, the role of constituent units of the Federal Government, and the non-self-executing nature of certain articles of the Covenant. Excerpts from Deputy Secretary Christopher's report, describing the International Covenant on Civil and Political Rights and recommending these qualifying statements, follow:

The International Covenant on Civil and Political Rights is, of the three treaties submitted, the most similar in conception to the United States Constitution and Bill of Rights. The rights guaranteed are those civil and political rights with which the United States and the western liberal democratic tradition have always been associated. The rights are primarily limitations upon the power of the State to impose its will upon the people under its jurisdiction.

Parts I, II, and III of the Covenant (Articles 1 through 27) contain the substantive provisions; Part IV (Articles 28 through 45) contains the administrative and enforcement provisions; Part V includes under Articles 46 and 47 further substantive clauses; and Part VI (Articles 48 through 53) sets forth the final clauses.

Article 1, which contains provisions regarding self-determination and the right to dispose of natural wealth and resources, subject to the principles of mutual benefit and international law, is identical to Article 1 of the Covenant on Economic, Social and Cultural Rights.

Article 2 commits States Parties to provide the rights enumerated in the Covenant without regard to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. States Parties are required to provide effective legal remedies for violations of the rights protected by the Covenant.

Article 3 expressly obligates States Parties to undertake to ensure the equal right of men and women to the enjoyment of the civil and political rights set forth in the Covenant.

Article 4 permits derogation from certain of the rights guaranteed by the Covenant in situations of public emergency "which threatens the life of the nation" and the existence of which is officially proclaimed, provided that those rights are not abridged on a discriminatory basis.

Paragraph (1) of Article 5 of the Covenant is identical to paragraph (1) of Article 5 of the Covenant on Economic, Social and Cultural Rights, and thus indirectly raises the question of free speech. Article 20 expressly prohibits "any propaganda for war" and "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence." This provision conflicts

⁴ *Id.* at VIII-XI.

with the Constitution, and thus a reservation is required. Article 20 also appears to restrict the freedom of expression provided for in Article 19 of the Covenant. With respect to Article 20 and to paragraph (1) of Article 5, the following reservation is recommended:

"The Constitution of the United States and Article 19 of this Covenant contain provisions for the protection of individual rights, including the right of free speech, and nothing in this Covenant shall be deemed to require or to authorize legislation or other action by the United States which would restrict the right of free speech protected by the Constitution, laws, and practice of the United States."

Article 6 of the Covenant provides a general right to protection of life, and limits the circumstances in which capital punishment may be imposed or carried out. Paragraph 2 indicates that the death sentence may be imposed only for "the most serious crimes in accordance with law in force at the time of the commission of the crime," and only pursuant to a final judgment of a competent court. Paragraph 4 provides a right to seek pardon or commutation of the death sentence. Paragraph 5 forbids execution of persons under the age of 18 or of pregnant women. As United States law is not entirely in accord with these standards, the following reservation is recommended:

"The United States reserves the right to impose capital punishment on any person duly convicted under existing or future laws permitting the imposition of capital punishment."

Article 9 protects the right to liberty and security of the person, and sets forth the conditions under which persons may be arrested and tried for criminal charges. Paragraph 5 grants a right to compensation for unlawful arrest or detention which goes beyond current federal law. A related provision is paragraph (1) of Article 15, which forbids *ex post facto* criminal offenses. The third clause of that paragraph provides that if, subsequent to the commission of an offense, provision is made by law for the imposition of a lighter penalty, the offender is to benefit thereby. This right is often granted in practice in the United States, but is not required by law. With respect to paragraph (5) of Article 9 and to paragraph (1) of Article 15, the following reservation accordingly is recommended:

"The United States does not adhere to paragraph (5) of Article 9 or to the third clause of paragraph (1) of Article 15."

Article 10 establishes standards for the treatment of prisoners. Subparagraph (2)(a) of Article 10 requires that accused persons be segregated from convicted persons save in exceptional circumstances, while subparagraph (2)(b) requires that accused juvenile persons be separated from adults and brought as speedily as possible for adjudication. Paragraph (3) of Article 10 provides that the penitentiary system is to "comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation." Practice and policy in United States prisons does not fully accord with these standards, and accordingly, with respect to paragraphs (2) and (3) of Article 10, the following statement is recommended:

"The United States considers the rights enumerated in paragraphs (2) and (3) of Article 10 as goals to be achieved progressively rather than through immediate implementation."

Article 14 establishes standards for the conduct of trials, including the right to be presumed innocent. Paragraph (3) protects a defendant's right to counsel, including court-appointed counsel, to a speedy trial, to be informed of the charges against him, to subpoena and examine witnesses, and not to testify against himself. Paragraph (4) requires that juvenile courts "take account" of the age and possible rehabilitation of juvenile defendants. Paragraph (5) protects the right to appeal convictions. Paragraph (6) gives a right to compensation for miscarriage of justice under certain circumstances; this right is protected by the United States Code, Title 28, §§1495 and 2513. Paragraph (7) forbids re-trial for the same offense, following final conviction or acquittal for that offense.

It is possible to read all the requirements contained in Article 14 as consistent with United States law, policy and practice. However, the Senate may wish to record its understanding of certain provisions of that Article as follows:

"The United States understands that subparagraphs (3) (b) and (d) of Article 14 do not require the provision of court-appointed counsel when the defendant is financially able to retain counsel or for petty offenses for which imprisonment will not be imposed. The United States further understands that paragraph (3)(e) does not forbid requiring an indigent defendant to make a showing that the witness is necessary for his attendance to be compelled by the court. The United States considers that provisions of United States law currently in force constitute compliance with paragraph (6). The United States understands that the prohibition on double jeopardy contained in paragraph (7) is applicable only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, which is seeking a new trial for the same cause."

Part IV of the Covenant contains the administrative and enforcement provisions. A Human Rights Committee is established, and rules for its constitution and functioning are provided. The States Parties to the Covenant are required to submit reports to the United Nations Secretary-General for transmission to and consideration by the Committee, which may make findings and recommendations on the basis of the reports.

Article 41 permits, but does not require, a State Party to declare that it recognizes the competence of the Committee to receive and consider communications "to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Covenant." If the Committee is unable to resolve a matter submitted to it pursuant to Article 41, a Conciliation Commission may be appointed, with the prior consent of the parties concerned. The good offices of the Commission are to be made available to the parties, and recommendations may be made by the Commission if a solution to the dispute is not reached.

Should the Senate give its advice and consent to ratification of the Covenant, it is contemplated that the United States will make a declaration pursuant to Article 41. It is in the interest of the United States to participate in and influence the State-to-State complaint procedure established by the Covenant, not least because it is to be hoped that

the work of the Committee will contribute to the development of a generally accepted international law of human rights. It should be noted that declarations made pursuant to Article 41 may be withdrawn at any time by notification to the Secretary-General.

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Article 47 is identical to Article 25 of the Covenant on Economic, Social and Cultural Rights. It provides that nothing in the Covenant is to be interpreted as impairing the "inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources." With respect to Article 47, the following declaration is recommended: "The United States declares that the right referred to in Article 47 may be exercised only in accordance with international law."

Part VI of the Covenant (Articles 48 through 53) contains the final clauses. Article 50, which is identical to Article 28 of the Covenant on Economic, Social and Cultural Rights, explicitly requires that the Covenant be applied to all parts of federal States without limitation or exception. For the reasons set forth above regarding Article 28 of the Covenant on Economic, Social and Cultural Rights, the following reservation is recommended with respect to Article 50:

"The United States shall implement all the provisions of the Covenant over whose subject matter the Federal Government exercises legislative and judicial jurisdiction; with respect to the provisions over whose subject matter constituent units exercise jurisdiction, the Federal Government shall take appropriate measures, to the end that the competent authorities of the constituent units may take appropriate measures for the fulfillment of this Covenant."

In addition, it is further recommended that a declaration indicate the non-self-executing nature of Articles 1 through 27 of the Covenant. For the same reasons as set forth above with regard to the Convention on Racial Discrimination and the Covenant on Economic, Social and Cultural Rights, the following declaration is recommended:

"The United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing."

A related instrument of significance which is not being submitted to the Senate at this time is the Optional Protocol to the International Covenant on Civil and Political Rights. The Optional Protocol, like Article 14 of the Convention on Racial Discrimination, establishes a procedure under which individuals who consider their rights under the Covenant to have been violated may, after exhausting all available domestic remedies, appeal in their individual capacity to the Human Rights Committee established by Article 28 of the Covenant. Any State that becomes a party to the Optional Protocol recognizes, by becoming a party, the competence of the Committee to receive and consider communications from individuals subject to the jurisdiction of that State who claim to be victims of a violation by that State of any of the rights set forth in the Covenant.⁵

In a separate report to the President, also submitted on December 17, 1977, Deputy Secretary Christopher summarized in part, as follows, the purposes of the American Convention on Human Rights, signed by President Carter and Ambassador Gale McGee on June 1, 1977:

Along with the United Nations Covenants on Human Rights and

⁵ *Id.* at XI-XV.

the United Nations Convention on the Elimination of All Forms of Racial Discrimination, the American Convention on Human Rights constitutes a significant contribution to the developing international law of human rights. The American Convention, like the United Nations treaties, gives legally binding expression to human rights that are, for the most part, accepted in United States law and practice. The Convention provides for extensive protection of personal liberty, preserves the right to a fair trial, to freedom of assembly, and to participation in government, and protects many other rights of great significance to Americans. In addition, the Convention includes provisions which recognize certain rights that are not protected by the United Nations human rights treaties. Among the most important of these are the provision protecting the right to privacy (Article 11), and the provision concerning territorial application (Article 28), which takes account of the federal structure of many countries in the Western Hemisphere, including the United States.⁶

Deputy Secretary Christopher's report recommended several reservations, understandings, and declarations dealing with such issues as the non-self-executing nature of portions of this OAS Convention, capital punishment, court-appointed counsel, First Amendment rights, and certain rights of the family. Set forth below are excerpts from the report on prior restraint and the "fairness doctrine" under the First Amendment and on the progressive implementation of certain rights of the family:

Article 13 protects freedom of thought and expression, including the right to seek, receive, and impart information and ideas of all kinds, regardless of frontiers. Paragraph (2) of Article 13 states that these rights "shall not be subject to prior censorship" but shall be subject to subsequent imposition of liability in order to ensure respect for the rights or reputations of others, or the protection of national security, public order, health or morals.

Paragraph (3) of Article 13 provides that the right of expression may not be restricted by indirect methods, such as the abuse of government or private controls over information media. Under paragraph (4), public entertainment may be subject by law to prior censorship "for the moral protection of childhood and adolescence."

Paragraph (5) of Article 13 stipulates that "any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law."

Both paragraph (2) and paragraph (5) of Article 13 raise questions under the First Amendment and of consistency with United States law. The following reservation is recommended:

"The United States reserves the right to permit prior restraints in strictly defined circumstances where the right to judicial review is immediately available; the United States does not adhere to paragraph (5) of Article 13."

Article 14, on the right of reply, provides:

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated me-

⁶ *Id.* at XVII.

dium of communication has the right to reply or make a correction using the same communications outlet, under such conditions as the law may establish.

2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.

3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible, who is not protected by immunities or special privileges.

Under United States law the "fairness doctrine," applicable to radio and television, is narrower than the right provided by paragraph (1) of Article 14. Further, paragraph (3) does not reflect the sovereign immunity granted government publishers under United States law. The following reservation and understanding are recommended:

"The United States does not adhere to paragraph (1) of Article 14, and understands that paragraph (3) of that Article applies only to non-governmental entities."

Article 17, on the rights of the family, requires that the family unit be protected by society and the State. No marriage is to be entered into without the free and full consent of the intending spouses. Paragraphs (4) and (5) forbid discrimination against illegitimate children and obligate States to take steps to eliminate discrimination between spouses during marriage and in the event of its dissolution. Both paragraphs state goals towards which United States law is moving, but neither goal has been fully achieved. The following statement is recommended:

"The United States considers the provisions of paragraphs (4) and (5) of

Article 17 as goals to be achieved progressively rather than through immediate implementation."⁷

DIPLOMATIC MISSIONS AND EMBASSY PROPERTY

(U.S. *Digest*, Ch. 4, §1)

Privileges and Immunities

The Secretary of State, in a circular note of January 24, 1978,¹ to the Chiefs of Mission in Washington (the immediate purpose of which was to inform them about procedures for obtaining vehicle registrations and plates or validating tabs for registration year 1978, in the District of Columbia and the States of Virginia and Maryland) emphasized that members of missions should be adequately covered by liability insurance and should observe local traffic laws and regulations applicable to both parking and operation of their automobiles. The note referred to earlier circular notes on the same subjects of December 10, 1975,² August 9, 1976,³

⁷ *Id.* at XIX-XXI.

¹ Dept. of State File No. P 78 0038-0100.

² In this note the Department stated its position that "all persons entitled to immunity should be adequately covered by liability insurance" and expressed its concern over the problem of parking and moving traffic violations by members of the diplomatic community. It also drew attention to Article 41 of the Vienna Convention on Diplomatic Relations (UN Doc. A/CONF.20/13, 55 AJIL 1075 (1961)) concerning the "duty," under international law, of those enjoying diplomatic immunity "to respect

and January 18, 1978.³ The note of January 24, 1978 also reminded the Chiefs of Mission that mission members were expected to comply with local automobile inspection requirements and that they should possess vehicle operators' permits issued by the jurisdictions where their vehicles were registered.

The circular note of January 18, 1978, informed the Chiefs of Mission, *inter alia*, of the Department's view that, with the passage of legislation to repeal title 22 USC §§252-254, then awaiting action in the Senate, and with institution of a new system for decriminalizing parking violations, planned by the City Council of the District of Columbia for 1978, the District of Columbia government would be provided with the legal authority to seek collection of fines from certain personnel of diplomatic missions who are responsible for a substantial proportion of parking violations.

In testimony concerning several legislative proposals to alter U.S. law on diplomatic immunity before the Subcommittee on Citizen and Shareholder Rights and Remedies of the Senate Committee on the Judiciary on February 6, 1978, Ambassador Evan S. Dobell, Chief of Protocol, Department of State, said, in part:

The Department strongly favors Senate approval of H.R. 7819, a bill which accomplishes, among others, two fundamental purposes of changing the law on diplomatic immunity. The first purpose is to repeal the 1790 statute (22 USC 252-254) which long ago lost its applicability to the modern world. Repeal of this statute will allow application of the Vienna Convention on Diplomatic Relations of 1961 as the standard for granting privileges and immunities to the various categories of diplomatic mission personnel serving in official government establishments today, as well as to certain of their dependents. Thus, no longer will a disproportionate degree of immunity from jurisdiction be granted to persons who have little, if any, representational functions to perform in connection with their service at a foreign post. The second main purpose is to establish a legal basis, on the federal level, for requiring all persons enjoying diplomatic immunity to acquire adequate liability insurance in connection with the operation in this country of a motor vehicle, vessel or aircraft. The State Department is enthusiastically supportive of imposition of this requirement as a means for minimizing in the future the occurrence of unfortunate, sometimes tragic, incidents involving accidents in which diplomatic mission personnel injure, or are injured by, members of the public. Compulsory insurance seems both the most efficient and the fairest way of reaching a goal which, I'm certain, is

the laws and regulations of the receiving state." Dept. of State File No. P 77 0093-0350.

³ In this note the Department again addressed the question of adequate liability coverage for vehicles belonging to missions or mission members and noted the Resolution on Consideration of Civil Claims adopted by the Vienna Conference on Diplomatic Intercourse and Immunities on April 14, 1961. UN Doc. A/CONF.20/Add.1, 55 AJIL 1081 (1961). It further stated that the U.S. Government would "increasingly feel obliged to resort to requests to sending States for waivers of immunity, or in the alternative, to bringing about a just settlement of claims." Dept. of State File No. P 76 0130-1591.

⁴ Dept. of State File No. P 78 0038-0106.

shared by all affected persons, including the diplomatic community. I am advised that there is a representative of the insurance community prepared to testify before the subcommittee today on the desirability of making insurance available to diplomats, and my department looks forward to continued consultations with such concerned persons in the implementation of the regulations which would be required should H.R. 7819 become law.

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S. 1257 is a direct-action insurance bill similar in purpose of H.R. 7679. While the Department strongly supports a direct-action insurance bill, it agrees with the Department of Justice that H.R. 7679 is a preferable version, primarily because it retains federal control over controversies arising out of insurance coverage and would avoid deference to state requirements which, in many instances, are insufficient to deal with the problem of uninsured motorists who have diplomatic immunity.⁵

JUDICIAL ASSISTANCE

(U.S. *Digest*, Ch. 6, §6)

Multilateral Arrangements

Bruno A. Ristau, Chief, Foreign Litigation Unit, Civil Division, Department of Justice, served as the U.S. Delegate to a Special Commission of Experts, convened by the Hague Conference on Private International Law, November 21-25, 1977, to exchange views and experiences of the Central Authorities of member states, so designated under the Hague Convention of 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters¹ and to study methods for improving and ensuring the smooth and effective operation of the Convention. Mr. Ristau's Report to the Secretary of State, February 1978, on the meeting reads, in part, as follows:

Foreign practices under the Convention:

a. *Scope of Convention:* There exists no agreement on the scope of the Convention, i.e., on the meaning of the term "civil and commercial matters" as used in the caption and in Article 1 of the Convention. United States practice under the Convention, concurred in by the United Kingdom expert, is to consider any legal proceeding that is *not criminal* as "civil or commercial" (including an administrative proceeding). French practice, concurred in by the Swiss observer, excludes from "civil and commercial matters" legal proceedings that are criminal and *fiscal*. Japanese practice excludes all administrative matters. The German observer offered the opinion that under German practice, in addition to criminal matters, proceedings involving the enforcement of *public law* (as distinguished from "private law") would be excluded. Finally, Egyptian practice excludes *family law*

⁵ For the testimony of the Chief of the Foreign Litigation Section of the Civil Division of the Department of Justice on the same subject, see 72 AJIL 383 (1978).

¹ Done at The Hague, Nov. 15, 1965, 20 UST 361, TIAS No. 6638, 658 UNTS 163, entered into force for the United States on Feb. 10, 1969.

from the purview of "civil and commercial matters," since disputes involving family relations belong to the religious courts of that country.

There was, however, general agreement among the experts that in case of doubt a liberal interpretation should prevail.

b) *Informal [d]elivery of American documents abroad*: The prevalent practice in civil law countries for service of an American legal document is by "delivery to an addressee who accepts it voluntarily" (Article 5, second paragraph). As explained by the experts, this entails the notification of the addressee by an official of the requested State that a foreign judicial document has been received, and that the addressee should call for the document (referred to in French practice as delivery "par remise simple").

c) *Formal service of American documents abroad; translations*: If the American requesting authority specifies in its request that formal service should be made under the provisions of subparagraphs (a) or (b), first paragraph of Article 5, the Central Authorities will generally comply with such request only if the document to be served is written in, or accompanied by a translation into, the language of the State addressed.

d) *Who is a proper "applicant" under the Convention*: Because the civil law system relies heavily on the intervention of a judge or other officials in the performance of procedural acts, some experts from civil law countries expressed the view that a request for service of an American legal document had to emanate from a "judicial officer" or other "authority" to qualify as a request under Article 3 of the Convention. In the past, requests sent by American attorneys to foreign Central Authorities were returned unexecuted because of the perceived lack of capacity of such attorneys to be "applicants" under the Convention.

The American delegate explained that the laws of numerous American jurisdictions authorize private attorneys to make service, without the interposition of a marshal, sheriff or other public officer. Consequently, under American law, such attorneys are proper "applicants" under the Convention, and should be so regarded by foreign Central Authorities under the Convention.

The experts agreed that their Central Authorities would henceforth honor applications by American attorneys if note is made on the request form that the attorney-applicant is "Authorized under U.S. practice to request service under the Convention."

e) *Costs*: No fees or costs are levied by foreign Central Authorities for service of documents by informal delivery (para. b, above). Some Central Authorities impose fees if formal service is made (para. c, above) by semi-official process servers (e.g., by "huissiers" in France), but not if the process servers are public officials of the State. Where fees are charged, they are collected after service has been made.

f) *Timeliness of service*: Although the Convention does not specify any time period within which service requests must be executed, the experts agreed that service should be made (or attempted) within a "reasonable time", the views on what is reasonable ranging from two weeks to two months.

g) *Service by mail*: Most experts from civil law countries indicated that service of a U.S. judicial document through the mails is objectionable. The Swiss and German observers indicated that no objection

would be raised in their countries if a copy of a legal document were mailed *strictly for information purposes*, as long as no legal consequences flow in the sending state from such mailing.

h) *Translation and [a]dequacy of notice*: The American delegate submitted to the experts that even though Article 7 of the Convention provides that the standard terms in the forms mandated by the Convention may be written either in French or in English, it would be advisable if the forms were written or printed in both languages, *and* if the blanks on forms sent to the United States were completed in English. The American delegate suggested that under American concepts of due process of law service of documents in the United States which are written entirely in French—although technically sufficient under the Convention—would in all likelihood be deficient as a matter of American domestic law, at least if served on a person who did not speak French. Such documents plainly fail to give to the recipient notice which is reasonably calculated to impart knowledge of an impending action. . . . The experts agreed to take the American submission under advisement.

i) *Service of stale documents*: A number of experts—including the American delegate—questioned whether a service request designed to give notice of a hearing on a given date should be honored if the request is received only after the expiration of the date. The consensus of the experts was that the request should be complied with, since it will serve to impart notice to the recipient of the pendency of a legal proceeding abroad. The Convention makes adequate provision in Articles 15 and 16 for the protection of the rights of a recipient who did not get timely notice of the foreign proceedings.²

CANALS

(U.S. Digest, Ch. 7, §7)

Panama Canal

On March 16, 1978, the U.S. Senate agreed by a vote of 68 in favor and 32 opposed to a resolution consenting to ratification of the Treaty concerning the Permanent Neutrality of the Panama Canal.¹ On April 18, 1978, the Senate, again by a vote of 68 to 32, agreed to a resolution consenting to the ratification of the Panama Canal Treaty.²

The resolution of March 16 reads as follows:

Resolved, (two-thirds of the Senators present concurring therein),
That the Senate advise and consent to the ratification of the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, together with the Annexes and Protocol relating thereto, done

² Dept. of State File P78 0038-0109, 17 ILM 312 (1978). *See also* Permanent Bureau of the Hague Conference, Report on the Work of the Special Commission on the Operation of the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 21-25, 1977. 17 ILM 319 (1978).

¹ Done at Washington, D.C., Sept. 7, 1977. 77 DEPT. STATE BULL. 496, S. EXEC N, 95th Cong., 1st Sess., 16 ILM 1040 (1977), 72 AJIL 238 (1978).

² Done at Washington, D.C., Sept. 7, 1977. 77 DEPT. STATE BULL. 483, S. EXEC N, 95th Cong., 1st Sess., 16 ILM 1021 (1977), 72 AJIL 225 (1978).

at Washington on September 7, 1977 (Executive N, Ninety-fifth Congress, first session), subject to the following—

(a) Amendments:

(1) At the end of Article IV, insert the following:

"A correct and authoritative statement of certain rights and duties of the Parties under the foregoing is contained in the Statement of Understanding issued by the Government of the United States of America on October 14, 1977, and by the Government of the Republic of Panama on October 18, 1977, which is hereby incorporated as an integral part of this Treaty, as follows:

"Under the Treaty Concerning the [P]ermanent Neutrality and Operation of the Panama Canal (the Neutrality Treaty), Panama and the United States have the responsibility to assure that the Panama Canal will remain open and secure to ships of all nations. The correct interpretation of this principle is that each of the two countries shall, in accordance with their respective constitutional processes, defend the Canal against any threat to the regime of neutrality, and consequently shall have the right to act against any aggression or threat directed against the Canal or against the peaceful transit of vessels through the Canal.

"This does not mean, nor shall it be interpreted as, a right of intervention of the United States in the internal affairs of Panama. Any United States action will be directed at insuring that the Canal will remain open, secure, and accessible, and it shall never be directed against the territorial integrity or political independence of Panama."

(2) At the end of the first paragraph of Article VI, insert the following:

"In accordance with the Statement of Understanding mentioned in Article IV above: 'The Neutrality Treaty provides that the vessels of war and auxiliary vessels of the United States and Panama will be entitled to transit the Canal expeditiously.' This is intended, and it shall so be interpreted, to assure the transit of such vessels through the Canal as quickly as possible, without any impediment, with expedited treatment, and in the case of need or emergency, to go to the head of the line of vessels in order to transit the Canal rapidly."

(b) Conditions:

(1) Notwithstanding the provisions of Article V or any other provision of the Treaty, if the Canal is closed, or its operations are interfered with, the United States of America shall have the right to take such steps as it deems necessary, in accordance with its constitutional processes, including the use of military force in Panama, to reopen the Canal or restore the operations of the Canal, as the case may be.

(2) The instruments of ratification of the Treaty shall be exchanged only upon the conclusion of a Protocol of Exchange, to be signed by authorized representatives of both Governments, which shall constitute an integral part of the Treaty documents and which shall include the following:

"Nothing in this Treaty shall preclude Panama and the United States from making, in accordance with their respective constitutional processes, any agreement or arrangement between the two countries to facilitate performance at any time after December 31, 1999, of their responsibilities to maintain the regime of neutrality established in the Treaty, including agreements or arrangements for the stationing of any United States military forces or maintenance of defense sites after that date in the Republic of Panama that Panama and the United States may deem necessary or appropriate."

(c) Reservations:

(1) Before the date of entry into force of the Treaty, the two Parties shall begin to negotiate for an agreement under which the American

Battle Monuments Commission would, upon the date of entry into force of such agreement and thereafter, administer, free of all taxes and other charges and without compensation to the Republic of Panama and in accordance with the practices, privileges, and immunities associated with the administration of cemeteries outside the United States by the American Battle Monuments Commission, including the display of the flag of the United States, such part of Corozal Cemetery in the former Canal Zone as encompasses the remains of citizens of the United States.

(2) The flag of the United States may be displayed, pursuant to the provisions of paragraph 3 of Article VII of the Panama Canal Treaty, at such part of Corozal Cemetery in the former Canal Zone as encompasses the remains of citizens of the United States.

(3) The President—

(A) shall have announced, before the date of entry into force of the Treaty, his intention to transfer, consistent with an agreement with the Republic of Panama, and before the date of termination of the Panama Canal Treaty, to the American Battle Monuments Commission the administration of such part of Corozal Cemetery as encompasses the remains of citizens of the United States; and

(B) shall have announced, immediately after the date of exchange of the instruments of ratification, plans, to be carried out at the expense of the United States Government, for—

(i) removing, before the date of entry into force of the Treaty, the remains of citizens of the United States from Mount Hope Cemetery to such part of the Corozal Cemetery as encompasses such remains, except that the remains of any citizen whose next of kin objects in writing to the Secretary of the Army not later than three months after the date of exchange of the instruments of ratification of the Treaty shall not be removed; and

(ii) transporting to the United States for reinterment, if the next of kin so requests, not later than thirty months after the date of entry into force of the Treaty, any such remains encompassed by Corozal Cemetery and, before the date of entry into force of the Treaty, any remains removed from Mount Hope Cemetery pursuant to subclause (i); and

(C) shall have fully advised, before the date of entry into force of the Treaty, the next of kin objecting under clause (B)(i) of all available options and their implications.

(4) To carry out the purposes of Article III of the Treaty of assuring the security, efficiency, and proper maintenance of the Panama Canal, the United States of America and the Republic of Panama, during their respective periods of responsibility for Canal operation and maintenance, shall, unless the amount of the operating revenues of the Canal exceeds the amount needed to carry out the purposes of such article, use such revenues of the Canal only for purposes consistent with the purposes of Article III.

(d) Understandings:

(1) Paragraph 1(c) of Article III of the Treaty shall be construed as requiring, before any adjustment in tolls for use of the Canal, that the effects of any such toll adjustment on the trade patterns of the two Parties shall be given full consideration, including consideration

of the following factors in a manner consistent with the regime of neutrality:

- (1) the costs of operating and maintaining the Panama Canal;
- (2) the competitive position of the use of the Canal in relation to other means of transportation;
- (3) the interests of both Parties in maintaining their domestic fleets;
- (4) the impact of such an adjustment on the various geographical areas of each of the two Parties; and
- (5) the interest of both Parties in maximizing their international commerce.

The United States and the Republic of Panama shall cooperate in exchanging information necessary for the consideration of such factors.

(2) The agreement "to maintain the regime of neutrality established in this Treaty" in Article IV of the Treaty means that either of the two Parties to the Treaty may, in accordance with its constitutional processes, take unilateral action to defend the Panama Canal against any threat, as determined by the Party taking such action.

(3) The determination of "need or emergency" for the purpose of any vessel of war or auxiliary vessel of the United States or Panama going to the head of the line of vessels in order to transit the Panama Canal rapidly shall be made by the nation operating such vessel.

(4) Nothing in the Treaty, in the annexes or the Protocol relating to the Treaty, or in any other agreement relating to the Treaty obligates the United States to provide any economic assistance, military grant assistance, security supporting assistance, foreign military sales credits or international military education and training to the Republic of Panama.

(5) The President shall include all amendments, reservations, understandings, declarations, and other statements incorporated by the Senate in its resolution of ratification respecting this Treaty in the instrument of ratification exchanged with the Government of the Republic of Panama.³

On March 17, 1978, Senator Robert C. Byrd, Majority Leader of the Senate, introduced into the *Congressional Record* the text of two letters exchanged on March 15, 1978, by President Carter and Chief of Government Torrijos. Set forth below are portions of President Carter's letter discussing the nature of the reservations, conditions, and understandings contemplated for insertion in the Senate's resolution on ratification:

We have made good progress since last September when you and I signed the Treaties. The Senate Foreign Relations Committee endorsed the Treaties by an overwhelming vote. In the Senate debate, we have fortunately been able to prevent any amendments to the Treaty other than the so-called "Leadership" amendments to Articles IV and VI. These incorporate exactly the terms of the Statement of Understanding published after our conversation of October 14.

In considering its Resolution of Ratification of the Treaty, the Senate will almost certainly attach a number of reservations, conditions or understandings reflecting certain of its concerns. We have made every effort and have been successful to date in ensuring that these will be

³ 124 CONG. REC. S 3857-58 (daily ed. Mar. 16, 1978).

consistent with the general purposes of our two countries as parties to the Treaty. I hope you will examine them in this light.⁴

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General Torrijos' letter of reply read in part as follows:

In your letter and conversation you informed me that the Senate will introduce some reservations, but that they will not alter nor detract from the content of what was agreed upon in the Neutrality Treaty and in our Declaration of October 14, 1977. In this respect, I wish to inform you that the Government of Panama will proceed to study carefully these reservations and will take its position once the Senate has voted on both Treaties. The situation is thus because in the plebiscite held in Panama the Panamanian people voted for the two Treaties together and not in separate form.

I do wish, nonetheless, to point out that such a study will be based on the following concepts: For Panama any reservation would be unacceptable which blemished our national dignity, which altered or changed the objectives of the Treaty or which were directed at hindering the effective exercise of Panamanian sovereignty over all of its territory, the transfer of the Canal, and military withdrawal on December 31, 1999. For that reason, I received with great gratitude your words that these objectives will absolutely not be changed by means of amendments or reservations. . . .

The Panamanian people would not accept words, misplaced commas or ambiguous sentences which had as their objective, or which might signify, occupation in perpetuity disguised as neutrality or intervention in their internal affairs.⁵

On April 18, 1978, Senator Edward W. Brooke introduced into the *Congressional Record* an exchange of letters dated April 11, 1978, between himself and President Carter concerning the condition sponsored by Senator Dennis DeConcini found at (b)(1) of the resolution of ratification of the Neutrality Treaty agreed to on March 16, 1978. In his letter Senator Brooke posed the following question to President Carter:

Under the so-called DeConcini condition, does the United States reserve to itself the option to take whatever actions are necessary, including the unilateral decision to use military force on the territory of Panama if necessary, to ensure that the Canal will be available for the passage of U.S. vessels, regardless of whether the threat to the Canal comes from any source external to Panama or from any internal source within Panama? ⁶

The text of President Carter's reply follows:

I appreciate your thoughtful letter of April 11, raising the question whether the United States reserves to itself the option to take any necessary action to ensure that the Panama Canal will be available for the passage of U.S. vessels. The answer to that question is affirmative.

⁴ 124 CONG. REC. S 3977 (daily ed. Mar. 17, 1978). For the "Statement of Understanding" referred to in the President's note, see 77 DEPT. STATE BULL. 631 (1977), 72 AJIL 138 (1978).

⁵ *Id.*

⁶ 124 CONG. REC. S 5755 (daily ed. Apr. 18, 1978).

Article IV of the Panama Neutrality Treaty gives to each of the Parties "... the responsibility to assure that the Panama Canal will remain open and secure to ships of all nations" and provides that each Party "... shall have the right to act against any aggression or threat directed against the Canal or against the peaceful transit of vessels through the Canal." The first "Condition" included by the Senate in its Resolution of Ratification reaffirms this right of the Parties.

In his letter to me dated March 15, General Omar Torrijos noted that, to clear up any confusion in this regard, he and I had earlier prepared a Memorandum of Understanding "which clearly interpreted the unilateral capability of each one of our countries to protect the regime of neutrality against threats, attacks, or a closing of the Canal..."

It is abundantly clear, therefore, that the United States can, under the Neutrality Treaty, take whatever actions are necessary to defend the Canal from any threat regardless of its source.

The correlative part of the Memorandum of Understanding, embodied in the leadership amendment to the Neutrality Treaty, makes it quite clear that action of this character must be confined to the stated objective alone, and that it will not be interpreted as a right of intervention in the internal affairs of Panama.

Thus, the provisions of the Neutrality Treaty are clearly consistent with our existing international obligations concerning nonintervention. We have no interest in or intention of intervening in the internal affairs of Panama. Our position in this regard should be clearly understood in both countries.

I am confident you will agree that the Panama Canal Treaties protect the interests of both parties and that they serve the highest national interests of the United States.⁷

On April 18, 1978, Senator Edward M. Kennedy introduced into the *Congressional Record* a memorandum of law, dated the same day, by Herbert J. Hansell, Legal Adviser of the Department of State, discussing the binding nature of a reservation or understanding in the Senate's resolution of ratification of the Panama Canal Treaty on the parties with respect to the Neutrality Treaty. The text of the memorandum of law follows:

The question has been raised whether an interpretation of the Neutrality Treaty expressed in a reservation or understanding in the Senate's resolution of ratification of the Panama Canal Treaty would be legally binding on the parties with respect to the Neutrality Treaty.

We are not aware of any reason why such an interpretation, concurred in by Panama, would not be binding. The essential inquiry is whether there is a meeting of the minds. If both parties to a bilateral treaty agree in a separate instrument to an appropriate interpretation of that treaty, there is no legal reason why the separate instrument should not be fully effective in accordance with its terms.

In my opinion, such an interpretation of the Neutrality Treaty would be legally authoritative and binding on the parties.⁸

⁷ *Id.* at S 5756.

⁸ *Id.* at S 5780.

On the same day, Senator Frank Church received permission to print in the *Congressional Record* a letter dated April 18, 1978, from Herbert J. Hansell to Senator John J. Sparkman, Chairman of the Senate Foreign Relations Committee, concerning the procedures to be followed if Panama were to adopt a reservation to the Panama Canal Treaty. The text of the letter follows:

This will confirm our prior advice to you that under United States law, substantive amendments and reservations to the Panama Canal Treaties put forth by Panama that would affect United States rights or obligations under the Treaties cannot be accepted by the United States unless approved by the President and the Senate.

The American Law Institute, in the Restatement of the Law (Second) of the United States Foreign Relations Law, at page 423, states:

"If the other state has made a reservation at signature or at ratification prior to the President's transmittal of the treaty to the Senate, in all likelihood the Senate will have official notice of the reservation in the message of transmittal and take it fully into account in acting on the treaty. The situation may arise, however, in which the Senate has given its consent to the treaty before the other state makes its reservation. In such a case Senate consent to the acceptance of the reservation is required."⁹

The Senate resolution of April 18, 1978 concerning the Panama Canal Treaty reads as follows:

Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Panama Canal Treaty, together with the Annex and Agreed Minute relating thereto, done at Washington on September 7, 1977 (Executive N, Ninety-Fifth Congress, first session), subject to the following—

(a) RESERVATIONS:

(1) Pursuant to its adherence to the principle of nonintervention, any action taken by the United States of America in the exercise of its rights to assure that the Panama Canal shall remain open, neutral, secure, and accessible, pursuant to the provisions of this Treaty and the Neutrality Treaty and the resolutions of advice and consent thereto, shall be only for the purpose of assuring that the canal shall remain open, neutral, secure, and accessible, and shall not have as its purpose or be interpreted as a right of intervention in the internal affairs of the Republic of Panama or interference with its political independence or sovereign integrity.

(2) Notwithstanding any other provisions of this Treaty, no funds may be drawn from the United States Treasury for payments under Article XIII, paragraph 4, without statutory authorization.

(3) Any accumulated unpaid balance under paragraph 4(c) of Article XIII at the termination of the Treaty shall be payable only to the extent of any operating surplus in the last year of the Treaty's duration, and that nothing in that paragraph may be construed as obligating the United States of America to pay after the date of the termination of the Treaty any such unpaid balance which shall have accrued before such date.

⁹ *Id.* at S 5735.

(4) Exchange of the instruments of ratification shall not be effective earlier than March 31, 1979, and the treaties shall not enter into force prior to October 1, 1979, unless legislation necessary to implement the provisions of the Panama Canal Treaty shall have been enacted by the Congress of the United States of America before March 31, 1979.

(5) The instruments of ratification to be exchanged by the United States and the Republic of Panama shall each include provisions whereby each Party agrees to waive its rights and release the other Party from its obligations under paragraph 2 of Article XII [prohibiting the construction of a new interoceanic canal except under stated conditions].

(6) After the date of entry into force of the Treaty, the Panama Canal Commission shall, unless it is otherwise provided by legislation enacted by the Congress, be obligated to reimburse the Treasury of the United States of America, as nearly as possible, for the interest cost of the funds or other assets directly invested in the Commission by the Government of the United States of America and for the interest cost of the funds or other assets directly invested in the predecessor Panama Canal Company by the Government and not reimbursed before the date of entry into force of the Treaty. Such reimbursement of such interest costs shall be made at a rate determined by the Secretary of the Treasury of the United States of America and at annual intervals to the extent earned, and if not earned, shall be made from subsequent earnings. For purposes of this reservation, the phrase "funds or other assets directly invested" shall have the same meaning as the phrase "net direct investment" has under section 62 of title 2 of the Canal Zone Code.

(b) UNDERSTANDINGS:

(1) Nothing in paragraphs 3, 4, and 5 of Article IV may be construed to limit either the provisions of paragraph 1 of Article IV providing that each party shall act, in accordance with its constitutional processes, to meet danger threatening the security of the Panama Canal, or the provisions of paragraph 2 of Article IV providing that the United States of America shall have primary responsibility to protect and defend the Canal for the duration of this Treaty.

(2) Before the first date of the three-year period beginning on the date of entry into force of this Treaty and before each three-year period following thereafter, the two parties shall agree upon the specific levels and quality of services, as are referred to in Article III, paragraph 5 of the Treaty, to be provided during the following three-year period and, except for the first three-year period, on the reimbursement to be made for the costs of such services, such services to be limited to such as are essential to the effective functioning of such canal operating areas and such housing areas referred to in Article III, paragraph 5 of the Treaty. If payments made under Article III, paragraph 5 of the Treaty for the preceding three-year period, including the initial three-year period, exceed or are less than the actual costs to the Republic of Panama for supplying, during such period, the specific levels and quality of services agreed upon, then the Commission shall deduct from or add to the payment required to be made to the Republic of Panama for each of the following three years one-third of such excess or deficit, as the case may be. There shall be an independent and binding audit, conducted by an auditor mutually selected by both parties, of any costs of services disputed by the two

parties pursuant to the reexamination of such costs provided for in this Understanding.

(3) Nothing in paragraph 4(c) of Article XIII shall be construed to limit the authority of the United States of America through the United States Government agency called the Panama Canal Commission to make such financial decisions and incur such expenses as are reasonable and necessary for the management, operation, and maintenance of the Panama Canal. In addition, toll rates established pursuant to paragraph 2(d) of Article III need not be set at levels designed to produce revenues to cover the payment to Panama described in paragraph 4(c) of Article XIII.

(4) Any agreement concluded pursuant to Article IX, paragraph 11 with respect to the transfer of prisoners shall be concluded in accordance with the constitutional processes of both parties.

(5) Nothing in the Treaty, in the Annex or Agreed Minute relating to the Treaty, or in any other agreement relating to the Treaty obligates the United States to provide any economic assistance, military grant assistance, security supporting assistance, foreign military sales credits, or international military education and training to the Republic of Panama.

(6) The President shall include all reservations and understandings incorporated by the Senate in this resolution of ratification in the instrument of ratification exchanged with the Government of the Republic of Panama.¹⁰

Subsequent to the Senate vote on April 18, 1978, President Carter sent a letter to General Torrijos discussing U.S. interests in the Panama Canal and the doctrine of nonintervention. Excerpts from this letter follow:

Through its action today, the Senate has reaffirmed what was central to the treaties from the outset: that the United States, while safeguarding its vital interest in a secure, open and accessible Canal, does not intend to intervene in the internal affairs of Panama, its government, its public policy, or its cultural integrity, or in any way to impair its sovereign integrity or political independence.

These are principles that we as a nation have long cherished. We have observed them in our relations with the other American Republics since President Roosevelt first proclaimed our adherence to the doctrine of nonintervention in 1933. They are enshrined as international law in the Charters of the United Nations and the Organization of American States. It is therefore fitting that these principles—and particularly that no nation has the right to intervene in the internal affairs of another—should be embraced in the Treaties and their accompanying documents, including the Senate Resolutions. When we meet to exchange the instruments of ratification, we can reaffirm that this principle of nonintervention is clearly accepted by both our countries.

Respect for the sovereignty and national dignity of Panama and the United States must be the foundation upon which we build the cooperation and mutual respect which will be crucial for the new period of partnership we are about to open.¹¹

¹⁰ *Id.* at S 5796-97.

¹¹ Dept. of State File P78 0094-1557.

INTERNATIONAL WATERWAYS

(U.S. Digest, Ch. 7, §11)

Rio Grande

The Convention Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, between the United States of America and the United States of Mexico, signed May 21, 1906,¹ provides for delivery by the United States to Mexico of 60,000 acre-feet of water annually, in the bed of the Rio Grande at the point where the headworks of the Old Mexican Canal exist, above the city of Juarez. Under Article II of the Convention, delivery is to be assured by the United States and to be distributed through the year in the same proportions as the water supply to be furnished from an irrigation system, auxiliary to a storage dam near Engle, New Mexico, to lands in the United States in the vicinity of El Paso, Texas, according to a stated schedule. Article II also provides that, in case of extraordinary drought or serious accident to the irrigation system in the United States, the amount delivered to the Mexican Canal shall be diminished in the same proportion as the water delivered to lands under the irrigation system in the United States.

By a note, February 24, 1978, to the Ambassador of Mexico on behalf of the Secretary of State, the Department of State noted the probability that the irrigation season would begin with a diminished allocation from the water currently available for U.S. project lands and that the initial allotment for those lands would also be delayed. The note mentioned the provision in the Convention for Mexico to receive, in the absence of normal deliveries to the U.S. project lands, a percentage of the 60,000 acre-feet stipulated for and stated that the U.S. Commissioner would be authorized to make such modifications in distribution during the 1978 irrigation season of the waters that correspond to Mexico as the Mexican Commissioner may request and the U.S. Commissioner may deem proper.

As the Department of State has felt obliged to reiterate on such previous occasions, it cannot regard as desirable a modification of the schedule of water deliveries provided in the convention. The current authorization is made with the well-being of the farmers in the Juarez Valley in mind. The authorization must be regarded as strictly *ex gratia*. It will not in any way obviate the exact observance of the terms of the convention of 1906.²

INTERNATIONAL TRADE

(U.S. Digest, Ch. 10, §2)

Import Control—Ferrochromium

By a memorandum for the Special Representative for Trade Negotiations dated January 27, 1978, President Jimmy Carter announced his determination with respect to the report of the U.S. International Trade Commission,

¹ 34 Stat. 2953, T.S. No. 455, 8 Bevans 924, entered into force Jan. 16, 1907.

² Dept. of State File P78 0093-1953.

dated December 1, 1977,¹ concerning the results of its investigation of a petition for import relief, filed by the Committee of Producers of High Carbon Ferrochromium (Ferrochrome) on behalf of the domestic industry producing ferrochromium, containing over 3% by weight of carbon, provided for in item 607.31 of the Tariff Schedules of the United States. Rejecting the Commission's recommendation for imposition of additional rates of duty, the President determined that provision of import relief was not in the national economic interest of the United States:

I have determined that the imposition of import relief would not be an effective means to promote adjustment in the industry since the dominant firm in the domestic industry now supplies over half of all domestic production and utilizes one of the world's largest, most technologically advanced furnaces. The other domestic producers, which now operate technologically obsolete furnaces, are unlikely to modernize their facilities.

Import relief would substantially increase costs for domestic stainless steel producers by raising prices of high carbon ferrochrome, low carbon ferrochrome, stainless steel scrap and chrome ore. Increased costs are estimated to be \$27 million per year based on the USITC recommendation. In view of the quotas on stainless steel imports, such increases would be likely to be passed through to consumers of stainless steel. In a time when we are striving to control inflation, this cost is too high.

Provision of import relief is unlikely to induce substantial production or employment gains for the domestic industry producing these articles. The Department of Labor has informed me that prospect of further layoffs in the industry during 1978 are doubtful and employment prospects of those workers already laid off are considered "fair" because the stainless steel industry is expected to maintain an adequate level of demand in the coming year.

The Trade Act of 1974 requires that the President consider the effect of increased import restraints on the international economic interests of the United States. The provision of import relief to the American producers of high carbon ferrochromium would entitle Brazil, the Republic of South Africa, Yugoslavia, other major supplier countries whose exports are affected to request compensatory tariff reductions. If compensation is not provided, the affected countries could retaliate by increasing their restrictions on products which American firms export.²

FOREIGN ASSETS CONTROL

(U.S. *Digest*, Ch. 10, §5)

National Emergency Authorities

On December 28, 1977, President Carter signed into law H. R. 7738, an Act with respect to the powers of the President in time of war or national

¹ For the report, see 42 Fed. Reg. 62,050 (1977).

² 43 Fed. Reg. 4,245 (1978).

The Presidential Determination was based upon a recommendation of the (inter-agency) Trade Policy Staff Committee, Doc. 78-5, Jan. 19, 1978, Dept. of State File P 78 0034-0627. See also Office of the Special Representative for Trade Negotiations, Press Release No. 261, Jan. 28, 1978.

emergency.¹ Portions of his statement on signing the Act follow:

H.R. 7738 is the result of a cooperative effort by the Congress and this Administration. Its broad purpose is to differentiate between those economic powers available to the President in time of war and those available in time of declared national emergency. The bill is largely procedural. It places additional constraints on use of the President's emergency economic powers in future national emergencies and insures that the Congress and the public will be kept informed of activities carried out under these powers. Enactment of the bill will not affect embargoes now being exercised against certain countries, nor does it affect the blockage of assets of nationals of those and other countries.

In approving the bill, I must note my serious concern over the provision contained in section 207(b), which would allow Congress to terminate a national emergency declared by the President by concurrent resolution.

Provisions such as these raise profound constitutional questions, since Article I, Section 7, of the Constitution requires that congressional action having the force of law be presented to the President for his signature or veto. In addition, such provisions have the potential of involving Congress in the execution of the laws—a responsibility reserved exclusively to the President under the Constitution. This feature of the bill may be unconstitutional. I will therefore treat the provision as requiring only that I “notify and wait” with respect to national emergencies covered by section 207(b) of this act.²

Title I of the Act makes certain amendments to the Trading With the Enemy Act, but provides conditions under which current uses of that act may continue notwithstanding those amendments. Title II establishes new presidential authority to exercise controls over international economic transactions during times of national emergency short of war. Title III provides the President with certain authority to regulate extraterritorial exports. Representative Jonathan B. Bingham submitted a report from the House Committee on International Relations with regard to H. R. 7738 describing sections in Titles II and III in part as follows:

As described by the Department of Justice in testimony before the Subcommittee on International Economic Policy and Trade the existing section 5(b) “confers upon the Executive four major groups of powers” in time of war or other national emergency declared by the President:

- (a) Regulatory powers with respect to foreign exchange, banking transfers, coin, bullion, currency and securities;
- (b) Regulatory powers with respect to “any property in which any foreign country or a national thereof has any interest”;
- (c) The power to vest “any property or interest of any foreign country or national thereof”; and
- (d) The powers to hold, use, administer, liquidate, sell or otherwise deal with “such interest or property” in the interest of and for the benefit of the United States.

¹ Pub. L. No. 95-223, 91 Stat. 1625 (1977), 17 ILM 139 (1978).

² 78 DEPT. STATE BULL. 22. (Feb. 1978) 22.

.....

Title II of the bill, the "International Emergency Economic Powers Act," confers upon the President a new set of authorities for use in time of national emergency which are both more limited in scope than those of section 5(b) and subject to various procedural limitations including those of the National Emergencies Act.

Title III of the bill makes a series of conforming amendments to the Export Administration Act, which transfer to that act the authority, heretofore exercised under section 5(b) of the Trading With the Enemy Act, to regulate exports of non-U.S.-origin goods and technology by foreign subsidiaries of U.S. concerns.³

The Section-by-Section Analysis in the report further describes Titles II and III as follows:

Section 201—Short title

Section 201 provides that title II may be cited as the "International Emergency Economic Powers Act."

Section 202—Situations in which authorities may be exercised

Section 202 defines national emergency as an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." This section provides that the authorities granted to the President by this title may be used to deal with such a threat if the President declares a national emergency with respect to the threat, that they may only be used to deal with that threat and not for any other purpose, and that the exercise of the authorities to deal with any new threat would require a new declaration of national emergency.

By its own terms, and with repeal by section 101(c) of this bill of the temporary exemption for section 5(b) [of the Trading With the Enemy Act], the provisions of the National Emergencies Act are applicable to any exercise of authorities pursuant to any declaration of national emergency. . . .

Section 203—Grant of authorities

Section 203(a) of the bill defines the international emergency economic authorities available to the President in the circumstances specified in section 202. This grant of authorities basically parallels section 5(b) of the Trading With the Enemy Act. Paragraph (1)(A) authorizes the President to regulate transactions in foreign exchange, banking transactions involving any interest of any foreign country or a national thereof, and the importing or exporting of currency or securities, and to regulate or freeze any property in which any foreign country or a national thereof has any interest. . . .

Section 203(b) of the bill states that the authority granted to the President by this section does not include the authority to regulate or prohibit, and should not be used with the effect of regulating or prohibiting, personal communications which do not involve the transfer of anything of value, or uncompensated transfers of anything of value except if the President determines that such transfers would seriously impair his ability to deal with the emergency, are in response

³ H. R. REP. NO. 95-459, 95th Cong., 1st Sess. 2 (1977) (footnotes omitted).

to coercion against the recipient or donor, or would endanger U.S. Armed Forces.

Section 204—Consultation and reports

Section 204 of the bill (a) requires that the President consult with Congress whenever possible before exercising any of the authorities of this title, and continue to consult regularly with Congress so long as such authorities are being exercised; (b) requires that the President transmit to Congress, immediately upon beginning to exercise any of the authorities of this title, a report (1) defining the circumstances which necessitate the exercise of authority; (2) stating why those circumstances constitute a national emergency within the meaning of section 202(a) of the bill; (3) specifying the authorities to be exercised and the actions to be taken; (4) justifying the necessity for such actions; and (5) designating the foreign countries toward which such actions are directed; (c) requires that the President update the report every 6 months; and (d) states that these requirements are supplemental to the reporting requirements of the National Emergencies Act. . . .

Section 208—Savings provision

Section 208 of the bill provides that, notwithstanding the termination of a national emergency under the National Emergencies Act, the President may continue to block any assets of a foreign country that were blocked on the date of the termination of the national emergency, if he determines that the continued blocking of those assets is necessary because of U.S. claims against the country involved, unless Congress specifies in a concurrent resolution terminating a national emergency that the assets may not continue to be blocked. Under subsection (a)(2) of section 208, notwithstanding the termination of a currently existing U.S. trade embargo of another country under section 101(b) of the bill, assets of that country which are blocked on the date of the termination of the trade embargo may continue to be blocked for the same reason. The President is required to report to Congress every 6 months on the reasons for continuing to block the assets of a foreign country under this section.

Holding the assets of a foreign country is generally the most effective means of achieving settlement of U.S. claims. The need to continue to block assets has prompted Presidents to continue a legal state of emergency in effect long after the factual state of emergency has passed. It is the intent of the committee by this section to enable the timely termination of states of emergency, and a return to government under normal law, without prejudicing the ability of U.S. citizens to recover claims against foreign countries.

COMMUNICATIONS AND TRANSPORTATION
(U.S. Digest, Ch. 10, §9)

Ocean Transportation—Shipping Discrimination

Effective January 18, 1978, the Federal Maritime Commission suspended certain shipping rules and regulations, which it had adopted in 1977,¹ to come into force January 13, 1978. The rules required Guatemalan-flag

¹ 42 Fed. Reg. 62,914 (1977).

carriers and their associate carriers receiving preferential treatment under Guatemalan law ("favored carriers") to pay to the Commission an equalization fee in U.S. dollars equal to 50 percent of the total ocean freight rate on all goods, merchandise, or cargo on any vessel departing the United States, owned, operated, or controlled by, or carrying cargo for the account of, any such "favored carrier," which was destined ultimately for Guatemala either directly or through transshipment.

The equalization fee had been "designed to eliminate the discriminatory diversion of cargo" to the Guatemalan-flag carriers and their associate carriers, caused by Guatemalan laws and had been calculated to offset the 50 percent penalty imposed by Guatemalan law for the transport to Guatemala of certain duty-free cargo on carriers other than Guatemalan carriers or associated carriers. The rules also required the "favored carriers" to file with the Commission an equalization fee payment guarantee as well as summary reports of cargo carryings in the Guatemala trade.

The Federal Maritime Commission suspended the rules and regulations in question because of assurances from officials of "favored carriers" (received January 16, 1978) that waivers would be issued to all cargoes affected by the Guatemalan laws in question moving through U.S. ports to Guatemala and that no penalties would be imposed under Guatemalan laws with respect to any U.S./Guatemalan commerce. Suspension of the rules was also accompanied by removal from the list of "favored carriers" of two former associate carriers who certified by affidavit that their relations with Guatemalan-flag carriers had been severed and that they did not have national flag preference or associated carrier status under the laws of Guatemala.²

The Commission's investigation had been prompted by a petition filed July 1, 1975, by Delta Steamship Lines, Inc., seeking relief under Section 19 of the Merchant Marine Act of 1920 from the effects of Guatemalan Decree 41-71. Delta had also filed a complaint under Section 301 of the Trade Act of 1974 with the Special Representative for Trade Negotiations (STR). In promulgating its 1977 regulation that imposed countervailing fees on Guatemalan carriers and associated carriers, the Commission had assigned findings of fact and law reading, in part, as follows:

Every sovereign nation has the right to control its commercial intercourse with other nations. Therefore, participation by the citizens of another nation in the foreign commerce of the United States is a privilege which may be terminated, conditioned, or limited.

However, the United States does not generally exercise such power because it recognizes that reciprocal privileges of commercial participation are preconditions to any substantial commercial intercourse. The United States is committed to the general idea that unrestricted participation in international trade is in the best interest of both the United States and her trading partners. It is believed that free trade can be relied upon to stimulate the most effective and efficient production and distribution of goods and services, redounding to the benefit of all involved. This commitment to the ideals of free trade

² 43 Fed. Reg. 3,361-62 (1978).

is a logical extension of our national belief in a market economy and competition in the marketplace.

These principles of free trade have found expression in the General Agreement on Tariffs and Trade (GATT), the antitrust laws, and the shipping laws of the United States. Generally, the ports of the United States are, therefore open to the vessels of all nations who wish to compete to carry our commerce.

This commitment to the idea that all persons should be allowed to compete in the international marketplace, does not, however, constitute an abandonment of the power of the United States over its own commerce. Quite to the contrary, the power to control commercial interaction with other nations is a power which must be preserved for use whenever the goods and services of the United States and her citizens are unnaturally handicapped in the international marketplace by the acts of other nations. When the acts of a foreign nation unfairly tip the delicate scales of competition in favor of their own citizens or commerce to the detriment of the citizens or commerce of the United States, it is only right and just that the scales be rebalanced. This may be done by persuading the other state to abandon or cease its actions or by balancing the detriments so as to negate any artificial advantages for the citizens or commerce of the foreign nation.

The power to regulate commerce of the United States is vested with the Congress by Article I, Section 8, Clause 3 of the Constitution. It is well recognized that the power of Congress over foreign commerce is absolute and may be used for the purposes of retaliation. These powers may, of course, be delegated by Congress.

Section 19(1)(b) of the Merchant Marine Act, 1920 (46 U.S.C. section 576, hereinafter referred to as section 19) is the delegation of such authority to the Federal Maritime Commission (Commission). Section 19 authorizes and directs the Commission to make rules and regulations affecting shipping in the foreign trade of the United States in order to adjust or meet general or special conditions unfavorable to shipping in the foreign trade of the United States and which arise out of, or result from, foreign laws, rules or regulations, or from competitive methods or practices employed by owners, operators, agents or masters of vessels of a foreign country.

The types of conditions which the Commission has found to be unfavorable to shipping in the foreign trade of the United States are generally set forth by Commission General Order No. 33 (46 CFR 506). Among these are conditions which preclude or tend to preclude vessels in the foreign trade of the United States from competing in a trade on the same basis as any other vessel, and those which are discriminatory or unfair as between carriers. (46 CFR 506.3 (a) and (d).)

Republic of Guatemala Decree No. 41-71 establishes a penalty of 50 percent of the ocean freight charges paid on any goods imported into Guatemala which are duty free under the Guatemalan Industrial Development Laws or the Central American Agreement on Tax Incentives for Industrial Development and which are not carried on "Guatemalan carriers." More than 600 importing industries, accounting for the vast preponderance of Guatemalan imports from the

United States, qualify for such duty free status for their imports under the Guatemalan Industrial Development Law or the Central American Agreement on Tax Incentives for Industrial Development.

Decree No. 41-71 defines the term "Guatemalan carriers" as those carriers owned by the State (Guatemala), or in which the State has a majority interest, or those private enterprises of which the capital is at least 75 percent Guatemalan and their vessels are of Guatemalan registry and have a capacity of no less than 2,000 tons. Guatemalan carriers may contract for the services of foreign carriers (known as "associated carriers"), in which case, duty free goods may be transported by the associated carriers to Guatemala without being subject to the aforementioned 50 percent penalty.

.....

On July 25, 1975, the Commission served fact finding Orders under section 21 of the Shipping Act, 1916 (46 U.S.C. 820), on all carriers serving in the trade between the U.S. Atlantic and Gulf Coasts and Guatemala. The STR also held hearings on the Delta complaint on September 25 and 26, 1976.

Based upon the information gleaned from the section 21 Orders, the hearings before the STR, and other information available to the Commission, the Commission ascertained that cargoes subject to Decree 41-71 carried by U.S. vessels not associated with Guatemalan-flag carriers were being fined by the Government of Guatemala. Furthermore the preponderance of goods transported from the United States to Guatemala were subject to the Decree 41-71 penalties. Shippers were also discouraged from shipping any cargo on U.S. vessels because they could not determine which cargo was subject to Decree 41-71 and which cargo was not.

Those circumstances resulted in the diversion of cargo from U.S. and nonassociated carriers to the carriers of Guatemala and their associates. Furthermore, delays in the transportation of goods had occurred because of the limited capacities of the Guatemalan carriers. Clearly, U.S. carriers had been discriminated against and potential entrants into the U.S. Guatemalan trade had been discouraged if not precluded.

The Commission, therefore, found that not only was Decree 41-71 discriminatory on its face but that its implementation had created conditions unfavorable to shipping in the foreign trade of the United States.

By letter dated December 4, 1975, the Chairman of the Commission notified the Secretary of State of the Commission's findings in this matter. The Chairman's letter asked the Department of State to seek a diplomatic resolution of the problem, and advised that, absent such resolution by February 14, 1976, the Commission would have no recourse but to promulgate a final regulation that would impose countervailing fees on Guatemalan carriers and associated carriers transporting goods from the United States which are to be imported duty free into Guatemala.

On February 4, an earthquake devastated Guatemala and the Commission agreed, at the request of the Department of State, to postpone the implementation of this regulation.

In the light of the lack of progress in the diplomatic negotiations with the Government of Guatemala, the Chairman of the Commission notified the Secretary of State on August 16, 1976, that the Commission had decided to issue a proposed rule pursuant to the authority of section 19(1)(b) of the Merchant Marine Act, 1920.

Issuance of this rule was again postponed on the basis of assurances by representatives of the Guatemalan-flag lines that a satisfactory resolution of the problem would be forthcoming. However, this contemplated resolution failed to materialize and negotiations reached an impasse. Therefore, a proposed rule was issued and interested parties were given an opportunity to comment.

Comments to the proposed rule were received from Delta Steamship Lines, Inc. (Delta), Crowley Maritime Corp. (Crowley), Sea-Land Service, Inc. (Sea-Land), Transportation Institute, Dow Chemical Latin America (Dow), the Embassy of Guatemala, and Marine Chartering Co., Inc. (Maritime Chartering).

Since we have found that most of the cargo moving to Guatemala does receive the benefits of the industrial incentive laws and that the Government of Guatemala keeps the identity of importers who are granted duty free status from being revealed, we are amending the final rules to require the "favored carriers" to pay an Equalization Fee on all cargo, and make a specific request for a refund of the Equalization Fee for any shipment which does not enjoy a duty free status under the industrial incentive laws. Refunds will not be granted for cargoes which have been subjected to penalties under Decree No. 41-71 in the past and will be granted only for cargoes which are clearly ineligible for duty free status under the industrial development incentive laws.

The Equalization Fee is expected to be passed through the carrier to the shipper. The Commission recognizes that the "favored carriers" may attempt to absorb the Equalization Fee but does not expect such an absorption to occur. The Commission will not, at this time, require any amendments to any carrier's tariff. If, however, it appears that the Equalization Fee, by itself, does not stem the artificial diversion of cargo, further measures will be taken.

The Transportation Institute, a maritime industry research organization comprised of 140 member shipper companies, also supports issuance of countervailing regulations. The Transportation Institute states that:

"Because U.S. shippers often could not know the tax status of their exports until they were landed, and because the same commodity was sometimes subject to the penalty and at other times exempt, the Decree created chaos and uncertainty in the U.S.-Guatemalan trade and was tantamount to 100 percent exclusion of U.S. carriers."

It also asserts that the Decree has caused delays in transportation and discourages new entrants into that trade.

The Transportation Institute therefore concludes that countervailing regulations are required; otherwise, other nations will be encouraged to establish similar discriminatory laws.

.....

The comments of Delta, Dow, Crowley, Sea-Land and the Transportation Institute firmly establish that the conditions unfavorable to shipping in the foreign trade of the United States have not been abated despite our repeated objections to the Government of Guatemala. Since our remonstrances have been met with refusal, the Commission will exercise the authority delegated by Congress to adjust or meet conditions unfavorable to shipping in the foreign trade of the United States which have been and continue to be resulting from the laws and acts of the Government of Guatemala.

This rule imposes an Equalization Fee on all Guatemalan vessels and the vessels of their associated carriers transporting goods from the United States to Guatemala which may be imported into Guatemala duty free under the Guatemalan Industrial Development Laws or the Central American Agreement on Tax Incentives for Industrial Development. This Equalization Fee, amounting to 50 percent of the freight charges, is calculated to offset the penalty imposed under Decree No. 41-71 for the transportation of such goods on carriers other than Guatemalan carriers or associated carriers. Furthermore, the Commission will, by notice in the *FEDERAL REGISTER*, adjust the level of the Equalization Fee to any extent necessary to adjust or meet the level of discrimination imposed by the Republic of Guatemala. Thus, the Equalization Fee is designed to eliminate the discrimination diversion of cargo to certain carriers in the U.S. to Guatemala trade resulting from Decree No. 41-71, and to place all carriers in those trades on an equal competitive footing.³

ENVIRONMENTAL AFFAIRS
(U.S. *Digest*, Ch. 11 §1)

Transfrontier Pollution

Canada: By a note, March 14, 1978, to the Embassy of Canada at Washington, the Department of State reiterated the continuing concern of the U.S. Government in respect of the potential transboundary impact caused by construction and operation of the Poplar River Generating Station by the Saskatchewan Power Corporation. The note summarized the course of bilateral exchanges, beginning in 1974, requested immediate consultations with the Government of Canada in regard to specific areas of construction enumerated in an Annex, and further requested that no decision be taken to permit construction of additional generating facilities beyond the first three hundred megawatt unit at the Poplar River Generating Station until the two governments should have received reports from the International Joint Commission on apportionment of the waters of the Poplar River and on their quality, not expected until April 1979. The note read in part:

Throughout this period, planning and construction of the Poplar River Generating Station have gone forward without interruption or delay. Full operation of the plant is scheduled to begin in May

³ 42 Fed. Reg. 62,914-16 (1977).

1979. Overburden removal and coal mining are scheduled to begin this summer; test operations will commence early in 1979.

Efforts to address the project's transboundary implications have not kept pace with development and construction. Activities with potentially significant and irreversible effects on water quality in the United States reach of the Poplar River have been undertaken and are continuing, before their transboundary consequences have been fully assessed. Without some adjustment in the present schedule, it appears likely that the first three hundred megawatt unit of the Poplar River Generating Station will be in full operation before the two Governments have received or have had an opportunity to consult upon the Commission's findings and recommendations covering the project's water quality impacts and possible violation of the Boundary Waters Treaty.

The Government of the United States has no wish unnecessarily to impede the completion of the Poplar River Generating Station and accordingly has acted with restraint throughout the lengthy period of bilateral exchanges concerning the project. However, the United States is deeply concerned that there is no clear evidence that the design and construction of the first unit and associated facilities has been planned to avoid or minimize transboundary impacts. Unless planned and undertaken with these larger concerns in mind, such activities could foreclose or severely limit possible corrective action should it be determined only after the fact that United States rights by treaty and under international law are being infringed.

For this reason, the United States requests immediate consultations with the Government of Canada with regard to the specific areas of construction enumerated in the Annex to this note. . . .

The Government of the United States, mindful of the obligations of both Governments regarding the prevention of transfrontier pollution, further requests that no decision be taken to permit construction of generating facilities beyond a single three hundred megawatt unit at the Poplar River Generating Station until the Governments are in receipt of the Reports of the International Joint Commission regarding apportionment of the waters of the Poplar River and its water quality and have had an opportunity to consult upon their contents. Approval of generating plant expansion with additional likely transboundary water quality, water quantity and air quality impacts while numerous questions remain regarding impacts of the first three hundred megawatt unit would, in the opinion of the Government of the United States, materially undermine the orderly process of examination and consultation relative to the project which was embarked upon by both Governments in referring the matter to the International Joint Commission.

The Government of the United States has welcomed the positive development of environmental relations between the two Governments in recent years which has been characterized by the reciprocal commitment to ensure that development activities in border areas do not cause transboundary pollution and by the mutual effort to address potential transfrontier problems in advance of actual impacts. The Government of the United States renews its commitment to ensure that in the planning and development stage of new activities full account is taken of possible transboundary impacts and that ade-

quate measures are taken in advance to see that the international and treaty obligations of the United States are not violated by construction and operation of new or expanded facilities in boundary regions.

A positive response on the part of the Government of Canada to the concerns and requests expressed by the Government of the United States in this communication would be in accord with the spirit of cooperation and mutual forbearance which has characterized and, it is hoped, will continue to characterize the actions of the two Governments with regard to environmental concerns along the common frontier.¹

Mexico: A note on behalf of the Secretary of State to the Ambassador of Mexico, March 3, 1978, referred to the continuing hazardous environmental and public health situation on the border, which resulted from the improper disposal of untreated sewage and other wastes, including those from a slaughterhouse, into the New River by the city of Mexicali, Baja California.¹ The note observed that expansions of the collection system and construction of treatment facilities had not kept pace with the city's rapid growth, and requested an early and effective solution to the problem, as being in keeping with the importance both governments attach to environmental concerns, public health, and the obligation in the 1944 Water Treaty "to give preferential attention to the solution of all border sanitation problems."²

ARMS CONTROL AND DISARMAMENT (U.S. *Digest*, Ch. 14, §7)

Nonproliferation of Nuclear Weapons

On March 10, 1978, President Jimmy Carter signed the Nuclear Non-Proliferation Act of 1978¹ which establishes conditions, criteria, and procedures to govern continuing U.S. cooperation with other nations in efforts to develop the peaceful use of nuclear energy. Excerpts follow from the statement by the President, released by the White House upon the occasion of signature:

Our efforts to prevent the spread of nuclear weapons began more than 30 years ago, when we went to the United Nations with an offer to place certain aspects of nuclear energy under international ownership and control. The passage of the Atomic Energy Act of 1954 and the adoption of the Non-Proliferation Treaty by the United Nations in 1968 and now this law, each have moved us further toward attainment of our non-proliferation goals.

¹ Dept. of State File P78 0044-155.

¹ Dept. of State File P78 0047-1830.

² For the Treaty Relating to the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, between the United States of America and the United Mexican States, signed February 3, 1944, and the Protocol signed November 14, 1944 (entered into force November 8, 1945), see 59 Stat. 1219, T.S. No. 994, 9 Bevans 1166. The quoted language appears in Article 3.

¹ Pub. L. No. 95-242, 92 Stat. 120. For text, see *Official Documents* section, *infra* p. 712 and 17 ILM 397 (1978).

We and the other nations of the world must use the time we now have and pause to develop safer technologies, better institutional arrangements, and improved safeguards which will permit all nations to achieve their energy objectives while preventing the spread of nuclear weapons.

More than 40 nations have already joined with us in an International Nuclear Fuel Cycle Evaluation [INFCE] to explore and assess our means of meeting these twin goals. During this period of examination, the uranium-fueled reactors now in widespread operation can be used without incurring new proliferation risks. If our common search for improved institutions and technologies is to be successful, however, all nations will be required to avoid those steps which prejudice the outcome of the INFCE.

The Nuclear Non-Proliferation Act sets the conditions and criteria which will govern U.S. cooperation with other nations in our efforts to develop the peaceful use of nuclear energy. The encouragement of universal ratification of the Non-Proliferation Treaty is central to the act, as is the establishment of a comprehensive set of controls, including application of International Atomic Energy Agency safeguards and provision of a stable framework for international nuclear cooperation and commerce. The act will also make our export licensing process more predictable.

We also will be taking steps to strengthen the safety and security of the fuel cycle we now have in operation and to ensure that it continues to be an efficient and reliable source of energy both domestically and abroad.

Preventing nuclear proliferation will not be easy—some have called this task impossible. I believe, however, that halting the spread of nuclear weapons is imperative. We must press forward in our efforts. Fear of failure cannot be allowed to become a self-fulfilling prophecy.

[W]e have made substantial progress. The nuclear-supplying countries have agreed upon and published guidelines for the export of nuclear fuel and technology. The International Nuclear Fuel Cycle Evaluation is underway. As this legislation now becomes law, we are establishing clear criteria and incentives for nuclear cooperation, as well as sanctions against violations of safeguards.

In conclusion, I am persuaded that the new criteria, incentives, and procedures in this act will help solve the problems of proliferation. They will help to ensure that access to nuclear energy will not be accompanied by the spread of nuclear explosive capability. While I recognize that some of these provisions may involve adjustments by our friends abroad, this more comprehensive policy will greatly increase international security. I believe that they will ultimately join us in our belief that improved world security justifies the steps which we all must take to bring it about. Control over the spread of nuclear weapons on our planet is one of the paramount questions of our time.

If the world is to benefit from the great potential of nuclear power, we must act now to protect ourselves and future generations from its worst dangers. We in the United States will dedicate our expertise and technical resources to this task, and we urge other countries to do the same. Let us continue to work together to achieve these goals.²

In commenting upon the statement of policy contained in the Senate's bill, S. 897, the Department of State conveyed the hope of the Executive Branch that the committee reports and conference report would reflect that "the capability to manufacture or otherwise acquire nuclear explosive devices is not the same as the proliferation of nuclear explosive devices, and that the former concept should not be considered to define proliferation." The comment continued:

While, of course, the Administration wishes to limit these capabilities, it is likely that many countries have the capability but not the intent to manufacture or otherwise acquire an explosive device. We would not wish the policies and initiatives of the Act to be seen as directed against non-nuclear-weapons states, which happen to be technologically advanced, particularly those which are allies of the United States and parties to the Non-Proliferation Treaty.³

Joseph S. Nye, Deputy to the Under Secretary of State for Security Assistance, testifying before the Subcommittee on Energy Research and Development of the Senate Committee on Energy and Natural Resources on Sept. 13, 1977, stressed the importance of consistency between the pending legislation and the overall nonproliferation strategy of the United States. He said, in part:

. . . This strategy places a high degree of emphasis on intensive diplomatic and technical cooperation with other nations. There are already some 20 countries with nuclear reactor programs and the number is likely to double over the next two decades. This is why the central long-term goal of our strategy is to build a broad consensus on political and technical means to make the commercial nuclear fuel cycle as proliferation resistant as possible in the face of technological change.

Our strategy cannot be based on domestic laws that prevent nuclear exports from the United States, for other countries could quickly step in to fill the order books. . . .

In short, if we are to achieve our goals, we have no choice but to work closely with other countries to try to find mutually beneficial solutions to the security and energy problems we all share.

. . . Planning for the future of nuclear power must be an international effort involving all nations interested in nuclear power, consumers and suppliers alike.

This global situation is the reason for the four main factors of our international strategy; (1) effective and comprehensive safeguards;

² 78 DEPT. STATE BULL. (April 1978) 49.

³ Secretary of State Cyrus Vance to Senator Henry M. Jackson, Chairman, Senate Comm. on Energy and Natural Resources, Sept. 12, 1977. S. REP. No. 467, 95th Cong., 1st Sess. 41, 43 (1977).

(2) self-restraint in the transfer of sensitive technologies; (3) creation of nonproliferation incentives through fuel assurances and assistance in the management of spent fuel; and (4) building consensus about the structure and management of the nuclear fuel cycle.

This fourth component is represented by the international nuclear fuel cycle evaluation that President Carter announced last April. Since then, we have had discussions with more than 30 countries that have a major interest in nuclear energy, including the seven London summit countries. We have received broad indication of interest in participation in the INFCE [International Nuclear Fuel Cycle Evaluation] including from the summit countries.

In October, we will be hosting an initial organizational conference. Among the topics which are likely to be discussed in the first INFCE meeting are: fuel availability; enrichment availability; security of supply and fuel assurances; spent fuel storage; reprocessing breeder reactors; improved efficiency of thermal reactors and advanced converter reactors; and alternative fuel cycles.

... [O]ur efforts to develop a new consensus about a more proliferation resistant and safeguardable commercial fuel cycle cannot be achieved overnight. Our efforts will require patience and close cooperation with other countries. Our legislation must reflect the same qualities. ...⁴

During the Senate's consideration of the Nuclear Non-Proliferation Act, Senator John H. Glenn, Jr. explained the necessity for expanding international nonproliferation efforts to include nuclear fuels and the advisability of establishing an International Nuclear Fuel Authority, as follows:

Until recent years, nonproliferation efforts were based on an approach that was deemed successful as long as it forestalled the specific manufacture or acquisition of nuclear weapons. It has become clear, however, that this approach is too narrow. Our concerns about proliferation must be broadened to include the capability to quickly procure a nuclear explosive device. The basic reason for this lies in the continuing spread of those types of nuclear technology adaptable to the production of weapons-grade fissionable material.

I am referring to both the technology of uranium enrichment in which the percentage of the isotope U-235 is increased beyond its natural level, and the technology of separation of reprocessing of plutonium from spent nuclear reactor fuel. If a nonnuclear weapon state has no direct access to these technologies nor to materials suitable for fission explosives, our nonproliferation concerns are minimal. That is indeed the case with the ordinary once-through, light water reactor (LWR) technology that is the backbone of our commercial nuclear industry. The fuel used in an ordinary light water power reactor is uranium enriched to about 3 percent in the isotope U-235. Weapons-

⁴ *Hearings on S. 897 before the Sub-comm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources, 95th Cong., 1st Sess. 169-71 (1977).*

For the text of the Final Communiqué of the Organizing Conference of the International Nuclear Fuel Cycle Evaluation, held at Washington, D.C., Oct. 19-21, 1977 (referred to in the testimony), see 77 DEPT. STATE BULL. 661-64 (1977).

usable material of this kind requires at least 20 percent U-235. Further, the fission process in the reactor core, while producing plutonium, also produces intensely radioactive materials which must be chemically separated from the plutonium in order to obtain weapons-usable material. Thus, unless an enrichment or reprocessing facility is immediately available, there are intrinsic safeguards in the once-through nuclear fuel cycle. Basically these safeguards provide for a sufficient amount of warning time in case of a diversion or seizure of spent fuel to allow a diplomatic effort to be mounted whose purpose would be to dissuade the country involved from carrying out its apparent course of action in moving down the weapons path.

Once the fuel cycle is closed, however, and stockpiles of plutonium are produced or if a nonweapon state has access to enrichment technology producing stockpiles of highly enriched uranium (HEU), then the leadtime to produce a weapon following diversion of the material may be reduced, just a few days or perhaps even hours, depending on the auxiliary preparations previously carried out. . . .

It is this situation that has produced the present challenge to the international safeguards system and has prompted a closer look at our system of nuclear export controls.

In trying to prevent or slow down the proliferation process, while at the same time assuring the benefits of nuclear power to nations that can well use that power to upgrade their standard of living, one must understand the motivations that cause nations to seek to possess sensitive nuclear technologies and by those I mean enrichment and reprocessing or the fissionable materials produced by them. Generally these motivations may be a combination of a desire for two things, for assurance of nuclear fuel supply coupled with the feelings of security engendered by having a latent weapons capability.

In other words, there is not only a nation's legitimate desire of fuel for legitimate electrical generating purposes but always in the background is the risk that perhaps a weapons capability could be developed if it were ever necessary to do so.

Any nonproliferation policy worthy of the name must deal with these realities of national and international life. A nation's national security concerns over the possibility [of] an external nuclear military threat can be alleviated by widespread commitments by neighboring nations to the provisions of the nonproliferation [treaty] which prohibits nuclear weapons, as well as through the adoption of other security treaties while efforts to arrive at a fair and equitable system of nuclear and general disarmament are made. . . .

Of perhaps equal importance as an inducement against proliferation is the granting of nuclear fuel assurances to those nations which have no abundant indigenous energy resources. No nation, the United States or any other nation, wants to be dependent on others, if possible, for its nuclear fuel supply. But there is some evidence from discussions with other nations that fuel assurances if decoupled from the political winds of the moment or attitudes of the moment of a given supplier nation would be looked upon as an attractive alternative to the construction or importation of reprocessing facilities for the purpose of separating plutonium as an independent source of fuel.

In other words . . . I believe it highly advisable to consider an International Nuclear Fuel Authority to which supplier nations could sell fuel and from which using nations could buy fuel—and most importantly, on a reliable apolitical basis; in other words, a more guaranteed supply than these user nations now feel they have.

The obvious benefit is that those nations buying from such an assured fuel supply would no longer need the assurance previously sought by owning their own reprocessing plant, which, of course, would carry with it the potential side effect of plutonium production and with that the possibility of nuclear weapon production.

Accordingly, this bill . . . contains a set of provisions for starting the United States along the path of international cooperation toward the establishment of fuel assurances through such an organization. An international nuclear fuel authority, INFA as we refer to it, which would deal with all aspects of the fuel cycle, including provision for the storage of spent fuel in facilities under international auspices. As an initial step, provision is made, subject to congressional review, for the President to indeed go ahead and set aside an amount of low-enriched nuclear fuel, capable of producing up to 100,000 megawatt-years of nuclear power.

A translation of that is that with the usual nuclear power plant being of approximately a 1,000 megawatt capacity, this would give a guarantee of 33 years of fuel for three average nuclear plants as most of them are built today, not a huge amount of fuel. But this could start the ball rolling and the fuel would be available for sale to an international stockpile under an international sales agreement with the hope that the other supplier nations will join in our efforts.

The fuel assurances arising from these arrangements are to be for the benefit of nations adhering to strict nonproliferation policies. And that . . . brings me to the other important aspects of this bill, namely, the criteria to which other nations are expected to adhere in order to continue to receive nuclear exports from the United States.

The criteria which go into effect immediately upon passage of this bill represent nothing more than a common-sense codification of existing policy regarding nuclear exports to nonweapon states.

These criteria include:

First, the requirement for IAEA safeguards on exporting U.S. materials or facilities;

Second, a prohibition on use of such exports for nuclear explosive devices;

Third, a requirement of adequate physical security on such materials or facilities;

Fourth, the establishment of prior approval rights by the United States with respect to reprocessing or retransfer of exported materials which could be waived for a limited period of time in those cases where such prior approval rights are not now provided in agreements for cooperation, as long as such agreements are being renegotiated—and

Finally, safeguards on replicated facilities.

Those certainly are common sense arrangements.

Eighteen months after enactment, a requirement of full-scope safeguards on all peaceful nuclear facilities is added. I believe . . . that these criteria are fair, reasonable, and represent an appropriate leadership position for the United States to take in safeguarding nuclear exports.

Indeed, . . . it is our sincere hope and, I believe, that of the administration that our leadership in the United States in establishing these reasonable and workable criteria will be followed by other supplier nations.⁵

⁵ 124 CONG. REC. S 1064-65 (daily ed. Feb. 2, 1978).

JUDICIAL DECISIONS

ALONA E. EVANS

Jurisdiction—foreign states—whether “persons” for treble damage suit under antitrust laws

PFIZER, INC. v. GOVERNMENT OF INDIA. 98 S. Ct. 584.
U.S. Supreme Court, Jan. 11, 1978.*

The Governments of India, Iran, and the Philippines brought actions against six pharmaceutical manufacturing companies for conspiracy to violate the Sherman and Clayton Antitrust Acts, 15 U.S.C. §§1 *et seq.*, by price fixing, market division, patent fraud, and other activities designed to enable defendants to restrain and monopolize interstate and foreign commerce in broad spectrum antibiotics. The actions were consolidated for pretrial purposes.¹ Plaintiffs sought treble damages under Section 4 of the Clayton Act (formerly Section 7 of the Sherman Act), 15 U.S.C. §15,² for themselves and various classes of foreign purchasers of the antibiotics. Defendants argued as an affirmative defense that foreign states were not “persons” within the meaning of that word as used in the antitrust laws and, consequently, that they were precluded from seeking treble damages under Section 4. The District Court, holding that foreign states were persons, refused to dismiss the actions; however, the Court certified the question for consideration by the Court of Appeals for the Eighth Circuit. 28 U.S.C. §1292(b). The Court of Appeals affirmed the trial court’s holding and also maintained this view upon rehearing *en banc*. 550 F.2d 396 (8th Cir. 1976); 70 AJIL 839 (1976). The Supreme Court affirmed the decision of the Court of Appeals.

Mr. Justice Stewart pointed out that “persons,” as used in Section 4 of the Clayton Act, explicitly comprehended foreign corporations, 15 U.S.C. §§7, 12, and that the antitrust laws were directed to foreign as well as interstate commerce, 15 U.S.C. §2. It followed that treble damage actions were available only to consumers in the United States.

Two decisions of the Supreme Court were particularly relevant to the problem of construction here. In *United States v. Cooper Corp.*, 312 U.S.

* Full text in 17 ILM 93 (1978).

¹ The Republic of Vietnam was also party to this suit; however, the complaint was dismissed on the ground that an unrecognized government could not maintain an action in a United States court. On appeal, this decision was affirmed. *Republic of Vietnam v. Pfizer, Inc.*, 556 F.2d 892 (8th Cir. 1977); 72 AJIL 152 (1978).

² Section 4 provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.

600 (1941), the Court held that the United States was not a "person" for purposes of Section 4 on the ground that the civil suit for treble damages was the only remedy available to private complainants under the antitrust laws, whereas the Federal Government had access to the remedies of criminal prosecution, injunction, and seizure of property. This view had also been supported by the legislative history of the Acts. In the second case, *Georgia v. Evans*, 316 U.S. 159 (1942), however, the Supreme Court held that the State of Georgia was a "person" for purposes of suit under Section 4, the reasoning being that as the remedies available to the Federal Government were not available to the states, they would be left without a remedy unless they had access to Section 4. Mr. Justice Stewart said:

And the reasoning of that case [*Georgia v. Evans*] leads to the conclusion that a foreign nation, like a domestic state, is entitled to pursue the remedy of treble damages when it has been injured in its business or property by antitrust violations. When a foreign nation enters our commercial markets as a purchaser of goods or services, it can be victimized by anticompetitive practices just as surely as a private person or a domestic state. The antitrust laws provide no alternate remedies for foreign nations as they do for the United States.³

The Court continued:

Finally, the result we reach does not require the judiciary in any way to interfere in sensitive matters of foreign policy. It has long been established that only governments recognized by the United States and at peace with us are entitled to access to our courts, and that it is within the exclusive power of the Executive Branch to determine which nations are entitled to sue. . . . Nothing we decide today qualifies this established rule of complete judicial deference to the Executive Branch.

We hold today only that a foreign nation otherwise entitled to sue in our courts is entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff.⁴

Chief Justice Burger, joined by Justices Powell and Rehnquist, dissenting, took the view that the decision of the majority was an "undisguised exercise of legislative power since I find the result not only plainly at odds with the language of the statute but also with its legislative history and precedents of the Court."⁵ He pointed out, *inter alia*, that when the antitrust laws were adopted "foreign sovereigns, even when acting in their commercial capacities, were immune from suits in the courts of this country under the doctrine of sovereign immunity."⁶ In his opinion, the impact of the Foreign Sovereign Immunities Act of 1976, 90 Stat. 2891, upon Section 4 involved political and foreign policy issues which should be examined by Congress.

³ 98 S. Ct. 590.

⁴ *Id.*, 591.

⁵ *Id.*, 592.

⁶ *Id.*

Jurisdiction—outer continental shelf—claim to abandoned ancient vessel and cargo—Geneva Convention on the Continental Shelf of 1958

TREASURE SALVORS, INC. v. UNIDENTIFIED WRECKED AND ABANDONED SAILING VESSEL. 569 F.2d 330.

U.S. Court of Appeals, 5th Cir., March 13, 1978.*

Plaintiffs, Florida corporations, brought an action for possession of, and confirmation of title to the wreck of a Spanish galleon, probably *Nuestra Señora de Atocha*, which had sunk in 1622 off the Marquesas Keys on the outer continental shelf beyond U.S. territorial waters. Plaintiffs had begun their search for the galleon in 1971; they found it at a cost of four lives and \$2,000,000. They were able to recover \$6,000,000 in gold, silver, artifacts, and armament. The United States intervened, answered, and filed a counterclaim to title on the basis of the Antiquities Act, 16 U.S.C. §§431 *et seq.*, or, in the alternative, on the Abandoned Property Act, 40 U.S.C. §310. Summary judgment was entered for plaintiffs. (408 F.Supp. 907 (S.D. Fla. 1976); 71 AJIL 151 (1977).) On appeal, the Court of Appeals affirmed the trial court's judgment as to its jurisdiction to adjudicate the matter of title but modified that portion of its order which could be interpreted as finding that plaintiffs had exclusive title to and possession of the vessel and cargo as against possible claimants who were not party to these proceedings.

The United States questioned whether the District Court could assert *in rem* jurisdiction over a matter of title to a vessel or other *res* which were located outside the Court's territorial jurisdiction. Observing that ordinarily in actions in admiralty a vessel or other *res* is expected to be within the territorial jurisdiction of the Court, a rule arising from a legal fiction concerning a ship's personality, Circuit Judge Gewin pointed out that in the present situation the vessel and the bulk of its cargo could not be brought within the Court's jurisdiction by reason of their location on the reef and their condition. It followed that as the vessel and its cargo were not in a position to avoid the Court's reach, an *in rem* decree was not necessary. Moreover, as the District Court had *in personam* jurisdiction over the claimants, there was no need to arrest the vessel and take her into custody. Circuit Judge Gewin said:

The government, by intervening in this action and by stipulating to the court's admiralty jurisdiction . . . , waived the usual requirement that the *res* be present within the territorial jurisdiction of the court and consented to the court's jurisdiction to determine its interest in the extraterritorial portion of the vessel.¹

The government argued that the law of salvage should not have been applied by the District Court in this case as no marine peril had been established. Observing that there was some controversy among publicists over the matter of whether salvage law or the law of finds should be utilized in regard to property abandoned at sea, the Court of Appeals

* Text provided by Michael Pearce Dodson, Esq.

¹ 569 F.2d 330, 335 (footnotes by Court omitted).

took the view that in the present case the law of finds had been properly applied by the trial court. Furthermore, it could be shown that marine peril, a ground for the application of salvage law, existed because the vessel had been lost in the first place and, as a wreck, it was in continual danger of being lost through the actions of the elements.

The government invoked the Antiquities Act in support of its claim. The District Court had found, however, that this Act, which established the interest of the Federal Government in historic and prehistoric objects, buildings, and the like, limited that interest to objects, *etc.*, found on "*lands owned or controlled by the Government of the United States.*"² The United States asserted that according to the Outer Continental Shelf Lands Act, 43 U.S.C. §§1331 *et seq.*, it had jurisdiction and control over the resources of the outer continental shelf and that this authority had been sustained in *United States v. Maine*, 420 U.S. 515 (1975).³ In the opinion of Circuit Judge Gewin, it followed from a reading of the Act, the provisions of Article 2(1) of the Geneva Convention on the Continental Shelf of 1958,⁴ together with the specific statement by the International Law Commission that a state's control over the resources of the shelf did "not cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil,"⁵ that the government has "limited . . . control over the wreck site . . . [and] that the remains of the *Atocha* are not situated on lands owned or controlled by the United States under the provisions of the Antiquities Act."⁶

Invoking the Abandoned Property Act, the United States contended that it was the successor to the right of the Crown under common law to assert title to abandoned property found at sea by a British subject and that this rule had been incorporated into American law. The Court of Appeals observed that this principle did not appear to be embedded in the terms of the Antiquities Act. As for the Abandoned Property Act, it did not seem to support the application of the principle of sovereign prerogative where title was being asserted to a Spanish vessel which had been wrecked more than a century and a half before the establishment of the Republic and which was located outside the jurisdiction of the United States.

Treaties—executive agreements—whether treaty needed for return of Crown of St. Stephen to Hungary

DOLE v. CARTER. 569 F.2d 1109.

U.S. Court of Appeals, 10th Cir., Dec. 31, 1977.

Plaintiff, a U.S. Senator, sought a declaratory judgment and an injunction preventing defendant from returning the Crown of St. Stephen and

² *Id.* 337 (emphasis by Court).

³ For digest of the Master's Report in this case, see 69 AJIL 432 (1975).

⁴ Done April 29, 1958. 15 UST 471, TIAS No. 5578, 499 UNTS 311, 52 AJIL 585 (1958). Article 2(1) provides: "The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources."

⁵ 569 F.2d 330, 340 (quoted by Court). ⁶ *Id.*

related regalia to Hungary. These objects had been in the custody of the United States since the end of hostilities in World War II on the understanding that they would ultimately be returned. Plaintiff argued that the Crown and regalia could only be returned pursuant to a treaty with Hungary (Art. II, §2(2), Constitution) and not under an executive agreement.¹ The District Court denied plaintiff's application for injunctive relief. Plaintiff's motion for an injunction pending appeal was denied by the Court of Appeals.

In a per curiam opinion, the Court of Appeals said:

The action of the President is to return to the people of Hungary property which belongs to them. The situation is one which "uniquely demand[s] single-voiced statement of the Government's views." *Baker v. Carr*, 369 U.S. [186] at 211 [1962]. . . . We are aware of no "judicially discoverable and manageable standards for resolving [the issue]." We have no way of ascertaining the interest of the United States, or of its people, in the controversy. The President has decided that our foreign relations are best served by the return of the crown. We decline to enter into any controversy relating to distinctions which may be drawn between executive agreements and treaties. We say only that on the facts before us we find no justiciable controversy.²

In the opinion of the Court, the return of the Crown and regalia would not violate the Treaty of Peace with Hungary of 1947 (61 Stat. 2065, TIAS No. 1651; 4 Bevens 453, 41 UNTS 135).

Treaties—Warsaw Convention of 1929—"accident" as defined in Article 17—carrier liability

WARSHAW V. TRANS WORLD AIRLINES, INC. 442 F.Supp. 400.
U.S. District Court, E.D., Pa. Dec. 14, 1977; amended Dec. 21, 1977.

Plaintiff sued carrier for damages for the loss of his hearing while on a flight from Philadelphia to London. He contended that his injury was caused by a change in the pressure in the passenger cabin in the course of descent, and, consequently, that it constituted an "accident" for which the carrier would be liable under the terms of Article 17 of the Convention for the Unification of Certain Rules Relating to International Transportation by Air of 1929 (Warsaw Convention) (49 Stat. 3000, TS.876, 2 Bevens 983, 137 LNTS 11) as modified by the Montreal Agreement (31 Fed. Reg. 7,302 (1966)). It was shown that plaintiff had been suffering from an upper respiratory tract infection at the time of the flight but that he had not anticipated any difficulty from repressurization of the cabin on descent. It was also shown that subsequent medical treatment had failed to restore his hearing. Defendant replied that the pressure system in the cabin had

¹ A similar application for injunctive relief based, however, upon the question of whether the objects were the property of the United States (Art. IV, §3(2), Constitution) was denied by the District Court for the District of Columbia (*Curtis v. Carter*, Civ. Action No. 77-2069 (1977), *aff'd* No. 77-2105 (D.C. Cir. 1977), cited by Court.

² 569 F.2d 1109, 1110.

functioned normally throughout the flight. The Court found for defendant.

Observing that this case presented a question of first impression, District Judge Fogel examined at length the U.S. case law regarding carrier liability under Article 17, as well as interpretations of this article which led to the adoption of the Guatemala Protocol of 1971, which had not yet been ratified by the United States. The Court found that "accident" was not to be defined as comprehending death or illness arising from natural causes, *i.e.*, from the state of health of a passenger. In the opinion of the Court, where the aircraft was operating in a routine manner, the carrier had no liability for an injury befalling a passenger in the course of the flight.

International claims—loss of property as result of hostilities—Micronesian Claims Commission—judicial review of awards

RALPHO V. BELL. 569 F.2d 607.

U.S. Court of Appeals, District of Columbia Circuit. March 29, 1977. Rehearing denied, Sept. 12, 1977.

In a class action, plaintiff sought mandatory, injunctive, and declaratory relief against members of the Micronesian Claims Commission (Commission) on the complaint that in deciding his claim for loss of property as a result of the American bombing of the Island of Jaluit in Micronesia during World War II, the Commission relied upon information which was not available to him. He contended that he had been deprived of property without due process of law. Micronesia, which Japan had held under a League of Nations mandate before World War II, became a U.S. Trust Territory in 1947 (Trusteeship Agreement for the Former Japanese Mandated Islands of 1947 (61 Stat. 3301, TIAS No. 1665, 12 Bevans 951, 8 UNTS 189). In Article 4(a) of the Treaty of Peace with Japan of 1951 (3 UST 3169, TIAS No. 2490, 136 UNTS 45), the parties agreed to compensate Micronesians who had suffered losses during the war. In 1969, a fund amounting to \$10,000,000 in cash, goods, and services was established by the parties *ex gratia* to meet claims arising before the United States had taken military control of the Islands (Agreement Concerning the Trust Territory of the Pacific Islands of 1969 (20 UST 2654, TIAS No. 6724, 719 UNTS 127). In 1971, a fund of \$20,000,000 was established to meet subsequent claims (50 U.S.C.App. §2020(a)). Congress also established the Micronesian Claims Commission which was authorized to determine claims under both funds, with provision for a hearing only where a claimant was dissatisfied with his award. All claims settlements were to be final. Plaintiff apparently estimated his loss at \$234.40. An expert witness testified that the value of the house in 1940 would have been \$656.32. On the basis of a "value study" of Micronesian property in general, to which plaintiff was denied access, the Commission awarded him \$298. It subsequently made the value study available to him, but denied his motion for reconsideration of the award. Plaintiff's present action was based upon the contention that he should have had

access to the value study before the hearing on his objections to the first award. The District Court dismissed the action for want of subject-matter jurisdiction (Fed.R.Civ.P. 12(b)(1)) apparently on the theory that any review of the award was barred by Section 2020. On appeal, the Court of Appeals reversed and remanded this judgment with directions to the District Court for settling the claim.

The basic issue was whether the terms of reference of the Commission barred judicial review of its decisions on any ground. Circuit Judge Robinson pointed out that there was no doubt that the Commission was bound by the Due Process Clause of the Fifth Amendment, as was Congress in legislating for the Trust Territory pursuant to Article IV, §3(2) of the Constitution. An examination of the Micronesian Claims Act (50 U.S.C.App. §§2018 *et seq.*) indicated that the protection of the due process rights of claimants was a matter of particular concern to Congress. There was no doubt that the constitutionality of the Commission's decisions could be reviewed by the federal courts.

In the present case, however, the claimant had contended that the Commission had violated both the Constitution and the Act. An examination of cases interpreting other statutes which had contained clauses precluding judicial review led the Court to the conclusion that in enacting the Micronesian Claims Act Congress had not expressly barred review of all challenges to the Act, that is, "judicial cognizance of complaints that the Commission [had] . . . disregarded unambiguous statutory directives or . . . constitutional commands."¹ In the opinion of Circuit Judge Robinson, "[t]his holding . . . [was] consistent not only with logic and legal precedent, but also with the Nation's commitment to the Micronesian people and to the United Nations."²

The Commission's request for a rehearing was denied (*Ralpho v. Bell*, 569 F.2d 636 (D.C.Cir. 1977); 72 AJIL 667 (1978)). The Court found no merit in the Commission's argument that resort to judicial review would result in extending the life of the Commission, thus adding to the costs of its activities beyond what had been contemplated by Congress. Similarly, the Court was not impressed by the Commission's complaint that during the present judicial review process all of the claims funds had been exhausted, so that this claim and that in the companion case of *Melong v. Micronesian Claims Commission*, 569 F.2d 630 (D.C.Cir. 1977); 72 AJIL 668 (1978), could not be met.

International claims—loss of life of civilian as result of hostilities—Micronesian Claims Commission—international law standard for ex gratia payments—judicial review of awards.

MELONG V. MICRONESIAN CLAIMS COMMISSION. 569 F.2d 630.

U.S. Court of Appeals, District of Columbia Circuit. March 29, 1977.

Rehearing denied, Sept. 12, 1977.

A claim for compensation for the death of a native of Micronesia during hostilities between the United States and Japan in World War II was filed

¹ 569 F.2d 607, 625-26.

² *Id.*, 626.

with the Micronesian Claims Commission (Commission) by his survivors.¹ The claim was for \$11,000. The Commission awarded \$4400 on a theory of recovery based entirely upon the age of decedent at the time of death. The claimants challenged the award before the Commission, which then reaffirmed the award but on the reasoning that under international law it had the authority to determine the amount of the award without regard to claimants' alleged losses where the payment was *ex gratia*. Claimants then brought an action questioning the Commission's standards of decisionmaking. The District Court dismissed the case on the ground that under 50 U.S.C.App. §2020 there could be no judicial review of the Commission's decisions.² On appeal, the Court of Appeals remanded the case to the District Court with instructions to vacate the award and to direct the Commission to make an award which was consistent with the opinion of the Court of Appeals.

Circuit Judge Robinson observed that the Commission seemed to take the position that because the claims were to be settled *ex gratia*, it could disregard the statutory mandate that its decisions should be made "in accordance with the laws of the Trust Territory of the Pacific Islands and international law."³ The Court continued:

The Act recites, to be sure, that its mission is *ex gratia* settlement of Micronesian war claims—*ex gratia* because both the United States and Japan have historically denied any responsibility to satisfy them. Just as assuredly, Congress intended the Commission to disregard questions of culpability under international law in deciding whether claims were to be allowed, and to debar no one simply because a nation's culpable involvement in a death could not be shown. Yet the statute implicitly, and its legislative history positively require consideration and adjudication of claims to be otherwise "in accordance with" international law standards. And international law, though it imposes liability for death caused by unlawful activities during hostilities, and prescribes therefor recovery equal to the pecuniary loss consequentially suffered by survivors, assesses no liability whatever for death resulting from war lawfully conducted, and provides, of course, no "rule" at all for determining awards therefor. The Commission's *ex gratia* interpretation, with its built-in premise that neither the United States nor Japan contributed culpably to any Micronesian death, would permit blithe disregard of every measure of damages discoverable in international law, and charge it only to heed a nonexistent rule. Clearly no such outcome was contemplated by Congress, and its illogic is further manifested by its relegation to the whimsy of the Commission of even those whose claims might have satisfied the international law standard establishing liability.⁴

In the opinion of the Court, the Commission took a similarly cavalier attitude toward the Trust Territory's laws. Circuit Judge Robinson con-

¹ See *Ralpho v. Bell*, 569 F.2d 607 (D.C.Cir. 1977); 72 AJIL 667 (1978) for the history of the establishment of the Micronesian Claims Commission.

² *Melong v. Micronesian Claims Commission*, Civ. No. 75-0462 (D.D.C. 1975) (unreported) (footnote by Court, other footnotes omitted).

³ 50 U.S.C.App. §2019c(a) (quoted by Court).

⁴ 569 F.2d 630, 633-34.

cluded that the Commission had violated its statutory mandate. Pursuant to the holding in *Ralpho v. Bell* (569 F.2d 607 (D.C. Cir. 1977); 72 AJIL 667 (1978)), judicial review of the Commission's actions was available in these circumstances.

International trade—Tariff Act of 1974—trade agreements with Republic of China and Republic of Korea—choice of forum

SNEAKER CIRCUS, INC. v. CARTER. 566 F.2d 396.
U.S. Court of Appeals, 2d Cir., Nov. 10, 1977.

Plaintiffs sought declaratory and injunctive relief against the enforcement of certain orderly marketing agreements with the Republic of China and the Republic of Korea (42 Fed. Reg. 32,440 (1977)) which had been concluded under the terms of the Trade Act of 1974 (19 U.S.C. §§2101 *et seq.*). The agreements at issue limited the quantity of footwear which could be imported from these states over a four-year period. They were enforceable by penalties imposed by the foreign states. Plaintiff argued that in the negotiation process the requirements of the Act were not observed, that there were no public hearings on the terms of the prospective agreements as required by the Act, and hence that their right to due process of law had been violated. The District Court dismissed the case for want of subject-matter jurisdiction (Fed.R.Civ.P. 12(b)(1)). On appeal, the Court of Appeals reversed and remanded this decision.

As in the District Court, the Court of Appeals did not consider the statutory or constitutional issues raised by plaintiffs. Circuit Judge Smith found that the point at issue was whether the validity of the agreements should be determined by a federal district court or by the U.S. Customs Court. Appellants opted for a district court (28 U.S.C. §§1331, 1337, Administrative Procedure Act, 5 U.S.C. §§701 *et seq.*), while the government contended that the Customs Court was the proper forum (28 U.S.C. §1582(a)) because the latter had jurisdiction over a civil action which had been brought under the terms of Section 514 of the Tariff Act of 1930 as a protest against an administrative ruling at the port of entry when that protest had been overruled. In the opinion of Circuit Judge Smith, the instant case presented an exception to the position argued by the government. Here, enforcement was to be by the exporting states, not by the United States; consequently, no protest within the terms of 28 U.S.C. §1582 would be likely to arise. It followed that jurisdiction over any controversy in these circumstances would be within the purview of the district court rather than that of the Customs Court.¹

To the contention that the case did not present a justiciable issue because it involved an inquiry into the conduct of foreign relations, the Court pointed out that appellants were challenging the procedures which had been followed in negotiating the trade agreements rather than the substance of the agreements; consequently, the case was justiciable.

¹ Citing, *inter alia*, *Consumers Union of United States, Inc. v. Kissinger*, 506 F.2d 136 (D.D.C. 1974), *cert. denied*, 421 U.S. 1004 (1975); 69 AJIL 685 (1975).

Extradition—retroactive effect of new treaty—double jeopardy—beginning of extradition proceedings as determining date—Extradition Treaty with Canada of 1971

GALANIS v. PALLANCK. 568 F.2d 234.

U.S. Court of Appeals, 2d Cir., Nov. 22, 1977.

The Government of Canada requested the extradition of petitioner, a U.S. national, on charges of securities fraud in the amount of \$1,600,000 (Canadian) which he allegedly perpetrated in 1971 and 1972 and for which he was indicted in 1973. After extradition was ordered (429 F. Supp. 1215 (D.Conn. 1976)), the accused petitioned the District Court for a writ of habeas corpus which was denied. On appeal, the Court of Appeals reversed this decision.

Petitioner argued that his extradition was barred by the double jeopardy provision in Article 4(1)(i) of the Extradition Treaty with Canada of 1971.¹ Specifically, it was shown that he had pleaded guilty to several federal indictments concerning fraud, for which he was serving sentences of six-months' imprisonment and five-years' probation in the United States. Although these indictments did not involve the Canadian fraud charges, testimony was offered to the effect that the accused's guilty plea comprehended any of his fraudulent activities "that came within the jurisdiction of the Department of Justice,"² including the Canadian fraud. The government replied that the extradition request was controlled by Article X of the Webster-Ashburton Treaty of 1842 (8 Stat. 572, TS 119, 12 Bevans 82) and relevant supplementary treaties, none of which contained a double jeopardy provision in the terms of Article 4(1)(i). Pointing out that Article 18(2)³ of the 1971 treaty provided that offenses committed before the treaty became effective (*i.e.*, in 1976) were to be governed by the earlier treaties, the government contended that this article barred the accused from invoking Article 4(1)(i).

Circuit Judge Friendly observed that, while there might be merit in the government's argument, recent U.S. practice regarding the drafting of extradition treaties indicated that protection against double jeopardy was commonly provided and that a like policy was usually followed by the Department of Justice against duplicative proceedings when an accused was liable to the same charges by the Federal Government and a state government. The Court said:

In view of the deep considerations of policy that must have moved

¹ The treaty was signed in 1971, amended in 1974, and ratifications were exchanged in 1976. Article 4(1)(i) provides:

Extradition shall not be granted in any of the following circumstances: (i) When the person whose surrender is sought is being proceeded against, or has been tried and discharged or punished in the territory of the requested State for the offense for which his extradition is requested.

TIAS No. 8237.

² 568 F.2d 234, 236.

³ Article 18(2) provides that the earlier treaties are to be terminated "except that the crimes listed in such agreements and committed prior to entry into force of this Treaty shall be subject to extradition pursuant to the provisions of such agreements."

the draftsmen to include the double jeopardy provision in this treaty, it would seem reasonable to conclude that they did not wish to defer the obligation of this country to respect it, but rather wished this and other improvements implemented by the 1971 treaty to become operative as soon as the treaty became effective.⁴

Circuit Judge Friendly noted that the District Court's decision had rested upon Article 18(2) together with the views of two Department of State officials supporting the nonretroactivity of the treaty. In the opinion of the Court of Appeals, "[w]hile the views of the State Department are entitled to respect . . . , they are not controlling."⁵ The Court concluded:

We therefore hold that the double jeopardy clause of the 1971 treaty applies in all proceedings begun after the exchange of ratifications even, though the crime occurred before. Whether it would apply in a proceeding brought before the exchange but not yet concluded, we need not decide.⁶

Circuit Judge Friendly took issue with the two judges below as to their interpretation of the Court of Appeals' views on the conclusiveness of diplomatic or consular certification of evidentiary material expressed in *Shapiro v. Ferrandina* (478 F.2d 894 (2d Cir. 1973), *cert. dismissed* 414 U.S. 884 (1973); 68 AJIL 127 (1974)). The Court pointed out that the certification was conclusive but that in *Shapiro* some of the material had not been included in the certification in question.

Refugees—conditional entry—firmly resettled in Hong Kong—standing to bring action

CHINESE AMERICAN CIVIC COUNCIL V. ATTORNEY GENERAL OF THE UNITED STATES. 566 F.2d 321.

U.S. Court of Appeals, District of Columbia Cir., Oct. 11, 1977.

Plaintiffs were five Chinese nationals who had fled from the People's Republic of China to Hong Kong between 1949 and 1956 and who had lived in Hong Kong thereafter. They were joined in their complaint by a sponsoring organization. Plaintiffs had sought admission into the United States on conditional entry as Seventh Preference refugees (Immigration and Naturalization Act, §203(a)(7), 79 Stat. 911; 8 U.S.C. §1153(a)(7)). Their applications were denied by the Immigration and Naturalization Service (Service) on the grounds that they had been "firmly resettled" in Hong Kong and hence were not eligible for relief under Section 203(a)(7). The District Court held that plaintiffs lacked standing to bring the action and also agreed with the conclusion reached by the Service (396 F.Supp. 1250 (D.D.C. 1975); 70 AJIL 363 (1976)). On appeal, the Court of Appeals affirmed the District Court's decision.

With regard to the matter of standing, Circuit Judge MacKinnon pointed out that persons living abroad do not have standing to challenge the application of the immigration laws. For its part, the plaintiff sponsoring organization lacked standing because it could not demonstrate any injury to itself or its members.

⁴ 568 F.2d 234, 239.

⁵ *Id.*

⁶ *Id.*

As for the interpretation of "firmly resettled," the Court observed that the Supreme Court in *Rosenberg v. Yee Chien Woo* (402 U.S. 49 (1971); 65 AJIL 828 (1971)) had made it clear that Section 203(a)(7) applied to persons fleeing a communist country, not to persons whose flight was "*interrupted by intervening residence in a third country reasonably constituting a termination of the original flight in search of refuge.*"¹ Appellants had resided in Hong Kong for periods ranging from fifteen years and nine months to twenty years before filing for Section 203(a)(7) preference.

It was argued on behalf of appellants that their applications had been denied because of the Service's delay in processing them. Specifically, they pointed to a Hong Kong Ordinance of April 1, 1972, which established two categories of residents, those who had resided there continuously since April 1, 1965, and those who had resided there for seven years with interruptions for business and other reasons. The Service had decided on April 1, 1973, that both categories should be treated as "firmly resettled." Appellants took the position that their applications had been made in 1971 and 1972 before the Service had reached this decision and that administrative ineptitude had delayed consideration of the applications until after that date. Circuit Judge MacKinnon found no merit in this argument, pointing out that there was no evidence that the applications had been subjected to unusual delay. The Court also observed that under the immigration laws the burden of proof as to an immigrant's eligibility for preferential status rests on the applicant (§203(d); 8 U.S.C. §1153(d)).

District Judge Kaufman, sitting by designation, and concurring specially, would have remanded the issue of the standing of the plaintiff sponsoring organization to the District Court for a determination of whether it had standing as an American organization which is concerned with the protection of the interests of aliens who reside abroad and are thereby denied standing to challenge their status under the immigration laws.

Citizenship—acquisition of citizenship jus sanguinis—effect of failure to meet statutory residence requirement

RAMOS-HERNANDEZ V. IMMIGRATION & NATURALIZATION SERVICE.
566 F.2d 638.

U.S. Court of Appeals, 9th Cir., Dec. 23, 1977.

Petitioner was born in Mexico in 1939. As his mother was a native-born American national and his father a Mexican national, he qualified for U.S. citizenship under Section 1993 Rev. Stat., as amended in 1934 by 48 Stat. 797. Prior to 1972, however, the immigration laws required that an individual must live in the United States for five years between the ages of fourteen and twenty-eight in order to confirm his claim to citizenship. Section 301(b), 66 Stat. 235; 8 U.S.C. §1401(b). In 1972, this period of residence was reduced to two years. 86 Stat. 289. Petitioner apparently came to the United States for the first time in either 1972 or 1973, at which time he was either thirty-two years or thirty-three years of age. The Immigration and Naturalization Service began deportation proceedings

¹ 566 F.2d 321, 328, quoting 402 U.S. 49, 57; emphasis by Court of Appeals. Footnotes by Court omitted.

against him in 1974. 8 U.S.C. §1251(a)(2). Petitioner contended that having acquired citizenship by birth, he could not be divested of it by having failed to meet the residence requirement about the existence of which he had not been aware. The immigration judge ruled against petitioner on the ground that he had not established his lack of knowledge of the requirement. The Board of Immigration Appeals affirmed this decision and also ruled that "his ignorance would not prevent operation of the statute against him."¹ Petitioner then sought a review of the Immigration and Naturalization Service's decision. The Court of Appeals denied his petition.

Senior Circuit Judge Barnes pointed out that according to *Afroyim v. Rusk*, 387 U.S. 253 (1967), 62 AJIL 189 (1968), "Congress has no power, absent the citizen's consent, to take away citizenship created by the first sentence of the Fourteenth Amendment,"² i.e., the citizenship of persons born or naturalized in the United States. The Supreme Court held in *Rogers v. Bellei*, 401 U.S. 815 (1971), 66 AJIL 183 (1972), a case involving a person in circumstances similar to those of petitioner, that his citizenship was not based upon the Fourteenth Amendment but upon statute and was, therefore, subject to control by regulations adopted by Congress and that the residency requirement was a reasonable condition subsequent. Unlike petitioner, however, Bellei admittedly knew about the statutory requirement of residence.

Petitioner argued that, although he had known since childhood that he had a right to American citizenship, at no time did he know about the residence requirement, and he stated that members of his family were not so informed when they made inquiries about their citizenship at the U.S. Consulate at Juarez. Evidence introduced at the administrative hearings did not clarify the matter of petitioner's knowledge of the requirement, nor was the case law definitive on this issue. Senior Circuit Judge Barnes said:

We conclude there is no controlling precedent on this issue. However, it seems to us the language in *Bellei* and *Rucker*³ suggests the existence of the excuse of ignorance is merely dicta which must be considered as such in view of the actual holdings of the two cases. The Supreme Court in *Bellei* specifically held that the rule concerning the loss of citizenship only pursuant to the citizen's assent would not be applied to Section 1993 (and thereby to Section 301(a)(7)) citizens. Given that the loss of non-Fourteenth Amendment citizenship can constitutionally occur even if the individual does not voluntarily relinquish it, does it make a difference if the relinquishing was involuntary because of an ignorance of the statutory requirements, a lack of funds with which to reach this country, or some other reason? The *Bellei* decision provided for a distinction between Fourteenth Amendment and non-Fourteenth Amendment citizenship. This Court is bound by it.⁴

District Judge Burns, sitting by designation, dissented.

¹ 566 F.2d 638, 639.

² *Id.*, 640.

³ *Rucker v. Saxbe*, 552 F.2d 998 (3d Cir. 1977), cert. denied sub nom. *Rucker v. Bell*, 98 S.Ct. 392 (1977).

⁴ 566 F.2d 638, 645.

BOOK REVIEWS AND NOTES

EDITED BY LEO GROSS

International Relations in a Changing World. By the Institut Universitaire de Hautes Etudes Internationales Geneva. Leiden: A. W. Sijthoff, 1977. Pp. vi, 434.

This volume was published on the occasion of the 50th anniversary of the Graduate Institute of International Studies in Geneva and contains twenty essays by professors of the Institute written partly in English, partly in French. Jacques Freymond, director of the Institute from 1955 to 1978, shows in his introduction that the Institute at the time of its foundation in 1927 had a quasi-monopoly in the world, whereas today it is surrounded by a great number of similar institutions. Different from most of those, however, it has kept its "universalist vocation" as much with regard to its fields of teaching and research as with regard to the origin of its students. The great variety of subjects in this book reflects the universalist character. Five contributions are devoted to "Approaches to the Study of International Relations," six concern primarily international economic relations, while nine, although not necessarily of a legal character, are of immediate interest for international law.

Two articles contain helpful surveys and analyses of the development of international relations in the past decades. Curt Gasteyger shows the new dimensions of conflict and order in the present world resulting from the proliferation of actors, issues, and means. Marlis G. Steinert and Harish Kapur sketch the new configurations of power which can be observed in the development from the bipolar system of the 1950's to the tridimensional world of the 1970's. Michel Virally contributes an illuminating study on the changing concept of sovereignty as a cornerstone of international law. He alludes to the revaluation of sovereignty, its expansion to new fields (natural resources, new spaces), and its growing relativity (interdependence, *ius cogens*, human rights, etc.). Lucius Caflisch compares the present "nationalization" of large parts of the oceans with the doctrine of *mare clausum* developed between the 15th and 17th centuries.

In an essay on the doctrines of peaceful coexistence and of socialist internationalism, Rudolf Bystricky characterizes the first of those doctrines as a weapon of socialist states with the object of overcoming countries of a different social system, whereas socialist internationalism as applied among socialist states is described as a tool to prevent the application of peremptory norms of international law in the relations between those states. Krystyna Marek, with biting irony, criticizes contemporary law-making in international law. Among many other aspects, she points to the dangers which codification may represent for customary law and the failure of the present majorities in international bodies to consider the

possibility that the rules they are proclaiming could one day apply to themselves. Finally, Philippe Cahier examines the responsibility of states for ultrahazardous activities and concludes that, on the basis of a general principle of law, states have a duty to pay compensation for the consequences of such activities, even without having committed any illegal act.

DIETRICH SCHINDLER
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International Organizations in Their Legal Setting : Documents, Comments and Questions. By Frederic L. Kirgis, Jr. St. Paul: West Publishing Co., 1977. Pp. xlv, 1016. Index. \$18.95.

Professor Kirgis's handsome book in the American Casebook Series is to be welcomed. It is a teaching book which gathers materials on the legal aspects of international organizations. Unlike many books which purport to be about international organizations but are really mostly about the United Nations, Kirgis's volume contains a great deal on the practice of the ILO, ICAO, GATT, IMF, and the World Bank, as well as some other organizations.

Chapter I deals in a fairly unexceptional way with the legal status and capacity of international institutions. The second chapter covers membership and participation questions. It is up to date in its treatment of the participation of the PLO as an observer in the General Assembly, but the various proposals for handling the ministate question are not included. Withdrawal is also dealt with here and, somewhat more surprisingly from the organizational point of view, so are the diverse voting procedures in the various agencies and organizations.

The layout of Chapter 3 is somewhat harder to grasp, and to this reader it is not altogether satisfactory. Entitled "Rule Making Powers" (a title with its own overtones of value-judgment) the initial part passes somewhat rapidly over the legal arguments of principle, and instead chooses to focus on a cluster of case studies: permanent sovereignty over natural resources, Palestine, and Namibia. Strangely, the emphasis is on the General Assembly, with scarcely any reference to the Security Council. The second part of the chapter deals with "rule making and dispute settlement." Again there is insufficient study of the Charter provisions as they relate to the Security Council's powers. The omission of the military or peacekeeping role of the United Nations seems singular (and it is scarcely touched on in the chapter on enforcement, which would have been an alternative location for these materials). One finds materials on the Namibia question. Although this reviewer is sympathetic to the views that have come across in the texts, it is arguable that the alternative view is underrepresented and that the materials would have been strengthened by inclusions of extracts from the opinions of Judges Van Wyk or Sir Gerald Fitzmaurice, for example. One notes, too, that materials on ICSID appear in this section rather than with the pages on permanent sovereignty over natural resources. In this chapter ILO materials are well represented

and the handling of the India-Pakistan dispute by ICAO receives especially good coverage.

Chapter 4 deals with Enforcement Techniques. It is an impressive section, for it provides case illustrations across a range of international institutions and also shows that the spectrum of enforcement measures consists of very much more than Security Council enforcement action. This is a dual strength. Kirgis has organized his materials in a readily understandable way. First he treats what he terms "non-sanctions," by which he means the technique for the mobilization of shame. Moving on to what he sees as sanctions proper, Kirgis deals initially with "authorized retaliations" (with the GATT and ICAO providing the main examples). Next he moves to "formal sanctions," broken down into loss of voting rights (which naturally enough focuses on the *Expense* case), suspension and expulsion, the withholding of certain other membership benefits, and economic enforcement under Chapter VII of the UN Charter. The materials under suspension and expulsion mostly relate to South Africa, and they usefully range through several of the agencies. The subsection on the withholding of selected membership benefits is particularly good and contains helpful documentary selections on the practice of the IMF, the World Bank, and ICAO, as well as the controversial events in UNESCO in 1974 concerning Israel. The structure of this section is clear and usable, although there are some odd little detours. For example, the section on "non-sanctions" has some pages on waivers; and the subsection on suspension and expulsion includes brief materials on the credentials versus representation argument and on Article 60 of the Vienna Convention on the Law of Treaties. One sees the train of thought, but these are digressions; a format which would have allowed their inclusion in smaller print would have been preferable.

Chapter 5, with an eclectic selection of materials, is a surprisingly successful introduction to the institutional aspects of the EEC (surprisingly because it is notoriously difficult to deal with EEC institutional problems through the casebook technique). Certain questions are obviously dealt with in considerably greater detail elsewhere, by Eric Stein and by Steiner and Vagts, for example. But here the focus is institutional rather than functional, and it should be a helpful chapter for teachers.

The final chapters on the Enforcement of Human Rights inevitably invites comparison with what is available elsewhere. It has the merit of being up to date, and those who want merely to touch briefly on human rights in the context of courses on international institutions may wish to use it; serious study of the question will still require reference to the much wider range of materials provided in Sohn and Buergenthal.

A bibliography on each section, as in Sohn and Buergenthal, would have been tremendously useful. But all in all, this book is a valuable addition to the teaching tools now available.

ROSALYN HIGGINS
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European Community Law and Institutions in Perspective: Text, Cases and Readings. By Eric Stein, Peter Hay, and Michel Waelbroeck. Pp. v, 1132. Index. \$22.50. *Documents for European Community Law and Institutions in Perspective* (same authors). Pp. iv, 525. \$10. (Combined purchase of book and documents, \$29.50). Indianapolis and New York: The Bobbs-Merrill Co., Inc., 1976.

This presentation, by text, cases, and readings of the legal side of the European communities is an up-dating, concentration, and enrichment of a well-honed and tremendously useful first edition by Stein and Hay. A third coauthor, a scholar of established distinction, based at the University of Brussels and a member of the Belgian Bar, has joined the original two in the preparation of the new edition. The coauthors have included a tremendous amount of material involving the three European communities centered at Brussels/Luxembourg, while at the same time reducing almost to zero the treatment of other aspects of postwar regional and semi-regional activities involving Western European countries, such as NATO, Western Union, OECD, the Council of Europe at Strasbourg, the European Convention on Human Rights, and the UN Economic Commission for Europe. The first edition taught of Western Europe as of 1963, with discernible expectations as to the eventual unfolding of a "Grand Design" that has not unfolded—that of an Atlantic Community.

The second edition does not, however, concentrate exclusively on the law stuff of the European Coal, Iron and Steel, Economic, and Atomic treaty communities. The editors never neglect to bring in the General Agreement on Tariffs and Trade where linkages exist, and running comparisons with American public law are placed throughout the book, particularly where federal and semifederal notions and institutions are available for such evaluation and in connection particularly with concepts of wide-area free markets, market-wide corporate activities, overriding "super-law" invalidations, free movement of services and capital, and antitrust.

I have appraised the differences in approach to coverage between the two editions, and mostly I agree that what the editors have done in the second edition is essential to the utility of the book, especially to American lawyers, law teachers who have not "lived" the intereditions period with an eye on Europe, and today's American law students. In the real world of law book economics, 1132 pages is about the limit of students' capacity to buy. In the tight world of course coverages, teacher and students must "go where the action is"; and in Western Europe it is from the Commission/Council at Brussels and the Community Court at Luxembourg that the flesh of living law is being put, every day, on the treaty skeletons. Also, on the plus side, the second edition is much more sharply focused than the first; and, as teachers know and students come to know, this is a helpful characteristic when found in study books. Finally, there are aspects of the less-focused coverage of the first edition that history (at least short-range history) has marked for decline, even failure. Normally it is not the business of American law school courses (other than those in legal history) to detail institutional history where it does not put a point

on what lawyers want to know in order to carry out their current or reasonably foreseeable professional responsibilities. I am particularly aware of the "American way" here, because of recollections of the (to me) excessive emphasis on The Past as Such (not as Prologue merely) in many Latin American law school courses. (And I have parallel suspicions about some courses in Europe).

Despite the sharper focus of the second edition, the editors are comparatists at heart, and probably it is neither possible nor desirable to teach European communities law "cold" to Americans. It is better to have the comparative materials in the study book and let the teacher decide what to do about using them than to exclude them. It does not seem possible, for example, to "get over" how the Community Court works in relationship to private parties, the Council/Commission, and national courts without the injection of Court-function subject matter normally dealt with in comparative law courses, in as much as comparative law is usually not a prerequisite: *Query*: in American law schools today, is much of anything not taught in the first year a prerequisite to anything else? On the other hand, brief general comparisons to American constitutional law seem to me either to say too little or to be shrugged off as obvious by the classroom *cognoscenti*.

The really difficult problem, however, is what to do about American antitrust law. The book under review makes many explicit references to (and sometimes it almost assumes prior study of) American antitrust law. It was foreseeable that those in my class who had not had antitrust would read with fear and alarm had I not declared to them that we would have to study EEC antitrust law *on its own* as a European phenomenon. Largely, my pilotage through EEC antitrust was faithful to this assurance, but the American antitrust buffs had more than once to be shushed in class and invited to the office.

I have found nothing comparable to this book for teaching European community law through cases, comments, and reports of administrative action. It is rich. It is complete. It is assured. It could be used anywhere (where English is read and spoken) for the study of European Communities law, including universities within the Nine.

My students and I have only one technical criticism: there are instances in which important "case" law is "buried" in law review excerpts. Having just seen from yesterday's preparation in international law that my colleagues and I are guilty of the same offense in Chapter 1 of *The International Legal System*, I only remind the authors of this fine compendium that we are all sinners together, sometimes. As forgers of teaching tools we might all well try to follow this law: Layout should always correspond to Significance.

There were two nonlaw graduate students in my course. They were able to hold their own. This suggests usability outside law schools.

COVEY T. OLIVER

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The Regulation of Statelessness Under International and National Law. Texts and Documents. By A. Peter Mutharika. Dobbs Ferry: Oceana Publications, Inc., 1977. A looseleaf binder allowing for future supplementation. \$60 (supplementation extra).

The analytical part of this book contains a correct presentation of the problem of statelessness and a rather exhaustive description of the efforts for its solution. The distinction between *de jure* and *de facto* stateless persons of which the author is aware is perhaps not everywhere sufficiently made. The term "*de facto* stateless," which is widely used, is actually a misnomer. It relates to persons who possess a nationality but whose nationality is ineffective; they are *de facto* unprotected persons. The vast majority of *de facto* stateless persons are refugees. Most present-day refugees are, on the other hand, not stateless *de jure*. The refugee problem, being a political problem, requires political solutions; it is only to a small extent amenable to legal solutions, *e.g.*, by naturalization in the country of asylum accompanied by social integration. The problem of *de jure* statelessness, on the other hand, could be solved by legal measures, if states were willing to take joint action for the elimination of statelessness. The author's analysis shows that this has so far been the case to only a very limited extent.

A slight error has crept into the description of the Convention on the Reduction of Statelessness of 1961. Article 1, paragraph 3, which provides for the acquisition of the nationality of the mother by a child who would otherwise be stateless, refers to legitimate, not to illegitimate children (p. 69). Insufficient emphasis is, perhaps, placed on Article 9 of the Convention which absolutely prohibits deprivation of nationality on racial, ethnic, religious, or political grounds. If one regards the principle of non-discrimination enshrined in the Charter as a general principle of international law, this provision may constitute codification of a general rule. If this rule were effectively applied, one of the main causes of statelessness would be dried up.

As to future action, the author suggests a new convention on the elimination of future statelessness or a protocol to the 1961 Convention which would close some of the lacunae in that Convention. Considering that the 1961 Convention has so far received only eight ratifications, it seems unlikely that this suggestion will be realized in the near future.

The Documents are divided into five parts: I. Resolutions and Recommendations of Private and Intergovernmental Organisations; II. Selected Draft Conventions; III. Global Conventions; IV. Regional and Bilateral Conventions; and V. National Constitutional and Statutory Provisions. Part I contains rather indiscriminately instruments relating to statelessness proper, to refugees and asylum, and general instruments such as the Universal Declaration of Human Rights and Lauterpacht's Draft International Bill of the Rights of Man. Resolution 31/96 of the UN General Assembly of December 12, 1976, by which the UN High Commissioner for Refugees was asked to continue to exercise the functions under Article 11 of the 1961 Convention which he had undertaken pursuant to Resolution 3274 (XXIX),

might have been added. The fifth part contains a rather eclectic presentation of nationality legislation. A full presentation of the nationality legislation of all countries would be very useful as no such up-to-date compilation exists in the English language, but it would probably exceed the scope of the book. The compilation prepared by the UN Secretariat (UN Doc. ST/LEG/SER. B/4 and Add.1) is unfortunately out of date.

The book is based on thorough research and should be useful as a work of reference.

PAUL WEIS

Geneva, Switzerland

Private International Law: A Comparative Treatise on American International Conflicts Law, Including the Law of Admiralty. Vol. III. Special Part, Obligations (Contracts, Torts), An Outline. By Albert A. Ehrenzweig and Erik Jayme. Leiden: A. W. Sijthoff; Dobbs Ferry, N.Y.: Oceana Publications, Inc., 1977. Pp. xiii, 156. \$26.

This volume completes a treatise the first (General) part of which appeared in 1967¹ under the authorship of Professor Ehrenzweig, one of the most influential of the *émigré* scholars who have done so much to broaden our all-too-insular approach to conflict of laws. In 1973, after the enlistment of Professor Jayme (then of Mainz, now of Munich) as a coauthor, the second (Special) part of "Jurisdiction, Judgments, and Persons (Family)" was published.² Before the third volume could be completed, but after its outline had been formulated, Professor Ehrenzweig died. He left its completion in able hands: one does not sense a diminution in quality or, indeed, a change in tenor in this final and controversial part, though Jayme has included his own, often suggestive, ideas in its development.

The authors are persuaded that American decisional law dealing with international conflicts can be distinguished from its interstate counterpart. Accordingly, they have cited, wherever practicable, American decisions involving international facts so as to provide a body of case law with which to compare decisions and statutes in other countries (chiefly European) in which all (or nearly all) conflicts of law are international. Even to those who, like myself, remain skeptical that our international conflicts are creating a body of doctrine that can usefully be separated from interstate case law, the focus of attention on our international cases can be helpful, especially when they are placed in juxtaposition to foreign authorities, including, of course, the views of foreign scholars. The brevity of treatment and citation may well be a virtue in performing this function.

To readers acquainted with Professor Ehrenzweig's views on conflict of laws, either through his 1962 treatise or his many articles, the positions taken, especially in the long chapter on torts, will come as no surprise. His polemics against the "non-rules" of the Restatement of Conflict of Laws (Second) and against the "governmental interest" approach to choice of law are re-echoed. Critics are assailed once more for oversimplifying his

¹ Reviewed in 64 AJIL 192 (1970).

² Reviewed in 69 AJIL 198 (1975).

view of the role of the *lex fori*. Of special value to American is the illumination this and the preceding volumes cast on Continental conflicts doctrine, statutes, and conventions. As American investment and travel have grown increasingly global, our knowledge of foreign legal sources and their application should expand correspondingly.

DAVID F.
Harvard Law

Geschichte des Internationalprivatrechts. Von den Anfängen bis zu den grossen Kodifikationen. By Max Gutzwiller. Basel and Stuttgart: Helbing & Lichtenhahn Verlag, 1977. Pp. xvii, 326. Index. I

Max Gutzwiller, renowned Swiss jurist and authority on conflict of laws, has written a history of private international law from the beginning to the turn of the eighteenth century, when the Prussian, French, and Austrian Codes appeared. The general histories of conflict of laws are almost a century old, written before the contributions by Neumeyer, Meijers, and Krcmár on the early centuries, by Kollewyn on the nineteenth century, by Gamillscheg on Dumoulin, and the many other works of individual statisticians, notably of the French and German schools.

The author's interest in conflicts history and, in particular, the history of private international law goes back to his student days. His Bonn 1916 doctoral thesis was on Italian and French statisticians. In 1929, he did a course on the history of private international law at the Hague Academy of International Law. In the 1940's, he wrote on a legal opinion of Baldus. Now a very active practitioner, he decided on a return visit to the old masters. He found much to be learned in this visit and so will the grateful users of the work. The book covers antiquity, the precursors and founders of the statist theory: Aristotle, Baldus and the epigones (Dumoulin is dealt with in a separate chapter), the French, Dutch and German "schools," as well as the writers of the eighteenth century, and includes an excursus covering modern statist authors. The volume ends with a helpful summary of over 100 pages, also presented in French and English translations. An appendix provides a translation of Latin quotations into German.

The statist theory, dividing laws into personal and real, the personal having effect everywhere and the real having effect only territorially, need no explanation to the American conflicts specialist. A critical appraisal is in Story's *Commentaries on the Conflict of Laws*. Story, for the benefit of the Livermore tract on the statisticians, published in New Orleans in 1829, and had access to the Livermore book collection which had been at Harvard. Story's own doctrinal option was for the more flexible approach of the Dutch "school" comity theory as developed by Huber. However, he did not fail to note that "from its generality it [the comity theory] is behind many grave questions as to its application."

The Gutzwiller volume comes at a time of considerable disarray in the doctrinal camp. On the Continent, beginning in 1849, the statist theory was replaced by the teaching of Savigny. Even

relation has a seat, the theory goes, and the law in force at the seat governs the relation. But the Savigny era is over, too. Often the "seat" is not identifiable, and there may be more than one seat; furthermore, the blindfolded jump into the seat jurisdiction prevents examination of the relevant substantive rules which may not even be in conflict. As for the common law world, the once dominant Dicey-Beale vested rights theory has long been laid to rest. The question is what, if anything, comes next.

In his introduction to the volume, Gutzwiller repeats what he had said in the Hague Academy course in 1929 that "en droit international privé l'histoire est tout." He suggested that a progressive effort in the development of governing principles was involved through the collective work of Italian, French, Dutch, German, and other scholars. All were writing in Latin, turning the field into an international endeavor, which for centuries had the same point of departure and used a common method and reasoning. In the commentaries and consultations of the epigones, the famous predecessors were quoted. An illustration is, of course, furnished by the quotations in Story's *Commentaries*. If the statutist classification did not work, still the jurists endeavored to come up with reasonable results. How they worked, what points of reference were used, how general rules developed is explored by Gutzwiller, making the treatise an important if not indispensable tool for scholarly work in the field. If it is too much to hope for an English translation, at least the summary could be made available in a revised English version.

Not all secondary sources meriting mention are referred to in the volume. Probably unavailable in Europe, the Livermore tract of 1829, subject of the valuable study by De Nova in the *American Journal of Legal History* of 1964, is not mentioned; nor is the volume by Chabaz Henry, published in London in 1823, which has a sketch of the statutist theory and is little more than a translation of Boullenois' *Dissertations* in Story's correct evaluation. No reference has been found to Hessel Yntema's study of the comity doctrine, first published in the *Dölle Festschrift* and thereafter reprinted in the *Michigan Law Review* of 1966. To Gutzwiller's list of modern conflicts textbooks with historical introductions, the A. E. Anton treatise, Edinburgh 1967, could have been added if only because of Anton's account of the use of the statutists in Scotland. Probably not yet available was the well-documented study of Bouhiér by Hughes Richard in the [1973-1974] *Mémoires of the Société pour l'Histoire du Droit et des Institutions des anciens pays bourguignons, comtois et romands*.

KURT H. NADELMANN
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Legal Reform in Occupied Japan: A Participant Looks Back. By Alfred C. Oppler. Princeton: Princeton University Press. 1976. 345 pages.

This is a unique book in many ways. Written in part as autobiography, it covers one of the most exciting postwar periods—the occupation of Japan and the specific problems that it presented to the victors.

Oppler, a refugee from Nazi Germany, where he had held a high position in the administrative judiciary, worked in the Foreign Economic Administration, where he drafted guides and handbooks for use in the forthcoming occupation of Germany. After V-J Day he joined General MacArthur's Tokyo headquarters, which had requested a person with German judicial experience, since the existing Japanese law was largely based upon German law.

The first task was the drafting of a new Constitution. The price which the Japanese had to pay for keeping the imperial constitution and Emperor Hirohito was the acceptance of a far-reaching transformation of the governmental structure as well as of the Emperor to a mere symbol.

On November 3, 1946, the new Constitution was promulgated by the Emperor in a solemn meeting of the Diet. Article 88 of the document provided that all laws contrary to its principles would become null and void at the date of its coming into force. It was clear that a complete revision of the basic codes within the remaining six months was impossible. To fill the resulting vacuum, personal bills might be submitted to the Diet for a brief duration. Only the Court Organization Law had to be passed, and actually was passed, within the six-month period.

The necessary institutional reforms offered themselves, so to speak, on a silver platter of codified German law: first, to create an independent judiciary, and second to implement the safeguards of fundamental rights (Chapter 8, pp. 85 *et seq.*). Substantive law did not call for a change in the first three books of the Civil Code, namely General Provisions, Real Property, and Obligations. Changes were required in the fields of family and inheritance law, however, where the institution of the "House" granted the oldest male of the clan important powers over the family members and their property. The revised Code of 1947 has done away with this antiquity. The inferior position of the wife with regard to her property was also abolished. The Criminal Code, which likewise followed European models, did not require a thorough reform.

The courts were subordinated to the Ministry of Justice, which, while it could not interfere directly with the judges' decisions, had sufficient powers to influence the judicial functions indirectly; the judiciary was treated as just another group of civil servants, inferior to high administrative officials. Oppler explains this in part by the dislike which the Japanese have of litigation and their preference for mediation, conciliation, and compromise instead of quarrelsome individualism. The little use made of the courts is reflected in the very small number of lawyers relative to the population.

For the period of transition, Oppler was appointed chief officer of a legal unit charged with carrying out the reform required by the new Constitution.

In 1950 Oppler was appointed guide for the so-called Supreme Court Mission under Chief Judge Tanaka Kotaro. The Mission, consisting of three outstanding Japanese lawyers and two judges, travelled all over the United States and had numerous opportunities to see American justice in

action in every type of tribunal, in court proceedings, and in administrative agencies. They visited law schools and met with bar associations. The outstanding event was their visit to the Supreme Court, which was not just a formal reception. It was a full day's meeting including attendance at an antitrust case and discussions on how to avoid overcrowding a Supreme Court. The governments of the two countries were deeply satisfied with the success of this ambitious mission.

M. MAGDALENA SCHOCH
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The Arab Oil Weapon. By Jordan J. Paust and Albert P. Blaustein with Adele Higgins. Dobbs Ferry: Oceana Publications, Inc.; Leiden: A. W. Sijthoff, 1977. Pp. vii, 370. \$27.50.

While military coercion must remain a major preoccupation of the international lawyer, the last two decades have witnessed growing concern over the use of economic coercion. This concern became acute when, in 1973, the Arab nations used an embargo on oil supplies to coerce Western powers to modify their policies in the Middle East, specifically in relation to the Arab-Israeli conflict.

The present book provides an excellent teaching tool to enable students to view the implications of the conduct of the Arab oil nations, and subsequently of OPEC itself, in a broad context. It contains the basic source material: a chronology of events, resolutions and documents from OPEC, the texts of relevant UN documents and treaties, and various statements of position from the U.S. Administration. Against this source material, there are nine articles by way of commentary, too varied in substance to permit detailed comment within the restricted space of this review.

Readers will be familiar with the articles by the present authors, Paust and Blaustein, and by Shihata in the *Journal* for 1974.¹ In this book Paust and Blaustein reprint the earlier articles and add a new and spirited reply to Shihata. This reviewer remains unconvinced that Article 2(4) of the Charter is the appropriate norm to determine the illegality of the embargo, but Paust and Blaustein are certainly right to question Shihata's reasoning on three counts: (1) the justification of the embargo against states which were politically "neutral" in the Arab-Israeli conflict; (2) the characterization of contracts for the supply of oil as "favors," which may be withdrawn at will; and (3) the suggestion that the UN Charter or resolutions do not apply to belligerents. It is to be hoped that Shihata, the ablest of the advocates of the Arab position yet to appear in print, will write a rejoinder.

Richard Lillich, in an article previously published in substance in the *Virginia Journal of International Law*, is more concerned with the future rules needed to regulate economic conduct. Timothy Stanley takes a broad and sensible look at the equity of resource distribution and, like Lillich,

¹ Paust & Blaustein, *The Arab Oil Weapon—A Threat to International Peace*, 68 AJIL 410 (1974); Shihata, *Destination Embargo of Arab Oil: Its Legality under International Law*, *id* at 591.

looks to the future development of rules as a preferable alternative to naked power. Ambassador Amuzegar writes a very lucid description of OPEC's role and, in contrast to the early justifications for the 1973 embargo, views OPEC's policies exclusively in terms of an attempt to secure fair prices.

Robert W. Tucker, with his customary courage and insight, discusses the possibilities of Western military intervention to secure oil supplies. His article is not so much about law as about the factors which may argue for or against intervention and his conclusions are pessimistic. Andrew Tobias raises the same problem, with somewhat more optimistic conclusions. Finally, John H. Jackson begins by a critical look at the 1974 Trade Act but then turns to an equally critical assessment of the mechanisms for regulating international trade. He concludes more optimistically than either Tucker or Tobias.

All in all, this is a rich and varied selection which, like all such publications, does not contain a central thesis but rather focuses on a central problem. The problem is so important that the book merits a warm welcome.

D. W. BOWETT

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International Rivers: The Politics of Cooperation. By David G. LeMarquand. Vancouver: Westwater Research Centre, University of British Columbia, 1977. Pp. vii, 143. Index. \$4.95.

As the subtitle indicates, this study is concerned with the political, rather than the legal, factors involved in reaching agreement in international river controversies. Nevertheless, it accepts as obsolete the Harmon Doctrine that a state has a legal right to do as it chooses with a river flowing through its territory without regard to the harmful effects to upstream or downstream riparians. It also accepts that, in the distribution for consumptive use of limited supplies, the principle of equitable apportionment has won judicial approval. The study focuses on the political problems that stand in the way of agreement between even those states that have renounced the Harmon Doctrine and have espoused the principle of equitable apportionment. The author's thesis is that, notwithstanding acceptance of the legal norms, an understanding of the political problems that impede agreement is a prerequisite to cooperative enjoyment of a common river resource.

In the past the problems involved the use of rivers for navigation and of their waters for municipal purposes and irrigation. These uses remain important, but other uses have gained importance and have multiplied the issues in controversy. They are described with reference to the negotiations respecting four rivers. The issues of the Colorado are drainage of saline supplies in Arizona which are harmful to irrigation in Mexico and drainage in Colorado which is harmful to Arizona and California; the issues of the Columbia and Skagit are hydroelectric power in the State of Washington coupled with storage in British Columbia; and the issues

of the Rhine are pollution by French and German cities and industries.

The account of each river is so well done that the reader's interest grows as the story unfolds. And it is the politics that absorbs one's interest. This is particularly true in controversies between states with a federal system of government, where local interests may have little in common with the international responsibilities of the nation.

This scholarly work analyzes the problems raised and then goes on to suggest solutions. It does this by describing experiences which teach us how to reconcile differences and get results in seemingly insoluble situations. The obstacles to agreement are not confined to parochial, environmental, industrial, and occasional overreaching national interests. In some river negotiations, agreement has been delayed because the government of one or the other country was not strong enough to defend internally an equitable solution, *i.e.*, one that was less than a victory over an opponent.

The author has rendered a most useful service. His research and analysis should help resolve present and future river controversies, and in any event his narratives make good reading.

JOHN G. LAYLIN
District of Columbia Bar

Traité de Droit international public de l'espace. By Marco G. Marcoff.
Sponsored by the Swiss National Foundation for Scientific Research
and published by Fribourg University Press, Fribourg-Geneva-Paris-
New York, 1973. Pp. 835. Index. \$25, F.90, £10.

Twenty years have passed since the day the Soviet Union astonished the world with a successful launching of the first artificial earth satellite, Sputnik I. During the intervening period we have witnessed a seemingly endless series of spectacular feats of space technology: the launching of more than two thousand satellites; voyages through outer space by dogs, monkeys, insects, and by scores of men and one woman (since the historic flight of Y. Gagarin in April of 1961, 83 astronauts have experienced space travel); the establishment of a worldwide system of satellite telecommunications serving 130 nations; the landing of man on the moon, possibly the greatest technological achievement of all time; resolution of the centuries-old mystery of life on Mars (there isn't any); the introduction of a satellite-based global meteorological network; journeys through the solar system of manmade scientific laboratories sending back to earth thousands of photographs and other priceless data from distances millions of miles away; and many other technological marvels and scientific discoveries.

At least two dozen books and many hundreds of articles on space law have been published to date, all too many of extremely limited usefulness. In this forest of contributions, Marcoff's monumental volume easily stands out. Marking the end of a period of maximum productivity in the field of space law literature, it represents a staggering individual accomplishment (690 pp. of original text), vast in scope and well above average in quality.

The book is soundly conceived, logically organized, and extremely well researched. All issues are presented lucidly and impartially and no piece of relevant information (with the regrettable exception of the 1972 UNESCO "Declaration of Guiding Principles" on the use of direct broadcast satellites) has been overlooked. Marcoff's fourteen chapters cover virtually every aspect of space use amenable to legal regulation and include discussion of the definition and place of space law in international law; history and sources of space law; legal nature and the definition of outer space domain; the scope of the principle of freedom of outer space; the legal regime of space objects and international liability for damage caused by space activities; legal status and structure of Intelsat and Intersputnik; problems of remote sensing activities conducted by satellites; international outer space cooperation as well as the regulation of the exploration and utilization of celestial bodies.

Within the confines of a short review it would be difficult to single out any particular section of this book for special scrutiny, partly because the presentation throughout is accurate and well balanced and partly because of the author's tendency to avoid controversial stands or depart too far from the conventional approaches. A few examples taken from the sections of the book analyzing the more important current issues of space law will illustrate the latter point. Marcoff's suggestion that the boundary separating airspace from outer space be placed somewhere between 80 km and 200 km. (p. 325) will hardly startle anyone familiar with the problem; the current search for an acceptable formula to govern the dissemination of data collected by remote sensing satellites will be neither hindered nor facilitated by the author's conclusion that, on the one hand, internationalization of such activities is most improbable and, on the other, that their continuation on a unilateral basis is bound to cause aggravation of international relations (p. 578); nor is the plea for a fair distribution of "parking slots" in the geostationary orbit among all states, "without preferential rights," particularly original (p. 619). As a matter of fact, since the publication of Marcoff's work several equatorial states have formally asserted that this orbit represents a natural resource of the subjacent nations and should therefore fall under their sovereignty. Inevitably, there are in this volume other examples of dated information, a phenomenon common to most contemporary writings on rapidly evolving international law and state practice. Thus among other omissions the book contains no reference to the European Space Agency (established in 1975), to the Registration of Spacecraft Convention, or to the principles relating to remote sensing of the earth by satellites agreed upon in the UN Outer Space Committee. Fortunately, the value of the book as a whole has been thereby only marginally impaired for the author anticipated most of these events.

On the assumption that the principal objective of Marcoff's effort was to provide a comprehensive survey of the past, present, and probable future problems of space law rather than to experiment with new approaches and seek new solutions, he has achieved his goal. Extensive bibliography (55 pp.), an index, and three annexes reproducing the texts

of the basic space law conventions enhance the utility of this massive and handsome volume.

IVAN A. VLASIC

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International Telecommunications Agreements. Volume 1. By Gerd D. Wallenstein. Dobbs Ferry: Oceana Publications, Inc., 1977. Looseleaf Service (with supplementation to be announced). \$75 per volume (3 volumes projected).

While the proliferation of international organizations still continues apace, our knowledge of this phenomenon and its impact on the relations of states still tends to lag. The reason for this unfortunate situation does not lie in the lack of well-qualified political scientists and international lawyers, but in the lack of information about the agencies themselves. With the exception of the United Nations and one or two more of the better known organizations such as UNESCO, there does not exist a convenient network of depositories for official documents. The cost of subscribing to all of the published material from even the Specialized Agencies would place an impossible strain on even the richest of public or private libraries. Consequently, the individual researcher has no alternative but to go to the Library of Congress.

One of the two main purposes of the present volume, the first in a projected series of three, is to help close the information gap of this extremely important international organization by putting "on record what the I.T.U. has accomplished." To attain this objective, Gerd Wallenstein offers us a reproduction of the 1932 and 1973 ITU Conventions, or basic treaties; a copy of the 1975 edition of the Resolutions and Decisions of the ITU's Administrative Council; and three short articles previously published in the ITU's official house organ, the *Telecommunication Journal*, one on radio frequency allocations for space telecommunications, one on compatibility requirements of a worldwide telephone service, and one on overcoming language barriers in the work of the ITU.

The second objective of the series is to prove that the ITU's "agreement making" system can serve as "a model for international collaboration in functional fields." Wallenstein provides us with a 256-page treatise, the title of which is "Collaboration Without Coercion: The I.T.U. As a Model for Worldwide Agreement-Making." The impression is given that this work is essentially a doctoral thesis presented recently to Stanford University by the author. In it the author draws upon knowledge from a number of disciplines including law, the humanities, social science, and physical science to support his hypothesis.

Despite a number of imperfections that could have been eliminated or corrected, Wallenstein has made a good start in closing an important gap in our knowledge of an important international organization and has provided us with a provocative hypothesis which deserves close attention by all those who feel that international organizations have a useful role to play in interstate relations. Although its ultimate worth will depend upon

what is offered in Volumes II and III, it must be admitted that he is performing an important service and, although the price is stiff, this volume should be found in all libraries where there is a strong interest in international law, international organization, and telecommunications in particular.

GEORGE A. CODDING, JR.
University of Colorado

L'entreprise multinationale face au droit. By Claude Lazarus, Charles Leben, Antoine Lyon-Caen, and Bernard Verdier. Paris: Libraries Techniques, 1977. Pp. xi, 453. Index. F.96.

This book brings together the efforts of one economist and three lawyers to consider the problems of effectively regulating the multinational business corporation. The method attempted is praiseworthy, since too many laws regulating business are based on unsound economic analysis. The book was written as an official research project of the University of Paris (Law, Economics and Social Science) under the supervision of Berthold Goldman (the foremost French authority on corporate law), and Phocion Francescakis (Research Director of the French National Council on Scientific Research), whose impressive credentials are well known.

The study is careful and displays a thorough knowledge of the literature on multinational corporations, particularly in the economic sphere. In the legal area, the book relies too heavily on French cases and legal authorities, and one wonders at times what position, for example, German jurists may have taken on the problems involved.

Despite the thorough review of the literature, the economic analysis seems unsound. The authors take the debatable view that classical economic theory is inadequate to explain the multinational corporation. As an economist, this reviewer was not persuaded by the book's argument. The economic analysis exaggerates the strength of the multinational corporations, for in truth national regulation can easily weaken them, provided national governments really want to do so; that is to say, to give up the benefits derived therefrom. More importantly, however, all four authors approach the multinational corporation as an essentially harmful development which has thus far evaded remedial political regulation by malign cunning and overwhelming economic power. Space in this short review is inadequate to argue the invalidity of that perception.

The treatment of particular legal subjects which include the nationality of corporations, the allocation of revenues for tax purposes, the application of national labor and social security laws, and an analysis of national and European Communities antitrust law is commendable, but the detail of these chapters does detract from the thrust of the book's argument. There is a good concluding chapter on the efforts to regulate multinational corporations through the United Nations.

The legal studies tend to be hamstrung by certain European conceptual fixations, such as an overemphasis on the place of the corporate home office, and on the role of *intracorporate* transfer prices for tax purposes.

European lawyers continue to find enormous difficulties in these problems which the American legal system settles by routine allocation formulas that ignore the corporate home office and intracorporate transfers completely. In fairness, however, this fault of the book may be attributable to the prevailing attitude of European lawyers to the subject matter and not specifically to the authors.

In conclusion, the book is recommended as essential to those concerned with multinational corporations because: (1) it contains coherent, detailed analyses of many important legal problems; and (2) it is representative of widely held attitudes and perceptions unsympathetic to the multinational corporation. Corporate officers, politicians, and lawyers working in this area must reckon with this unfriendly outlook, however debatable it may be. In the intellectual tradition of Colbert, the book contrasts beneficent state regulation to asocial private commerce.

ANDREW WILSON GREEN
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Foreign Relations of the United States, 1950. Vol. III: Western Europe. (Dept. of State Pub. 8888). Washington: U.S. Govt. Printing Office, 1977. Pp. xiii, 1840.

Secretary of State Dean Acheson said in his memoirs that decisions were made fast in 1949, but that problems came faster in 1950. This volume deals with those problems.

The volume contains messages and their enclosures, diplomatic drafts, preparatory papers for conferences, plans for existing international entities or for others to be created, and evaluations of economic and military situations. The dispatches originated during 1950 in the United States diplomatic, economic, and military missions in Western Europe, and in the Department of State in Washington. Their major topics are: Military Assistance for Western Europe and the North Atlantic Treaty Organization, the Economic Recovery of Western Europe, the Foreign Ministers' Conferences in London and New York uniting Acheson with Britain's Bevin and France's Schuman, and the relations of the United States with individual countries of the region. Here large sections are devoted to England and France and few, but poignant, pages to the other nations of the area.

The material reflects the general concern about the hostility of the Soviet Union, possessor of the same deadly weapons for which the United States once had a monopoly. The negotiations on NATO stand under these auspices. In the same vein and with varying sympathy is the view maintained that Germany must join the Western World as a full ally. NATO must be organized as a truly international organization and force, before which national schemes must recede. A strong economic underpinning is unwaivable. U.S. military aid and economic assistance are conceded. Regional organizations such as the Organization for European Economic Cooperation (OEEC) including the European Payments Union

(EPU) are encouraged and supported by the United States, which associates itself with Canada in some of the organizations' work. The European Coal and Steel Community, unveiled to Secretary Acheson in Paris on his way to the London Foreign Ministers' Conference as the Schuman-Monnet Plan, has his enthusiastic support, the cool reception of his British colleague, and, as we learn indirectly, the impatient echo of Germany's Chancellor Adenauer. It is Germany's reentry into the Western World.

Worries about France's Indochina war, the Korean conflict, Spain's attitudes, and hopes to deneutralize Switzerland are recounted. Norway's close relationship with Sweden, as between a NATO and a non-NATO member, often poses a question, as does the need for a change of U.S. attitude towards the United Kingdom from a political, cultural, and historical stance to that of a close traditional tie only in the light of the rising importance of continental Western Europe.

The editing of the volume is impeccable; the charts, such as that of the North Atlantic Treaty Organization, and the glossary of abbreviations and symbols are invaluable; so are the editorial notes. A work of great scholarship, its contents are of immense interest.

SIEGFRIED GARBUNY
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Foreign Relations of the United States, 1950. Vol. VI: East Asia and the Pacific (Dept. of State Pub. 8858). Washington: U.S. Government Printing Office. Pp. x, 1581. Index. \$16.

This volume covers the whole range of U.S. relations with the Far East with the exception of Korea, which is treated in Volume VII. Volume VI opens with a section of 188 pages on general policies in the area, including military and economic assistance and the question of security arrangements. In talks in London in May, the U.S., British, and French Foreign Ministers agreed that the security of Southeast Asia was primarily a British-French responsibility and that U.S. assistance would be supplementary only. The ability of the Communist leaders to play down their party affiliation and to equate their movement with nationalism made it difficult to combat the threat of communism in Southeast Asia. This was especially true in Indochina.

Documentation on "The China Area" (434 pages) records uncertainties and divisions of opinion regarding U.S. policy toward the Republic of China on Formosa and the Communist regime on the mainland. It indicates little support for Formosa among Department of State officials, but a more favorable attitude among the military.

A CIA intelligence report based on information received prior to February 20 estimated that the Chinese Communists had the capability of carrying out their frequently expressed intention to seize Formosa and would probably do so during the period June to December. Intelligence agencies of the Department of State concurred in this estimate; those of Defense dissented. Reports regarding mainland China were sketchy because of the lack of diplomatic relations, although consular offices were

maintained until April, when they were closed and American personnel withdrawn because of continued violations of American rights. On January 5, President Truman issued a public statement that the United States would not provide military aid or advice to the Chinese forces on Formosa, although economic aid would continue. On June 22, Dulles reported from Tokyo that General MacArthur believed that domination of Formosa by an unfriendly power would be "a disaster of utmost importance to the U.S." (p. 366) and recommended that a study should be made without delay of the requirements to prevent such domination.

The outbreak of the Korean War on June 24 drastically affected U.S. relations with both the Nationalist Chinese Government and the Communist regime on the mainland. On June 27 President Truman issued his declaration ordering the Seventh Fleet to prevent an attack against Formosa and calling on the Chinese Nationalist Government to cease air and sea operations against the mainland. He declared the future status of Formosa must await the restoration of security in the Pacific, a peace settlement with Japan, or consideration by the United Nations. On July 19 Defense recommended that the Chinese Nationalist Government be authorized to purchase with its own funds any matériel needed, including tanks and jet aircraft, and that shipment of such purchases should be expedited by U.S. assistance. Secretary of State Acheson concurred on July 24.

On July 27 the Joint Chiefs of Staff (J.C.S.) strongly recommended that, irrespective of the situation in Korea, the United States continue the present policy of denying Formosa to Communist forces, that adequate U.S. forces be prepared to counter Communist expansion, that the present policy of withholding military aid to Chinese forces on Formosa be modified to permit such aid, and that a survey of Chinese military requirements be made. The J.C.S. recommendations were discussed at a meeting of the National Security Council, President Truman presiding, and were approved in principle by the President. There was no important change in policy for the rest of the year.

Following an early August visit to the Chinese Nationalist Government, General MacArthur told the Political Adviser in Japan of his "definite impression of deep resentment in Chinese official circles resulting from what was taken to be an attitude of general hostility on the part of the State Department representatives in Taipei" (p. 415). MacArthur believed there was a failure to establish a degree of confidence and cordiality which is so essential to diplomatic success and was concerned over the adverse effect this situation might have on his efforts to maximize military cooperation. In reply to the report of this conversation, Acheson telegraphed: "I assume you did not fail to remind General MacArthur of long standing efforts [of] Chi Nats to attempt to discredit US officials mil[itary] and civilian maintaining independent viewpoint or faithfully executing US Govt policies unpalatable to Chi[na]" (p. 418).

On December 3, the United States extended controls over all exports to mainland China (p. 676). Disagreeing with a recommendation by the Department of State, which wanted delay for possible international action,

the J.C.S. recommended on December 13 that the U.S. Government "undertake at once [a] full unilateral trade embargo, together with financial freezing measures against Communist China." The National Security Council accepted this recommendation and at midnight on December 16 the United States placed under control all Chinese Communist assets within U.S. jurisdiction and prohibited all vessels of U.S. registry from calling at Chinese Communist ports.

The U.S. and British Governments discussed referring the question of the status of Formosa to the United Nations and on October 11 the U.S. Representative at the United Nations transmitted to Washington a British draft resolution to establish a commission to study the problem and make recommendations for the future of Formosa. A slight revision of this draft was sent to the U.S. Delegation on October 14 with the statement that the Department of State believed that the British draft offered a satisfactory basis for a General Assembly resolution regarding Formosa. A further revision was sent to the Secretary of Defense and to the U.S. Delegation at the United Nations on November 11. The draft resolution cited the Cairo Declaration regarding the return of Formosa to the Republic of China but did not cite the Japanese surrender terms accepting that Declaration. The draft stated that no formal act restoring sovereignty to China had yet occurred. Reference to the administration of the island by the Chinese Nationalist Government was made in one draft but this was omitted in the draft of November 11.

After discussion of the draft resolution in meetings of the U.S. Delegation on November 14 and 15, Austen and Dulles telegraphed the Secretary of State that there was virtually unanimous opposition in the Delegation to the resolution as drafted. It was felt that the resolution was slanted toward giving Formosa to Communist China. In a meeting of the First Committee of the General Assembly, Dulles proposed that debate on Formosa be deferred. This was accepted and the question was not taken up again in 1950.

The section on Indochina (272 pages) covers the establishment by France of the states of Laos, Cambodia, and Vietnam as members of the French Union and the beginning of U.S. involvement in economic and military aid. The United States and the United Kingdom recognized the three new governments, while the USSR and Communist China recognized the rebel movement under Ho Chi-Minh.

On February 22, Alexandre Parodi, Secretary General of the French Ministry of Foreign Affairs, told U.S. Ambassador Bruce that the effort in Indochina was such a drain on France that long-term U.S. assistance was necessary. Otherwise France might be forced to withdraw from Indochina. The Department of State prepared a report dated February 27 concluding that State and Defense should prepare a program of all practicable measures to protect U.S. security interests in Indochina. This report was adopted by the National Security Council on April 18 and approved by President Truman on April 24. On May 1 the President authorized the use of certain funds for aid to Indochina and requested

the Secretary of State to submit an estimate of further economic and military aid needed. State and Defense agreed upon a program of military assistance to France and the Associated States and estimated that the amounts needed would total \$31,000,000. This amount was allocated by President Truman in installments in May, June and July (p. 835).

Ambassador Bruce reported on August 17 that René Pleven, the French Premier, had told him that the only possible solution to the situation in Indochina was to build up a strong native army which would make possible the gradual withdrawal of the French Army for service in Europe. He appealed for U.S. aid to finance this program. Active discussion on this appeal for aid continued for two months. Congress appropriated about \$500,000,000 for military aid in the Far East. On October 17, the Department of State announced that the major part of this sum was being used to provide military equipment for armed forces of both France and the Associated States in Indochina. On December 3, the United States, France, Vietnam, Laos, and Cambodia signed an agreement of mutual defense assistance.

The 290 pages on Japan deal largely with the question of a peace settlement. General MacArthur and the Department of State supported efforts to secure an early treaty. The J.C.S. was opposed for security reasons. The outbreak of the Korean War delayed advancement of peace proposals and emphasized the problem of security for Japan. The J.C.S. took the view that eventually Japan must prepare for effective self-defense and that the ultimate U.S. goal should be a rearmed and friendly sovereign Japan.

A memorandum of points for a peace treaty with Japan dated September 7 was agreed on by the Secretaries of State and Defense and approved by the President. Treaty discussions continued throughout the rest of the year, and a proposed U.S.-Japan bilateral security agreement was drafted to be signed at the same time as the peace treaty. A December 28 report by the J.C.S. Survey Committee strongly recommended that negotiations for a peace treaty with Japan should await a solution of the situation in Korea.

Other sections of this volume deal with Australia, Burma, Indonesia, the Philippines, and Thailand.

E. R. PERKINS
Washington, D.C.

The British Year Book of International Law 1974-1975. Oxford: Oxford University Press, 1977. Pp. xix, 525. Index. \$66.

The leading article in this volume on "Custom as a Source of International Law" by Michael Akehurst lays down the law on a complex topic with the directness demanded by limitations of space. The recent studies of customary international law by D'Amato and Thirlway have been of book length, and 53 pages are hardly adequate for the entire subject, including comments on the views of these and other authors. Dr. Akehurst supplements his article with an instructive note on "The Hierarchy of the Sources of International Law."

In a lengthy article, Guy S. Goodwin-Gill rejects the outdated view that a state has virtually unlimited power to expel aliens. The interests of the individual, including his family ties and his links with the state of residence, must be weighed in the balance with considerations of *ordre public* in determining the legality of an expulsion under international law. A remedy must be provided against unjustifiable expulsion, and the expulsion itself must be carried out with due regard for the human rights of the individual. Another article on human rights by D. J. Harris deals with "The Application of Article 6(1) of the European Convention on Human Rights to Administrative Law." The copious jurisprudence on the interpretation of the words "in the determination of his civil rights and obligations" is meticulously examined and analyzed. K. Lipstein describes "The Legal Structure of Association Agreements with the E.E.C." C. F. Amerasinghe, who has been an indefatigable exponent of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, here writes on jurisdiction *ratione personae* under the Convention. I doubt that any possibility has been left unconsidered.

A short period piece by Geoffrey Marston on "Some Legal Problems of the Channel Tunnel Scheme, 1874-1883" shows the lawyers of that time groping with problems of international and municipal law that are still alive today.

The ample case notes on decisions of British courts and of the Court of Justice of the European Communities, as well as decisions under the European Convention on Human Rights, are real analyses and not just digests. Messrs. Crawford, Carter, Harris, and Akehurst deserve a particular word of commendation on these. The volume also contains an unusually rich array of book reviews.

On the whole, this volume is somewhat less lively than usual. The length of articles in the *British Year Book of International Law*—one in this volume exceeds 100 pages—has always provided an opportunity for a fuller examination of legal questions than is permitted by the modest thirty-page norm to which the journal seeks to adhere, but the availability of space sometimes permits a certain amplitude of expression, which can take its toll of the reader.

R. R. BAXTER

BRIEFER NOTICES

The Principle of Self-Determination in International Law. By W. Ofuatey-Kodjoe. (New York: Nellen Publishing Company, Inc., 1977.) This compact and well organized book is a useful addition to the literature of the controversy over the nature of self-determination and adds one more author to the growing numbers of those who have come to accept the erratic and at least potentially revolutionary doctrine as an international legal right.

In pursuit of the characteristics of international law to be found in the principle of self-determination, the author reviews familiar material in

examining the contrasts and similarities between the major periods in which self-determination has flourished, inevitably with primary emphasis on the aftermath of the two World Wars. As another approach, he proposes analysis of three theories of self-determination which he finds dominant in the time of Wilson and Lenin: the sovereign equality of all nations, the right of each homogeneous nation to form a state, and the plebiscitary right of the people to be consulted in any transfer of territory. The essence of self-determination as Ofuatey-Kodjoe sees it is the denial of the right to maintain or impose alien rule over a subject people. This constitutes an increasingly broader principle and legal right which in recent decades has moved from protection of minority rights and the mandates system after World War I to decolonization after World War II, at first in terms of an expression of the enlightened good will of the colonial powers but with growing recognition that the right of self-determination of subject peoples is a matter of legitimate international concern, with the United Nations playing an increasingly important supervisory role.

The most difficult problem which advocates of self-determination must meet is how to deal with the claim of a right of secession on the part of a community subject to alien rule—all the more so in the light of the author's charge that the issue of self-determination was always associated with violent conflict. To meet this danger in part, Ofuatey-Kodjoe contends that the right of self-determination renders any subjugation of other peoples an illegal act; but he is well aware that only the ruling elements in the multitude of new colonial demarcated states have achieved self-determination. He cites Bangladesh and Biafra as examples of the sheer savagery with which the demands of ethnic minorities will be fought, but he also sees the future of self-determination as associated with the protection of the human rights of all subject peoples and minorities.

Not the least of the virtues of the book, particularly for those who are newcomers to the field, are the nearly fifty pages of fine print devoted to notes, which cumulatively add up to being a valuable bibliography.

RUPERT EMERSON
Harvard University.

In the Face of the Nations: Israel's Struggle for Peace. By Yosef Tekoah. Edited by David Aphek. (New York: Simon and Schuster, 1976. Pp. 284. \$9.95.) This book was written by Israel's former Permanent Representative at the United Nations at the nadir of Israel's despair about that Organization. The General Assembly resolution deeming Zionism a form of racism matched, in Israeli eyes, the decision to grant observer status to the PLO. While Israel's views about the United Nations have not changed since that time, the general climate has been somewhat altered by President Sadat's visit to Israel. Already the bitter descriptions of the isolation and ostracism of the Israeli representative at the United Nations no longer hold true; the new Egypt-Israeli cordiality already extends to relations in that body.

This book is a collection of speeches made by Tekoah. It is partisan in the sense that it represents one deeply felt point of view. At the same time, it is deeply rooted in the Jewish culture. In the first section of the book particularly—"Self Determination for the Jewish People"—the author's sense of history and personal learning comes through strongly. The speeches dealing with the plight of Soviet Jewry or (upon the anniversary of the Warsaw Ghetto uprising) of the cultural value of memory are moving indictments. For Tekoah, Zionism is "the Jewish people's national liberation movement" and therefore the implacable hostility of the UN majority is all

the more bitterly resented. He does not address himself to the problem of a concept of national liberation by one people in a territory regarded by another people as rightfully its own.

The second main section of the book—"Israel and Ishmael"—is largely devoted to denunciation of the Egyptian position on the mid-East conflict. It is pleasing for a reviewer to be able to feel that its tone belongs to the past.

The third section of the book contains speeches which deal specifically with Israel's position in the family of nations. The speeches make sad reading, because they all reflect the deep belief that Israel cannot get a fair hearing at the United Nations. In 1968, speaking to the Security Council, he explained that, of the states around the table, five of them had no diplomatic relations with Israel and all five had unreservedly supported the Arab case. By 1975 eight Security Council members had no relations with Israel. Tekoah's addresses collected in this third section are interesting to the scholar as an example of a nation under duress, but which has nevertheless decided to use the international organization as best it may in the circumstances by explaining its own case, but even more by pointing to the partisanship of the other members. Inevitably, (and one would think unfortunately from Israel's point of view, though its domestic policy has been ambiguous on this) these speeches invite comparison with speeches of the South African government as it retreats into the *laager*.

ROSALYN HIGGINS
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at Canterbury*

The Procedure of the UN Security Council. By Sydney D. Bailey. (Oxford: Clarendon Press, 1975. Pp. xiii, 424. \$26.) This book follows an earlier volume by the author on Security Council voting.* It is the author's announced intention "to complete the trilogy" with a volume that deals with aspects of the Council's responsibility for peacemaking and peacekeeping. The present volume on procedure, like the earlier volume, and one can anticipate, like the one to follow, is the product of careful and thorough inquiry and is based on full documentation and consultation with responsible persons directly involved in the work of the Council.

In successive chapters the author examines the institutional framework of the Council; the convening and conduct of meetings; the role of the Secretary-General, the president, members, nonmembers, and various groups; the form of decisions and the way they are taken; and the Council's relations with other organs. In a concluding chapter, Bailey considers whether experience thus far calls for Charter revision, changes in the Provisional Rules, or new national policies. He comes to the sound and sensible conclusion that changes in the Charter and Provisional Rules, to the extent that they are practically achievable, are not likely to contribute significantly to making the Council more effective. The more promising course, he believes, is to "work for a more effective Security Council through changes in national attitudes and national policies, as States review their perceptions of national interest in light of national interests of others." He suggests ten areas of concern in which adjustments of national policy might help. All of his suggestions reflect a thorough understanding of the role of the Security Council in the United Nations and in international relations of today and in particular a sensitive appreciation of the restraints under which the Council functions.

* Reviewed in 65 AJIL 425 (1971).

The book contains invaluable tables giving in concise form information on a variety of relevant topics. It also contains useful appendixes, a select bibliography, and detailed references. Publishers often insist, and in any case strongly prefer, that references instead of being given on each page be brought together at the end of the volume, as has been done in this case. The reader who has occasion, as the practitioner and serious scholar normally would, to make frequent use of the references finds the arrangement anything but convenient. In this volume, largely because of the nature of the subject matter, the references are of special value in illuminating and supporting the points made, and the arrangement adopted does not facilitate their use.

LELAND M. GOODRICH
Columbia University

Annual Review of United Nations Affairs 1976. Compiled and edited by William A. Landskron. (New York: Oceana Publications, Inc., 1977. Pp. xii, 464. \$17.50.) The 1976 *Annual Review of United Nations Affairs* is vastly improved in organization over the two previous editions. It presents a comprehensive picture of the work done by the United Nations and items are covered in a coherent, logical arrangement. For each item the starting point is a specialized body dealing with the issue, then the major organ of the United Nations which considered it: the Security Council, Economic and Social Council, or the General Assembly. The table of contents is well arranged and very helpful.

This reviewer was not impressed with the Preface, which did not show a deep understanding of the major currents in the United Nations and world politics. For future editions it might be better if the Preface were written by an experienced student of United Nations affairs, such as Brian Urquhart, Oscar Schachter, or Leland Goodrich. I would also question the use of the heading "Middle East and Palestine" for the first issue discussed in the Political and Security section. Obviously Palestine is part of the Middle East rather than a separate area. One must also wonder whether the term includes the original Palestine mandate of which Jordan constituted 80 per cent, the West Bank and Gaza, or some secular state that would engulf Israel if the covenant of the PLO is ever realized. The text itself makes it clear what the General Assembly has discussed under the heading of Palestine; however, this reviewer would have preferred the simple title "Middle East." Such a section might also have included reference to the civil war in Lebanon, which was not discussed at the United Nations but was brought to the attention of members of the Security Council by the Secretary-General in 1978. Overall, however, this *Review* is highly useful and well edited.

SEYMOUR M. FINGER
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on the United Nations*

Gosudarstva na arhipelagakh. By G. G. Shinkaretskaia. (Moscow: izd-vo "Mezhdunarodnye otnosheniia," 1977. Pp. 104. 75 kopecks.) Mrs. Shinkaretskaia's monograph on archipelagic states, based on her dissertation for the *kandidat iuridicheskikh nauk* (candidate of juridical sciences), is a useful addition to the few Soviet works treating the subject. She takes a somewhat different approach from two of her colleagues who considered the problem in 1973: whereas O. V. Bozrikov had treated archipelagic waters essentially as a matter of delimitation¹ and L. V. Speranskaia had

¹ O. V. BOZRIKOV, PRAVOVYE VOPROSY DELIMITATSII TERRITORIAL'NOGO MORIA (1973).

dwelt upon the uses of such waters.² Shinkaretskaia is disposed to favor a regime for archipelagic waters that accommodates both international community and coastal state interests. One no longer "defines" archipelagoes, she says, but ascertains their special regime. She outlines both the geographic and historical requirements of an archipelago, noting that historic rights may appertain also to nonarchipelagic states, and distinguishes between mid-ocean and coastal archipelagoes in doctrine and state practice. Some attention is given to principles of delimitation, including the use of astronomical boundaries (which, the author notes, have been used to delimit the Soviet sector in the Arctic). The final chapter reviews the concept of archipelagic waters and straits laid down in the various stages of the negotiating text being drafted at the Third UN Conference on the Law of the Sea. Considerable use is made of original Indonesian source material, which is critically evaluated. No specific mention is made of possible uses of the archipelagic concept off Soviet coasts, neither in the Arctic nor the Baltic, where in earlier days some Soviet jurists had advocated its application.

W. E. BUTLER

University of London

Staatsangehörigkeit, Soziale Grundrechte, Wirtschaftliche Zusammenarbeit nach dem Recht der Bundesrepublik Deutschland und der Volksrepublik Polen. Referate des Rechtskolloquiums 1974. Edited by Józef Kokot and Krzysztof Skubiszewski. (Berlin, Heidelberg, New York: Springer-Verlag, 1976. Pp. 293. DM 59, \$24.20.) This volume continues the excellent European tradition of organizing binational meetings on select legal themes (Rechtskolloquiums in Germany, journées d'études in France and Belgium) at which experts from both sides report on the state of the law on a designated subject in their own legal system. Apart from increasing the flow of legal information across frontiers, such exchanges stimulate comparison of the respective experiences and debate about the relative merits of the different techniques of legal regulation of social problems.

The present account contains the papers read at a joint conference in Warsaw in 1974 of West German and Polish law specialists, the agenda for which featured three main topics: nationality and the diplomatic protection of citizens; basic social rights; economic cooperation. The first rubric contains two reports, each by the West German and Polish participants dealing with the definition of a German and German nationality in Bonn law; Polish citizenship—fundamental principles, acquisition and loss; exercise of diplomatic protection for Germans; and the diplomatic protection of citizens. The second portion consists of two West German and three Polish studies on the principle of basic social rights and its realization in West German law; basic social rights in international treaties to which West Germany is a party; the role of the employees in the management of enterprises; basic social rights in Poland; and basic social rights and the treaties of Poland. The last section includes two Polish and two West German essays addressed to economic cooperation between Poland and the FRG in the light of international treaties; economic cooperation between the FRG and Poland in the light of their mutual treaty ties; legal problems of contracts of cooperation between Polish enterprises and West German companies, and domestic legal regulations in the FRG governing economic cooperation between the FRG and Poland.

² L. V. Speranskaia, *Mezhdunarodno-pravovoi rezhim vod arkhipelagov*, 9 SOVETSKOE GOSUDARSTVO I PRAVO, 109-15 (1973).

As might have been expected, and as the participants themselves acknowledge, the reports and ensuing discussions of the citizenship/nationality problem on which the official positions of the two sides remain farthest apart provoked intense controversy. By contrast, on the themes of social rights and economic cooperation, there was considerable common ground and the discourse here was marked by a high degree of consensus. Even where opinions differed, however, all seemed to think that the dialogue had been very worthwhile and, indeed, it was noted that just the willingness to talk about issues on which attitudes diverged was a major step forward compared to the past.

It would behoove academic circles in the United States to follow suit and arrange regular roundtable contacts with their colleagues in Eastern Europe to air views on subjects of professional interest to all concerned.

GEORGE GINSBURGS
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School of Law

La defensa jurídica y social del patrimonio cultural. By Alejandro Gertz Manero. (Mexico: Archivo del Fondo, 1976. Pp. 204. \$ Mex. 15.) This is a very useful reference book for those interested in the protection and international movement of Mexican antiquities and other cultural property. The author discusses Mexican laws, past and present, in their historical and philosophical contexts, with illuminating commentary on the political dynamics involved. Most of the book is, however, devoted to a comprehensive collection of Mexican legislation dealing with cultural property, from a 1523 decree of King Charles II of Spain to current legislation, regulations, and treaties to which Mexico is a party.

The author, who as a Deputy Attorney General of Mexico has been instrumental in drafting and enforcing Mexican laws on cultural property, was a controversial witness in the landmark case of *United States v. McClain*, 545 F. 2d 988 (5th Cir. 1977), *rehearing denied*, 551 F. 2d 52 (5th Cir. 1977), which involved the prosecution of five defendants under the National Stolen Property Act, arising out of transactions concerning pre-Columbian artifacts exported from Mexico contrary to that country's law. In an opinion denying a petition for rehearing of its decision to remand the case, the Fifth Circuit Court of Appeals, *per curiam*, lamented the quality of legal briefing and noted that on remand experts on Mexican law would "have an opportunity to correct any misconstruction of which this Court may have been guilty in venturing forth in the arcane field of the Mexican law of pre-Columbian artifacts." Although the Fifth Circuit held in its first opinion that Dr. Gertz's construction of a key 1897 law was in material error, those familiar with *McClain* will appreciate the very substantial contributions his legal materials and commentary make toward clarifying an internationally important, though perhaps "arcane" field of law.

JAMES A. R. NAFZIGER

Seabed Mineral Resources and the Economic Interests of Developing Countries. By Danny M. Leipziger and James L. Mudge. (Cambridge, Mass.: Ballinger Publishing Company. Pp. xxviii, 234. Index. \$17.50.) This book deals with two separate subjects: (1) the exploitation of hydrocarbon resources from the continental shelf and (2) exploitation of mineral deposits from the deep ocean floor beyond the continental shelf. It is essentially an economic treatise, and the authors' stated intent is to provide an economic analysis of these two major law of the sea issues to complement existing legal, political, and technical treatments of the issues.

For each subject, the authors first discuss the nature and distribution of the resource, as well as the technology of exploitation. They then focus on the principal theme of the book, viz., the impact of the particular resource (and its exploitation potential) on the economies of underdeveloped nations. A variety of systems for the disposition of benefits from both hydrocarbon and seabed mineral exploitation are discussed and analyzed. This treatment of revenue sharing, by avoiding rhetoric over the philosophical aspects of the transfer of ocean wealth from rich to poor nations, provides some very useful analysis for considering the desirability and potential effectiveness of any ocean resource revenue-sharing system. The book concludes with a chapter describing the progress on these two subjects in the Third UN Conference on the Law of the Sea.

International lawyers not schooled in international economics should not be put off from reading this book. I found the basic economic concepts to be understandably presented, with a minimum of higher mathematics. The authors consistently weave the political, technical, and legal aspects of the subjects into their economic analyses. To some extent, events have overtaken the final chapter on the law of the sea conference, but this is *de rigueur* for anything written on law of the sea these days. The remainder of the text is of a sufficiently fundamental nature so as to remain relevant even should the negotiations go on for several more years, as seems likely.

H. GARY KNIGHT
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Politische Konzeptionen zur Neuordnung des Meeresvölkerrechts. By Renate Platzöder. (Ebenhausen: Stiftung Wissenschaft und Politik, 1976. Pp. 283.) Platzöder is the one in Germany who, through her publications, has followed most intensely the Third UN Law of the Sea Conference. After each stage of the negotiations, she has prepared useful volumes of documents, one of which has been reviewed in this *Journal*¹ by David L. Larson. In the present publication, prepared after the 1976 round of negotiations, she writes of the past proceedings and of the possible prospects of the Conference.

Her book is divided roughly into three main parts. In the first part she describes the different groups that have been formed and tries to clarify their bargaining positions, their interests, and their ideologies. She devotes some space to the struggle between the developing and the "disadvantaged" states. Platzöder attributes much influence to the President of the Conference and to the chairmen of the main committees who appear to have steadily increased their commitment to obtain results. In the second part she discusses some of the essential concepts on which the law of the sea is based or on which it may be reformed. She is fully aware of the pointlessness of much of the prevailing phraseology, e.g., she points out that the principle of freedom of the seas covers most of the economic and industrial development and that it countenances the intrinsic limitations necessary for the protection of natural resources and of the environment. In the same skeptical vein, she feels that the concept of the common heritage, which is employed in the new terminology, robs the community of the resources of the sea. In the third part, Platzöder suggests to her countrymen that they turn their attention to areas under special regimes, such as Spitsbergen and the Antarctic, and she describes their legal situation.

¹ See 71 AJIL 170 (1977).

Platzöder complains of a lack of interest in the Conference among German official and scientific circles. Actually, during such negotiations, scientific discussion is utterly unproductive. As a geographically disadvantaged state, Germany must insist on complete freedom of the sea. And if that is not attained, Germany must for the good of its industry and fisheries arrange for concessions or joint ventures with developing coastal states.

Summary conclusions are presented as an introduction and appendixes make up a great part of the book. Among the latter, the reader will find a useful list of the draft articles and papers presented to the Conference by every participating state.²

F. MÜNCH
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Le Pétrole et la Mer. By René-Jean Dupuy. (Paris: Presses Universitaires de France, 1976. Pp. 358.) In June 1974 the Center for Study and Research on Law and the Marine Environment held a three-day meeting on oil and the sea. The participants were drawn from the Institute of the Law of Peace and Development, laboratories for marine geology and biology, and the oil industry.

The resulting publication, which consists of 14 papers with an introduction and a conclusion by the editor, who is the Secretary-General of the Academy of International Law at The Hague, contains much information in a small compass. The book may provide international lawyers with more than they care to know about the technology of the exploration and exploitation of undersea oil and the national legislation relating thereto, but probably not more than they need to know. Special attention is given to semi-enclosed seas, particularly the North Sea, the Caribbean, and the Mediterranean. Pollution and reparation for injuries caused by accidents are treated in three papers; the one by Bernard Dubais is particularly notable. In the discussion of juridical and economic problems of a general character, the paper by Alain Piquemal treating recent international agreements for the delimitation of boundaries in and beyond the continental shelf is of considerable interest. The difficulties to be expected in the future in carrying on fundamental scientific research, as distinguished from exploration, with a view to the exploitation of petroleum reserve resources are usefully set forth jointly by Georgette C. Mariani, a jurist, and Gisèle Ringard, an engineer. Ports for supertankers and petroleum installations in or on the high seas are also discussed.

The participants in this meeting, held on the eve of the Caracas session of the Law of the Sea Conference, outlined the principal problems posed by the existence of marine petroleum deposits and the technology to exploit them. The Conference has been struggling with them ever since.

ALICE MORRISSEY MCDIARMID

Völkerrechtlicher Schutz gefährdeter Tiere und Pflanzen vor übermassiger Ausbeutung durch den internationalen Handel (Das Washingtoner Artenschutzabkommen von 1973). By Anton Flachsmann. (Zürich: Schulthess Polygraphischer Verlag, 1977. Pp. 147.) This slender volume contains an astoundingly comprehensive account of all major efforts undertaken by individuals, private organizations, governments, regional and international private and public organizations over the last hundred years to preserve

² A misprint at the bottom of page 55 changes the meaning of Platzöder's statement into the opposite.

animals and plants from extinction. In chronological order the author presents the actual steps taken and their motives which range from primitive taboos of tribes and their need for food to the sophisticated use of fauna and flora for lucrative trade, with the pleasure to hunt and collect or to investigate scientifically the trapped specimens interposed between the two extremes of awe of nature and desire for gain.

The first half of the book presents all major acts of individual countries around the world, their laws and ordinances on the subject, including their international agreements to keep seals, whales, polar bears, birds, fish, and lesser known exotic species alive. The United States, England, Canada, Japan, Russia, several other European countries, Asian and African nations, especially since their decolonization, play an ever growing role in international collaboration. The second part of the book is entirely dedicated to the Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora of March 3, 1973, in force since July 1, 1975, in whose formulation the United States had a leading part. Switzerland is the depositary government, the United Nations Environmental Program (UNEP) with the help of the nongovernmental International Union for Conservation of Nature and Natural Resources (IUCN) functions as Convention Secretariat. The Convention protects endangered species only against rapacious trade and not against other dangers like hunting or environmental pollution. Much work therefore remains to be done.

A bibliography of English and German titles concludes this fascinating work.

SIEGFRIED GARBUNY
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Licensing and Regulatory Control of Nuclear Installations (Legal Series #10). A selection of papers presented at the regional seminar in nuclear law for Latin American countries, Rio de Janeiro, 25-29 June 1973, and the study group meeting on regulations and procedures for licensing nuclear installations, Athens, 16-20 December 1974. (Vienna: International Atomic Energy Agency, 1975. Pp. viii, 313. \$19. Also available from UNIPUB, Box 433, Murray Hill Station, New York, N.Y. 10016.) This publication is the tenth in the Legal Series of the IAEA, other volumes of which contain lists or texts of treaties in the nuclear field, the records of or papers from other IAEA meetings of legal interest, and this reviewer's monograph on the law of the Agency. The Regional Seminar in Rio de Janeiro and the Study Group in Athens, where the papers here presented originated, constituted part of the Agency's program of disseminating information relevant to the peaceful uses of nuclear energy; the subsequent publication of these studies is pursuant to another part of the same program. Thus these papers (ten prepared for Rio de Janeiro and nine prepared for Athens) had originally been written for a different purpose: to stimulate discussions in intimate sessions of experts and would-be experts. Their appearance here, though not exactly an afterthought (participants in Agency meetings were put on notice that their written contributions might be immortalized), thus constitutes intellectual recycling—commendable as a labor-saving device but not necessarily conducive to creating a product of high quality. Consequently it is to be particularly regretted that steps were not taken to improve it: grouping the 19 papers (17- $\frac{2}{3}$ of which are in English, the rest in French) according to subject matter, the addition of footnote crossreferences between papers dealing with similar or identical questions, or better still a short introductory essay pulling together the individual contributions and setting them in context.

Lacking such niceties, the value of this compendium must rest entirely on that of the individual essays, which are uneven in length, scope, and quality. The subject best and most completely covered is the licensing of reactors, with several contributions each on British, Canadian, West German, and U.S. practices, as well as a useful comparative summary by the Nuclear Energy Agency of OECD covering those four countries and eleven others; in addition, there are some general essays on licensing by the IAEA and by the OECD/NEA secretariats. Absent from all of these, perhaps in part because of their dates (1973 and 1974) and in part because of their official sponsorship, is any sense of the tension prevailing on this subject in many countries because of the apparently still growing opposition to all types of nuclear activities. Two useful contributions briefly describe certain aspects of safeguards against the misuse of nuclear materials, as required respectively by the Non-Proliferation Treaty and IAEA and by the Latin American Tlatelolco Treaty. Finally, there are four studies relating to various aspects of nuclear liability, including a discussion of some practical problems involving the overlapping European and worldwide treaties in this field.

PAUL C. SZASZ

International Arrangements for Nuclear Fuel Reprocessing. Edited by Abram Chayes and W. Bennett Lewis. (Cambridge, Mass.: Ballinger Publishing Co., 1977. Pp. xx, 251. Index. \$15.) This volume is a collection of papers presented at a symposium held under the auspices of the International Pugwash Movement in Racine, Wisconsin, in May of 1976. The book explores the ways and means of placing reprocessing facilities for nuclear fuel under international or multinational control. Written by experts drawn from research and policymaking agencies in the service of various national governments and international organizations, from industry and universities, the papers represent informed and sober evaluations of the difficulties encountered in meeting the problem of nuclear control and outline methods of instituting more effective supervision. The essays are arranged in four parts. Part I consists of two brief introductory chapters. Part II, preempting approximately 100 of the book's 245 pages of text, deals with technical matters. Part III is devoted to institutional arrangements. Part IV in one brief chapter discusses the political aspects of nuclear control.

The emphasis throughout is predominantly on the opportunities which multinational control may offer. As one might expect, in view of the high calibre of the contributors, all suggestions for multinational arrangements are cautious and qualified. Throughout the volume a catalogue of incentives and "disincentives" for participation emerges and of the advantages and disadvantages likely to result from various types of arrangements. On the positive side, there is reduction of suspicion and diversion (clearing the road to international inspection), increased reliability of supply of nuclear fuel, and as a result a disincentive to the building of national facilities. On the negative side, none of the advantages is automatic and all may prove illusory while the cooperative arrangement gives more states access to advanced nuclear technology and possibly materials suitable for nuclear weapons.

All this does not add up to a clear case for multinational arrangements. There appears to be a far reaching consensus that the organizational problems are technically soluble provided that persistent political obstacles can be cleared away. The concluding chapter ends on a guardedly utopian note by spelling out what is implied in many of the papers: that the technical problems, difficult though they are, could be overcome if "only" the

political will were present. Such a conclusion, saying in essence that international politics must cease to be international politics, is not very helpful except perhaps to call attention to the limits necessarily encountered by any effort to make the world safer from the nuclear threat.

A serious shortcoming of the anthology is the absence of editorial guidance. Redundancies abound, and the papers are uneven, ranging from a level of considerable sophistication to that of chapters in an introductory textbook on public administration. Nevertheless, students of international law and relations may find this a useful introduction to an important aspect of nuclear control.

PETER J. FLIESS

University of Massachusetts

Global Companies. The Political Economy of World Business. Edited by George W. Ball. (Englewood Cliffs: Prentice-Hall, Inc., 1975. Pp. viii, 179. Index. \$8.95, cloth; \$2.95, paper.) This convenient, brief compendium of recognized American experts' established attitudes toward multinational enterprises was generated by an American Assembly (Arden House) session. The headings of the ten chapters and the listing of the names of the contributors thereto show (largely to the already reasonably well informed) what "global companies" evolved from; how they operate; what responses they induce in sending states, host states, and among economists, political scientists, and international organizations-oriented lawyers.

The thrust of Ronald Müller's paper, "A Qualifying and Dissenting View of the Multinational Corporation," is somewhat overstated in the title. His major contribution is the essential one of showing definite needs for "new-think" in both economic analytical and accounting methodologies and in national legal rules if the multinational is to be effectively controlled in the public interest. This is a useful analysis because it pulls together at one place thoughts as to the need for adjustments that in the literature of this subject are usually discernible only by inference.

The book is enlivened throughout by the grace and originality of its editor. The last paper, "The Need for International Arrangements," is of most direct significance to students of public international law and its sibling, international organizations law. In this paper Rostow, Nye, and Ball put forward their individual preferences as to the structuring of legal order for "global" enterprises. Of the three, Nye is the most closely attuned to the perhaps lamentable reality that the sharp split between developed and LDC countries as to the acceptability of MNE's still stands as a formidable obstacle to either Rostow's UNCTAD-linked regulatory regime or Ball's global corporation act.

COVEY T. OLIVER

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International Payoffs, Dilemma for Business. By Yerachmiel Kugel and Gladys W. Gruenberg. (Lexington, Mass. and Toronto, Canada: Lexington Books, D. C. Heath and Co., 1977. Pp. xiii, 209. Index. \$15.) The authors have undertaken a two-fold task, but have succeeded in only one. As a "conceptual framework to facilitate the analysis of business ethics in general and business decisions relating to international payoffs in particular," the study provides an original and well organized *vade mecum* for MNE guides through economic jungles. The jungles are not always distant or

exotic ones. As the authors confess, they came to see in the course of their work that the dilemmas for business (small as well as large) arise from the "intermingling of the roles of society, the business firm, and the individual executive." They might well have referred also to the responsibility of the professional advisers, lawyers, and accountants, whose ethical standards sometimes provide highly flexible yardsticks for corporate performance. A creative contribution of the study is the appraisal of a much neglected aspect of transnational corruption: the role of the government, including the Military Assistance Advisory Groups overseas, in the huge volume of business known to the trade as "FMS," *i.e.*, foreign military sales. The Defense Department places orders with the U.S. corporation, then resells the equipment to the foreign government. Along the way, the Defense Department (as in the Northrop Aviation scandal) may find its fingers in sticky places.

The second task undertaken by the authors, clarification of control measures, falls far short of its promise. Their research at the St. Louis University School of Business and Administration, which generated the study, did not produce a detailed appraisal of the vexatious problems for legislation, passed since this study appeared, in giving extraterritorial application to criminal laws.

It may be hoped that an equally diligent and talented research team of legal scholars may undertake a matching volume to complete the second task. In particular, a new and needed analysis of the potential uses and practical limits of international codes and guidelines, now under study in the OECD, UNCTAD, the UN Commission on Transnational Corporations, and the International Chamber of Commerce, would provide a welcome addition to literature in a field of expanding importance.

ERNEST A. GROSS
Of the New York Bar

Fair Trading in Europe. By A. H. Hermann and Colin Jones. (London: Kluwer-Harrap Handbooks, 1977. Distributed in the U.S. by Fred B. Rothman & Co., South Hackensack, N.J. Pp. xxviii, 443. Index.) The title of this book may lead some American readers astray. Instead of describing the law which permits resale price maintenance, as would be expected in the United States, the term "fair trade" as used in England embraces anti-trust, competition policy, and consumer protection. Furthermore, although the book describes the law in "Europe," with a listing on the dust jacket of the fifteen countries of Western Europe which are considered, the bulk of the book is devoted to "The Three Major Systems," *i.e.*, the EEC, Germany, and the United Kingdom,¹ with only a considerably smaller portion devoted to "The Lesser Systems,"² *i.e.*, the other thirteen national systems.

The authors describe this as a handbook written for businessmen and lawyers who wish a nontechnical discussion of the relevant law. It has the chief merits of such an effort, being organized by clearly delineated chapters and subchapters. An extensive index makes it easy to find any relevant discussion on a particular subject. The book also has the chief failing of a handbook on most any legal subject of any complexity. It offers a nontechnical discussion only by simplifying. In this case the failing is most noticeable in respect of the discussion of individual cases, whether before administrative bodies such as the Commission of the European Communities or before the courts. The authors have tended to present the facts,

¹ Part II, pp. 53-338.

² Part III, pp. 339-395.

the main arguments, and the decision, but they have not adequately explained to what degree those cases were illustrations of the law or were the means by which the law has developed. As a result it is sometimes difficult to grasp the significance of the decision. It should be said that this criticism cannot be laid to the portion of the book dealing with the law of the United Kingdom.

Overall the book should be useful to its target audience "as a first step."³ One can agree with the authors that "the most important function of this handbook is to alert readers to the need to obtain more detailed information and to guide them to its sources."⁴

ERIC BERGSTEN
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Trading under EEC and US Antitrust Laws. By Alfred F. Crotti. (London: Butterworths, 1977. Pp. xxi, 361. Index. \$40.70.) To say that Crotti has undertaken, in a slim volume, to cover one of the most complex areas of international trading law would be an understatement. It is one of the areas in which a vast amount of material needs to be published as, until recently, few studies of a thorough nature were produced covering the aspects of law relevant to multinational corporations and multinational trading. This book has, in this reviewer's opinion, a great advantage for those needing reference material at a glance, namely, a concise table of contents, very well organized tables of relevant legislation, and a table of cases, as well as a most comprehensive index, all items which assist greatly in the readability of any book dealing with such a vast area. The appendix is a very useful survey of EEC decisions.

The book is divided into two sections. The first, in the words of the author, is "an overview of the field of antitrust in the United States and in Europe." The second covers areas of normal business activity and the antitrust problems inherent therein and some procedural and jurisdictional aspects of antitrust enforcement. The body of the text is written in a simple, but not simplistic manner, which will be much appreciated by those who have long wished for a comprehensive but uncluttered book on this subject. The summaries, headings, and subheadings assist greatly and will be much appreciated by both law students and practitioners needing a ready reference tool. The concise but detailed coverage of those areas of most interest to business, the Sherman Act, price fixing, tying arrangements, monopoly, mergers, joint ventures, patents, trademarks, and the Schwinm principle, together with examples of licensing clauses, offer enough detail to enable the reader to determine his or her interest in a specific area and provides, by reference, indications of materials for deeper research.

This reviewer recommends the book to all those in the field of international trade and multinational corporate activities, not just to attorneys in commercial corporate practice. It is one of the few books which makes me wonder "why did not I think of it first?" It is a scholarly and worthwhile work.

ANTHONY M. EATON
Washington, D.C.

³ P. ix.

⁴ *Id.*

*United States Treaties and Other International Agreements. UST Cumulative Supplement 1971-1975.*¹ Compiled by Igor I. Kavass and Adolf Sprudz. (Buffalo: William S. Hein & Co., 1977. Pp. 593. \$60.) Anyone who has had occasion to work on a subject involving contemporary treaty practice is bound to have had reason to complain about the sorry state of affairs in terms of identifying and reporting international agreements. Not only has the recent record in this respect been bad, but it seems to be getting constantly worse and students of international law are experiencing increasing difficulty in keeping track of the diplomatic traffic between members of the expanding community. In this situation, research aids of every kind are virtually indispensable and, of course, periodic inventories of existing treaty stocks are especially useful in helping foreign policy analysts pick their way through the wilderness.

Thus, one can only welcome the publication of this cumulative index to the contents of the United States treaty series for the years 1971-1975. The compilers have arranged the data in four different sections: a numerical list of documents following the TIAS number sequence; a chronological catalogue; a country index divided into two parts dealing with bilateral and multilateral accords, respectively; and a subject index. The elaborate cross-referencing system allows ready access to source information concerning particular agreements and facilitates sketching a treaty profile either by theme or partner. The United States has, on the whole, done a better job than most countries in publicizing its diplomatic activity. Consequently, it is easier to locate agreements the United States has concluded than it is to perform the same task for other countries. The United States also signs agreements at a faster rate than the majority of nations so its files thereby serve as a repository for the diplomatic documents of other states which are less prompt and more selective in releasing the evidence.

The format and substantive quality of the volume deserve high praise. The material is well organized, the individual entries clearly set out, making consultation simple, and the text is refreshingly free of error. In every respect, then, we have here a superior research tool whose great practical value is further enhanced by its pleasing appearance.

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* Mention here neither assures nor precludes later review.

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OFFICIAL DOCUMENTS

UNITED STATES: NUCLEAR NON-PROLIFERATION ACT OF 1978
PUBLIC LAW 95-242

95TH CONGRESS, H.R. 8638

MARCH 10, 1978

AN ACT

To provide for more efficient and effective control over the proliferation of nuclear explosive capability.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Nuclear Non-Proliferation Act of 1978".

STATEMENT OF POLICY

SEC. 2. The Congress finds and declares that the proliferation of nuclear explosive devices or of the direct capability to manufacture or otherwise acquire such devices poses a grave threat to the security interests of the United States and to continued international progress toward world peace and development. Recent events emphasize the urgency of this threat and the imperative need to increase the effectiveness of international safeguards and controls on peaceful nuclear activities to prevent proliferation. Accordingly, it is the policy of the United States to—

(a) actively pursue through international initiatives mechanisms for fuel supply assurances and the establishment of more effective international controls over the transfer and use of nuclear materials and equipment and nuclear technology for peaceful purposes in order to prevent proliferation, including the establishment of common international sanctions;

(b) take such actions as are required to confirm the reliability of the United States in meeting its commitments to supply nuclear reactors and fuel to nations which adhere to effective non-proliferation policies by establishing procedures to facilitate the timely processing of requests for subsequent arrangements and export licences;

(c) strongly encourage nations which have not ratified the Treaty on the Non-Proliferation of Nuclear Weapons to do so at the earliest possible date; and

(d) cooperate with foreign nations in identifying and adapting suitable technologies for energy production and, in particular, to identify alternative options to nuclear power in aiding such nations to meet their energy needs, consistent with the economic and material resources of those nations and environmental protection.

STATEMENT OF PURPOSE

SEC. 3. It is the purpose of this Act to promote the policies set forth above by—

(a) establishing a more effective framework for international cooperation to meet the energy needs of all nations and to ensure that the worldwide development of peaceful nuclear activities and the export by any nation of nuclear materials and equipment and nuclear technology intended for use in peaceful nuclear activities do not contribute to proliferation;

(b) authorizing the United States to take such actions as are required to ensure that it will act reliably in meeting its commitment to supply nuclear reactors and fuel to nations which adhere to effective non-proliferation policies;

(c) providing incentives to the other nations of the world to join in such international cooperative efforts and to ratify the Treaty; and

(d) ensuring effective controls by the United States over its exports of nuclear materials and equipment and of nuclear technology.

DEFINITIONS

SEC. 4. (a) As used in this Act, the term—

(1) “Commission” means the Nuclear Regulatory Commission;

(2) “Director” means the Director of the Arms Control and Disarmament Agency;

(3) “IAEA” means International Atomic Energy Agency;

(4) “nuclear materials and equipment” means source material, special nuclear material, production facilities, utilization facilities, and components, items or substances determined to have significance for nuclear explosive purposes pursuant to subsection 109 b. of the 1954 Act;

(5) “physical security measures” means measures to reasonably ensure that source or special nuclear material will only be used for authorized purposes and to prevent theft and sabotage;

(6) “sensitive nuclear technology” means any information (including information incorporated in a production or utilization facility or important component part thereof) which is not available to the public and which is important to the design, construction, fabrication, operation or maintenance of a uranium enrichment or nuclear fuel reprocessing facility or a facility for the production of heavy water, but shall not include Restricted Data controlled pursuant to chapter 12 of the 1954 Act;

(7) “1954 Act” means the Atomic Energy Act of 1954, as amended; and

(8) “the Treaty” means the Treaty on the Non-Proliferation of Nuclear Weapons.

(b) All other terms used in this Act not defined in this section shall have the meanings ascribed to them by the 1954 Act, the Energy Reorganization Act of 1974, and the Treaty.

TITLE I—UNITED STATES INITIATIVES TO PROVIDE ADEQUATE NUCLEAR FUEL SUPPLY

POLICY

SEC. 101. The United States, as a matter of national policy, shall take such actions and institute such measures as may be necessary and feasible to assure other nations and groups of nations that may seek to utilize the benefits of atomic energy for peaceful purposes that it will provide a reliable supply of nuclear fuel to those nations and groups of nations which adhere to policies designed to prevent proliferation. Such nuclear fuel shall

be provided under agreements entered into pursuant to section 161 of the 1954 Act or as otherwise authorized by law. The United States shall ensure that it will have available the capacity on a long-term basis to enter into new fuel supply commitments consistent with its non-proliferation policies and domestic energy needs. The Commission shall, on a timely basis, authorize the export of nuclear materials and equipment when all the applicable statutory requirements are met.

URANIUM ENRICHMENT CAPACITY

SEC. 102. The Secretary of Energy is directed to initiate construction planning and design, construction, and operation activities for expansion of uranium enrichment capacity, as elsewhere provided by law. Further the Secretary as well as the Nuclear Regulatory Commission, the Secretary of State, and the Director of the Arms Control and Disarmament Agency are directed to establish and implement procedures which will ensure to the maximum extent feasible, consistent with this Act, orderly processing of subsequent arrangements and exports licenses with minimum time delay.

REPORT

SEC. 103. The President shall promptly undertake a study to determine the need for additional United States enrichment capacity to meet domestic and foreign needs and to promote United States non-proliferation objectives abroad. The President shall report to the Congress on the results of this study within twelve months after the date of enactment of this Act.

INTERNATIONAL UNDERTAKINGS

SEC. 104. (a) Consistent with section 105 of this Act, the President shall institute prompt discussions with other nations and groups of nations, including both supplier and recipient nations, to develop international approaches for meeting future worldwide nuclear fuel needs. In particular, the President is authorized and urged to seek to negotiate as soon as practicable with nations possessing nuclear fuel production facilities or source material, and such other nations and groups of nations, such as the IAEA, as may be deemed appropriate, with a view toward the timely establishment of binding international undertakings providing for—

(1) the establishment of an international nuclear fuel authority (INFA) with responsibility for providing agreed upon fuel services and allocating agreed upon quantities of fuel resources to ensure fuel supply on reasonable terms in accordance with agreements between INFA and supplier and recipient nations;

(2) a set of conditions consistent with subsection (d) under which international fuel assurances under INFA auspices will be provided to recipient nations, including conditions which will ensure that the transferred materials will not be used for nuclear explosive devices;

(3) devising, consistent with the policy goals set forth in section 403 of this Act, feasible and environmentally sound approaches for the siting, development, and management under effective international auspices and inspection of facilities for the provision of nuclear fuel services, including the storage of special nuclear material;

(4) the establishment of repositories for the storage of spent nuclear reactor fuel under effective international auspices and inspection;

(5) the establishment of arrangements under which nations placing spent fuel in such repositories would receive appropriate compensation for

the energy content of such spent fuel if recovery of such energy content is deemed necessary or desirable; and

(6) sanctions for violation of the provisions of or for abrogation of such binding international undertakings.

(b) The President shall submit to Congress not later than six months after the date of enactment of this Act proposals for initial fuel assurances, including creation of an interim stockpile of uranium enriched to less than 20 percent in the uranium isotope 235 (low-enriched uranium) to be available for transfer pursuant to a sales arrangement to nations which adhere to strict policies designed to prevent proliferation when and if necessary to ensure continuity of nuclear fuel supply to such nations. Such submission shall include proposals for the transfer of low-enriched uranium up to an amount sufficient to produce 100,000 MWe years of power from light water nuclear reactors, and shall also include proposals for seeking contributions from other supplier nations to such an interim stockpile pending the establishment of INFA.

(c) The President shall, in the report required by section 103, also address the desirability of and options for foreign participation, including investment, in new United States uranium enrichment facilities. This report shall also address the arrangements that would be required to implement such participation and the commitments that would be required as a condition of such participation. This report shall be accompanied by any proposed legislation to implement these arrangements.

(d) The fuel assurances contemplated by this section shall be for the benefit of nations that adhere to policies designed to prevent proliferation. In negotiating the binding international undertakings called for in this section, the President shall, in particular, seek to ensure that the benefits of such undertakings are available to non-nuclear-weapon states only if such states accept IAEA safeguards on all their peaceful nuclear activities, do not manufacture or otherwise acquire any nuclear explosive device, do not establish any new enrichment or reprocessing facilities under their de facto or de jure control, and place any such existing facilities under effective international auspices and inspection.

(e) The report required by section 601 shall include information on the progress made in any negotiations pursuant to this section.

(f) (1) The President may not enter into any binding international undertaking negotiated pursuant to subsection (a) which is not a treaty until such time as such proposed undertaking has been submitted to the Congress and has been approved by concurrent resolution.

(2) The proposals prepared pursuant to subsection (b) shall be submitted to the Congress as part of an annual authorization Act for the Department of Energy.

REEVALUATION OF NUCLEAR FUEL CYCLE

SEC. 105. The President shall take immediate initiatives to invite all nuclear supplier and recipient nations to reevaluate all aspects of the nuclear fuel cycle, with emphasis on alternatives to an economy based on the separation of pure plutonium or the presence of high enriched uranium, methods to deal with spent fuel storage, and methods to improve the safeguards for existing nuclear technology. The President shall, in the first report required by section 601, detail the progress of such international reevaluation.

TITLE II—UNITED STATES INITIATIVES TO STRENGTHEN THE
INTERNATIONAL SAFEGUARD SYSTEM

POLICY

SEC. 201. The United States is committed to continued strong support for the principles of the Treaty on the Non-Proliferation of Nuclear Weapons, to a strengthened and more effective International Atomic Energy Agency and to a comprehensive safeguards system administered by the Agency to deter proliferation. Accordingly, the United States shall seek to act with other nations to—

(a) continue to strengthen the safeguards program of the IAEA and, in order to implement this section, contribute funds, technical resources, and other support to assist the IAEA in effectively implementing safeguards;

(b) ensure that the IAEA has the resources to carry out the provisions of Article XII of the Statute of the IAEA;

(c) improve the IAEA safeguards system (including accountability) to ensure—

(1) the timely detection of a possible diversion of source or special nuclear materials which could be used for nuclear explosive devices;

(2) the timely dissemination of information regarding such diversion; and

(3) the timely implementation of internationally agreed procedures in the event of such diversion;

(d) ensure that the IAEA receives on a timely basis the data needed for it to administer an effective and comprehensive international safeguards program and that the IAEA provides timely notice to the world community of any evidence of a violation of any safeguards agreement to which it is a party; and

(e) encourage the IAEA, to the maximum degree consistent with the Statute, to provide nations which supply nuclear materials and equipment with the data needed to assure such nations of adherence to bilateral commitments applicable to such supply.

TRAINING PROGRAM

SEC. 202. The Department of Energy, in consultation with the Commission, shall establish and operate a safeguards and physical security training program to be made available to persons from nations and groups of nations which have developed or acquired, or may be expected to develop or acquire, nuclear materials and equipment for use for peaceful purposes. Any such program shall include training in the most advanced safeguards and physical security techniques and technology, consistent with the national security interests of the United States.

NEGOTIATIONS

SEC. 203. The United States shall seek to negotiate with other nations and groups of nations to—

(1) adopt general principles and procedures, including common international sanctions, to be followed in the event that a nation violates any material obligation with respect to the peaceful use of nuclear materials and equipment or nuclear technology, or in the event that any nation violates

the principles of the Treaty, including the detonation by a non-nuclear-weapon state of a nuclear explosive device; and

(2) establish international procedures to be followed in the event of diversion, theft, or sabotage of nuclear materials or sabotage of nuclear facilities, and for recovering nuclear materials that have been lost or stolen, or obtained or used by a nation or by any person or group in contravention of the principles of the Treaty.

TITLE III—EXPORT ORGANIZATION AND CRITERIA

GOVERNMENT-TO-GOVERNMENT TRANSFERS

SEC. 301. (a) Section 54 of the 1954 Act is amended by adding a new subsection d. thereof as follows:

“d. The authority to distribute special nuclear material under this section other than under an export license granted by the Nuclear Regulatory Commission shall extend only to the following small quantities of special nuclear material (in no event more than five hundred grams per year of the uranium isotope 233, the uranium isotope 235, or plutonium contained in special nuclear material to any recipient):

“(1) which are contained in laboratory samples, medical devices, or monitoring or other instruments; or

“(2) the distribution of which is needed to deal with an emergency situation in which time is of the essence.”

(b) Section 64 of the 1954 Act is amended by inserting the following immediately after the second sentence thereof: “The authority to distribute source material under this section other than under an export license granted by the Nuclear Regulatory Commission shall in no case extend to quantities of source material in excess of three metric tons per year per recipient.”

(c) Chapter 10 of the 1954 Act is amended by adding a new section 111 as follows:

“SEC. 111. a. The Nuclear Regulatory Commission is authorized to license the distribution of special nuclear material, source material, and byproduct material by the Department of Energy pursuant to section[s] 54, 64, and 82 of this Act, respectively, in accordance with the same procedures established by law for the export licensing of such material by any person: *Provided*, That nothing in this section shall require the licensing of the distribution of byproduct material by the Department of Energy under section 82 of this Act.

‘b. The Department of Energy shall not distribute any special nuclear material or source material under section 54 or 64 of this Act other than under an export license issued by the Nuclear Regulatory Commission until (1) the Department has obtained the concurrence of the Department of State and has consulted with the Arms Control and Disarmament Agency, the Nuclear Regulatory Commission, and the Department of Defense under mutually agreed procedures which shall be established within not more than ninety days after the date of enactment of this provision and (2) the Department finds[,] based on a reasonable judgment of the assurances provided and the information available to the United States Government, that the criteria in section 127 of this Act or their equivalent and any applicable criteria in subsection 128 are met, and that the proposed distribution would not be inimical to the common defense and security.”

SEC. 302. Subsection 57 b. of the 1954 Act is amended to read as follows:

"b. It shall be unlawful for any person to directly or indirectly engage in the production of any special nuclear material outside of the United States except (1) as specifically authorized under an agreement for cooperation made pursuant to section 123, including a specific authorization in a subsequent arrangement under section 131 of this Act, or (2) upon authorization by the Secretary of Energy after a determination that such activity will not be inimical to the interest of the United States: *Provided*, That any such determination by the Secretary of Energy shall be made only with the concurrence of the Department of State and after consultation with the Arms Control and Disarmament Agency, the Nuclear Regulatory Commission, the Department of Commerce, and the Department of Defense. The Secretary of Energy shall, within ninety days after the enactment of the Nuclear Non-Proliferation Act of 1978, establish orderly and expeditious procedures, including provision for necessary administrative actions and inter-agency memoranda of understanding, which are mutually agreeable to the Secretaries of State, Defense, and Commerce, the Director of the Arms Control and Disarmament Agency, and the Nuclear Regulatory Commission for the consideration of requests for authorization under this subsection. Such procedures shall include, at a minimum, explicit direction on the handling of such requests, express deadlines for the solicitation and collection of the views of the consulted agencies (with identified officials responsible for meeting such deadlines), an inter-agency coordinating authority to monitor the processing of such requests, predetermined procedures for the expeditious handling of intra-agency and inter-agency disagreements and appeals to higher authorities, frequent meetings of inter-agency administrative coordinators to review the status of all pending requests, and similar administrative mechanisms. To the extent practicable, an applicant should be advised of all the information required of the applicant for the entire process for every agency's needs at the beginning of the process. Potentially controversial requests should be identified as quickly as possible so that any required policy decisions or diplomatic consultations can be initiated in a timely manner. An immediate effort should be undertaken to establish quickly any necessary standards and criteria, including the nature of any required assurances or evidentiary showings, for the decision required under this subsection. The processing of any request proposed and filed as of the date of enactment of the Nuclear Non-Proliferation Act of 1978 shall not be delayed pending the development and establishment of procedures to implement the requirements of this subsection. Any trade secrets or proprietary information submitted by any person seeking an authorization under this subsection shall be afforded the maximum degree of protection allowable by law: *Provided further*, That the export of component parts as defined in subsection 11 v. (2) or 11 cc. (2) shall be governed by sections 109 and 126 of this Act: *Provided further*, That notwithstanding subsection 402(d) of the Department of Energy Organization Act (Public Law 95-91), the Secretary of Energy and not the Federal Energy Regulatory Commission, shall have sole jurisdiction within the Department of Energy over any matter arising from any function of the Secretary of Energy in this section, section 54 d., section 64, or section 111 b."

SUBSEQUENT ARRANGEMENTS

SEC. 303. (a) Chapter 11 of the 1954 Act, as amended by sections 304, 305, 306, 307, and 308, is further amended by adding at the end thereof the following:

"SEC. 131. SUBSEQUENT ARRANGEMENTS.—

"a. (1) Prior to entering into any proposed subsequent arrangement under an agreement for cooperation (other than an agreement for cooperation arranged pursuant to subsection 91 c., 144 b., or 144 c. of this Act), the Secretary of Energy shall obtain the concurrence of the Secretary of State and shall consult with the Director, the Commission, and the Secretary of Defense: *Provided*, That the Secretary of State shall have the leading role in any negotiations of a policy nature pertaining to any proposed subsequent arrangement regarding arrangements for the storage or disposition of irradiated fuel elements or approvals for the transfer, for which prior approval is required under an agreement for cooperation, by a recipient of source or special nuclear material, production or utilization facilities, or nuclear technology. Notice of any proposed subsequent arrangement shall be published in the Federal Register, together with the written determination of the Secretary of Energy that such arrangement will not be inimical to the common defense and security, and such proposed subsequent arrangement shall not take effect before fifteen days after publication. Whenever the Director declares that he intends to prepare a Nuclear Proliferation Assessment Statement pursuant to paragraph (2) of this subsection, notice of the proposed subsequent arrangement which is the subject of the Director's declaration shall not be published until after the receipt by the Secretary of Energy of such Statement or the expiration of the time authorized by subsection c. for the preparation of such Statement, whichever occurs first.

"(2) If in the Director's view a proposed subsequent arrangement might significantly contribute to proliferation, he may prepare an unclassified Nuclear Proliferation Assessment Statement with regard to such proposed subsequent arrangement regarding the adequacy of the safeguards and other control mechanisms and the application of the peaceful use assurances of the relevant agreement to ensure that assistance to be furnished pursuant to the subsequent arrangement will not be used to further any military or nuclear explosive purpose. For the purposes of this section, the term 'subsequent arrangements' means arrangements entered into by any agency or department of the United States Government with respect to cooperation with any nation or group of nations (but not purely private or domestic arrangements) involving—

"(A) contracts for the furnishing of nuclear materials and equipment;

"(B) approvals for the transfer, for which prior approval is required under an agreement for cooperation, by a recipient of any source or special nuclear material, production or utilization facility, or nuclear technology;

"(C) authorization for the distribution of nuclear materials and equipment pursuant to this Act which is not subject to the procedures set forth in section 111 b., section 126, or section 109 b.;

"(D) arrangements for physical security;

"(E) arrangements for the storage or disposition of irradiated fuel elements;

"(F) arrangements for the application of safeguards with respect to nuclear materials and equipment; or

"(G) any other arrangement which the President finds to be important from the standpoint of preventing proliferation.

"(3) The United States will give timely consideration to all requests for prior approval, when required by this Act, for the reprocessing of material proposed to be exported, previously exported and subject to the applicable agreement for cooperation, or special nuclear material produced

through the use of such material or a production or utilization facility transferred pursuant to such agreement for cooperation, or to the altering of irradiated fuel elements containing such material, and additionally, to the maximum extent feasible, will attempt to expedite such consideration when the terms and conditions for such actions are set forth in such agreement for cooperation or in some other international agreement executed by the United States and subject to congressional review procedures comparable to those set forth in section 123 of this Act.

"(4) All other statutory requirements under other sections of this Act for the approval or conduct of any arrangement subject to this subsection shall continue to apply and any other such requirements for prior approval or conditions for entering such arrangements shall also be satisfied before the arrangement takes effect pursuant to subsection a. (1).

"b. With regard to any special nuclear material exported by the United States or produced through the use of any nuclear materials and equipment or sensitive nuclear technology exported by the United States—

"(1) the Secretary of Energy may not enter into any subsequent arrangement for the retransfer of any such material to a third country for reprocessing, for the reprocessing of any such material, or for the subsequent retransfer of any plutonium in quantities greater than 500 grams resulting from the reprocessing of any such material, until he has provided the Committee on International Relations of the House of Representatives and the Committee on Foreign Relations of the Senate with a report containing his reasons for entering into such arrangement and a period of 15 days of continuous session (as defined in subsection 130 g. of this Act) has elapsed: *Provided, however*, That if in the view of the President an emergency exists due to unforeseen circumstances requiring immediate entry into a subsequent arrangement, such period shall consist of fifteen calendar days;

"(2) the Secretary of Energy may not enter into any subsequent arrangement for the processing of any such material in a facility which has not processed power reactor fuel assemblies or been the subject of a subsequent arrangement therefor prior to the date of enactment of the Nuclear Non-Proliferation Act of 1978 or for subsequent retransfer to a non-nuclear-weapon state of any plutonium in quantities greater than 500 grams resulting from such reprocessing, unless in his judgment, and that of the Secretary of State, such reprocessing or retransfer will not result in a significant increase of the risk of proliferation beyond that which exists at the time that approval is requested. Among all the factors in making this judgment, foremost consideration will be given to whether or not the reprocessing or retransfer will take place under conditions that will ensure timely warning to the United States of any diversion well in advance of the time at which the non-nuclear-weapon state could transform the diverted material into a nuclear explosive device; and

"(3) the Secretary of Energy shall attempt to ensure, in entering into any subsequent arrangement for the reprocessing of any such material in any facility that has processed power reactor fuel assemblies or been the subject of a subsequent arrangement therefor prior to the date of enactment of the Nuclear Non-Proliferation Act of 1978, or for the subsequent retransfer to any non-nuclear-weapon state of any plutonium in quantities greater than 500 grams resulting from such reprocessing, that such reprocessing or retransfer shall take place under conditions comparable to those which in his view, and that of the Secretary of State, satisfy the standards set forth in paragraph (2).

"c. The Secretary of Energy shall, within ninety days after the enactment of this section, establish orderly and expeditious procedures, including

provision for necessary administrative actions and inter-agency memoranda of understanding, which are mutually agreeable to the Secretaries of State, Defense, and Commerce, the Director of the Arms Control and Disarmament Agency, and the Nuclear Regulatory Commission for the consideration of requests for subsequent arrangements under this section. Such procedures shall include, at a minimum, explicit direction on the handling of such requests, express deadlines for the solicitation and collection of the views of the consulted agencies (with identified officials responsible for meeting such deadlines), an inter-agency coordinating authority to monitor the processing of such requests, predetermined procedures for the expeditious handling of intra-agency and inter-agency disagreements and appeals to higher authorities, frequent meetings of inter-agency administrative coordinators to review the status of all pending requests, and similar administrative mechanisms. To the extent practicable, an applicant should be advised of all the information required of the applicant for the entire process for every agency's needs at the beginning of the process. Potentially controversial requests should be identified as quickly as possible so that any required policy decisions or diplomatic consultations can be initiated in a timely manner. An immediate effort should be undertaken to establish quickly any necessary standards and criteria, including the nature of any required assurance or evidentiary showings, for the decisions required under this section. Further, such procedures shall specify that if he intends to prepare a Nuclear Proliferation Assessment Statement, the Director shall so declare in his response to the Department of Energy. If the Director declares that he intends to prepare such a Statement, he shall do so within sixty days of his receipt of a copy of the proposed subsequent arrangement (during which time the Secretary of Energy may not enter into the subsequent arrangement), unless pursuant to the Director's request, the President waives the sixty-day requirement and notifies the Committee on International Relations of the House of Representatives and the Committee on Foreign Relations of the Senate of such waiver and the justification therefor. The processing of any subsequent arrangement proposed and filed as of the date of enactment of this section shall not be delayed pending the development and establishment of procedures to implement the requirements of this section.

"d. Nothing in this section is intended to prohibit, permanently or unconditionally, the reprocessing of spent fuel owned by a foreign nation which fuel has been supplied by the United States, to preclude the United States from full participation in the International Nuclear Fuel Cycle Evaluation provided for in section 105 of the Nuclear Non-Proliferation Act of 1978; to in any way limit the presentation or consideration in that evaluation of any nuclear fuel cycle by the United States or any other participation; nor to prejudice open and objective consideration of the results of the evaluation.

"e. Notwithstanding subsection 402(d) of the Department of Energy Organization Act (Public Law 95-91), the Secretary of Energy, and not the Federal Energy Regulatory Commission, shall have sole jurisdiction within the Department of Energy over any matter arising from any function of the Secretary of Energy in this section.

"f. (1) With regard to any subsequent arrangement under subsection a. (2)(E) (for the storage or disposition of irradiated fuel elements), where such arrangement involves a direct or indirect commitment of the United States for the storage or other disposition, interim or permanent, of any foreign spent nuclear fuel in the United States, the Secretary of Energy may not enter into any such subsequent arrangement, unless: .

"(A) (i) Such commitment of the United States has been submitted to the Congress for a period of sixty days of continuous session (as defined in subsection 130 g. of this Act) and has been referred to the Committee on International Relations of the House of Representatives and the Committee on Foreign Relations of the Senate, but any such commitment shall not become effective if during such sixty-day period the Congress adopts a concurrent resolution stating in substance that it does not favor the commitment, any such commitment to be considered pursuant to the procedures set forth in section 130 of this Act for the consideration of Presidential submissions; or (ii) if the President has submitted a detailed generic plan for such disposition or storage in the United States to the Congress for a period of sixty days of continuous session (as defined in subsection 130 g. of this Act), which plan has been referred to the Committee on International Relations of the House of Representatives and the Committee on Foreign Relations of the Senate and has not been disapproved during such sixty-day period by the adoption of a concurrent resolution stating in substance that Congress does not favor the plan; and the commitment is subject to the terms of an effective plan. Any such plan shall be considered pursuant to the procedures set forth in section 130 of this Act for the consideration of Presidential submissions;

"(B) The Secretary of Energy has complied with subsection a.; and

"(C) The Secretary of Energy has complied, or in the arrangement will comply with all other statutory requirements of this Act, under sections 54 and 55 and any other applicable sections, and any other requirements of law.

"(2) Subsection (1) shall not apply to the storage or other disposition in the United States of limited quantities of foreign spent nuclear fuel if the President determines that (A) a commitment under section 54 or 55 of this Act of the United States for storage or other disposition of such limited quantities in the United States is required by an emergency situation; (B) it is in the national interest to take such immediate action, and (C) he notifies the Committees on International Relations and Science and Technology of the House of Representatives and the Committees on Foreign Relations and Energy and Natural Resources of the Senate of the determination and action, with a detailed explanation and justification thereof, as soon as possible.

"(3) Any plan submitted by the President under subsection f. (1) shall include a detailed discussion, with detailed information, and any supporting documentation thereof, relating to policy objectives, technical description, geographic information, cost data and justifications, legal and regulatory considerations, environmental impact information and any related international agreements, arrangements or understandings.

"(4) For the purposes of this subsection, the term 'foreign spent nuclear fuel' shall include any nuclear fuel irradiated in any nuclear power reactor located outside of the United States and operated by any foreign legal entity, government or nongovernment, regardless of the legal ownership or other control of the fuel or the reactor and regardless of the origin or licensing of the fuel or reactor, but not including fuel irradiated in a research reactor."

(b) (1) Section 54 of the 1954 Act is amended by adding new subsection e. as follows,

"e. The authority in this section to commit United States funds for any activities pursuant to any subsequent arrangement under section 131 a. (2)(E) shall be subject to the requirements of section 131."

(2) Section 55 of the 1954 Act is amended by adding a proviso at the

end of the section as follows, "*Providing*, That the authority in this section to commit United States funds for any activities pursuant to any subsequent arrangement under section 131 a. (2)(E) shall be subject to the requirements of section 131."

EXPORT LICENSING PROCEDURES

SEC. 304. (a) Chapter 11 of the 1954 Act is amended by adding a new section 126 as follows:

"SEC. 126. EXPORT LICENSING PROCEDURES.—

"a. No license may be issued by the Nuclear Regulatory Commission (the 'Commission') for the export of any production or utilization facility, or any source material or special nuclear material, including distributions of any material by the Department of Energy under section 54, 64, or 82, for which a license is required or requested, and no exemption from any requirement for such an export license may be granted by the Commission, as the case may be, until—

"(1) the Commission has been notified by the Secretary of State that it is the judgment of the executive branch that the proposed export or exemption will not be inimical to the common defense and security, or that any export in the category to which the proposed export belongs would not be inimical to the common defense and security because it lacks significance for nuclear explosive purposes. The Secretary of State shall, within ninety days after the enactment of this section, establish orderly and expeditious procedures, including provision for necessary administrative actions and inter-agency memoranda of understanding, which are mutually agreeable to the Secretaries of Energy, Defense, and Commerce, the Director of the Arms Control and Disarmament Agency, and the Nuclear Regulatory Commission for the preparation of the executive branch judgment on export applications under this section. Such procedures shall include, at a minimum, explicit direction on the handling of such applications, express deadlines for the solicitation and collection of the views of the consulted agencies (with identified officials responsible for meeting such deadlines), an inter-agency coordinating authority to monitor the processing of such applications, predetermined procedures for the expeditious handling of intra-agency and inter-agency disagreements and appeals to higher authorities, frequent meetings of inter-agency administrative coordinators to review the status of all pending applications, and similar administrative mechanisms. To the extent practicable, an applicant should be advised of all the information required of the applicant for the entire process for every agency's needs at the beginning of the process. Potentially controversial applications should be identified as quickly as possible so that any required policy decisions or diplomatic consultations can be initiated in a timely manner. An immediate effort should be undertaken to establish quickly any necessary standards and criteria, including the nature of any required assurances or evidentiary showings, for the decisions required under this section. The processing of any export application proposed and filed as of the date of enactment of this section shall not be delayed pending the development and establishment of procedures to implement the requirements of this section. The executive branch judgment shall be completed in not more than sixty days from receipt of the application or request, unless the Secretary of State in his discretion specifically authorizes additional time for consideration of the application or request because it is in the national interest to allow such additional time. The Secretary shall notify the Committee on Foreign Relations of the Senate and the Committee on International

Relations of the House of Representatives of any such authorization. In submitting any such judgment, the Secretary of State shall specifically address the extent to which the export criteria then in effect are met and the extent to which the cooperating party has adhered to the provisions of the applicable agreement for cooperation. In the event he considers it warranted, the Secretary may also address the following additional factors, among others:

"(A) whether issuing the license or granting the exemption will materially advance the non-proliferation policy of the United States by encouraging the recipient nation to adhere to the Treaty, or to participate in the undertakings contemplated by section 403 or 404(a) of the Nuclear Non-Proliferation Act of 1978;

"(B) whether failure to issue the license or grant the exemption would otherwise be seriously prejudicial to the non-proliferation objectives of the United States; and

"(C) whether the recipient nation or group of nations has agreed that conditions substantially identical to the export criteria set forth in section 127 of this Act will be applied by another nuclear supplier nation or group of nations to the proposed United States export, and whether in the Secretary's judgment those conditions will be implemented in a manner acceptable to the United States.

The Secretary of State shall provide appropriate data and recommendations, subject to requests for additional data and recommendations, as required by the Commission or the Secretary of Energy, as the case may be; and

"(2) the Commission finds, based on a reasonable judgment of the assurances provided and other information available to the Federal Government, including the Commission, that the criteria in section 127 of this Act or their equivalent, and any other applicable statutory requirements, are met: *Provided*, That continued cooperation under an agreement for cooperation as authorized in accordance with section 124 of this Act shall not be prevented by failure to meet the provisions of paragraph (4) or (5) of section 127 for a period of thirty days after enactment of this section, and for a period of twenty-three months thereafter if the Secretary of State notifies the Commission that the nation or group of nations bound by the relevant agreement has agreed to negotiations as called for in section 404(a) of the Nuclear Non-Proliferation Act of 1978; however, nothing in this subsection shall be deemed to relinquish any rights which the United States may have under agreements for cooperation in force on the date of enactment of this section: *Provided further*, That if, upon the expiration of such twenty-four month period, the President determines that failure to continue cooperation with any group of nations which has been exempted pursuant to the above proviso from the provisions of paragraph (4) or (5) of section 127 of this Act, but which has not yet agreed to comply with those provisions would be seriously prejudicial to the achievement of United States non-proliferation objectives or otherwise jeopardize the common defense and security, he may, after notifying the Congress of his determination, extend by Executive order the duration of the above proviso for a period of twelve months, and may further extend the duration of such proviso by one year increments annually thereafter if he again makes such determination and so notifies the Congress. In the event that the Committee on International Relations of the House of Representatives or the Committee on Foreign Relations of the Senate reports a joint resolution to take any action with respect to any such extension, such joint resolution will be considered in the

House or Senate, as the case may be, under procedures identical to those provided for the consideration of resolutions pursuant to section 130 of this Act: *And additionally provided*, That the Commission is authorized to (A) make a single finding under this subsection for more than a single application or request, where the applications or requests involve exports to the same country, in the same general time frame, of similar significance for nuclear explosive purposes and under reasonably similar circumstances and (B) make a finding under this subsection that there is no material changed circumstance associated with a new application or request from those existing at the time of the last application or request for an export to the same country, where the prior application or request was approved by the Commission using all applicable procedures of this section, and such finding of no material changed circumstance shall be deemed to satisfy the requirement of this paragraph for findings of the Commission. The decision not to make any such finding in lieu of the findings which would otherwise be required to be made under this paragraph shall not be subject to judicial review: *And provided further*, That nothing contained in this section is intended to require the Commission independently to conduct or prohibit the Commission from independently conducting country or site specific visitations in the Commission's consideration of the application of IAEA safeguards.

"b. (1) Timely consideration shall be given by the Commission to requests for export licenses and exemptions and such requests shall be granted upon a determination that all applicable statutory requirements have been met.

"(2) If, after receiving the executive branch judgment that the issuance of a proposed export license will not be inimical to the common defense and security, the Commission does not issue the proposed license on a timely basis because it is unable to make the statutory determinations required under this Act, the Commission shall publicly issue its decision to that effect, and shall submit the license application to the President. The Commission's decision shall include an explanation of the basis for the decision and any dissenting or separate views. If, after receiving the proposed license application and reviewing the Commission's decision, the President determines that withholding the proposed export would be seriously prejudicial to the achievement of United States non-proliferation objectives, or would otherwise jeopardize the common defense and security, the proposed export may be authorized by Executive order: *Provided*, That prior to any such export, the President shall submit the Executive order, together with his explanation of why, in light of the Commission's decision, the export should nonetheless be made, to the Congress for a period of sixty days of continuous session (as defined in subsection 130 g.) and shall be referred to the Committee on International Relations of the House of Representatives and the Committee on Foreign Relations of the Senate, but any such proposed export shall not occur if during such sixty-day period the Congress adopts a concurrent resolution stating in substance that it does not favor the proposed export. Any such Executive order shall be considered pursuant to the procedures set forth in section 130 of this Act for the consideration of Presidential submissions: *And provided further*, That the procedures established pursuant to subsection (b) of section 304 of the Nuclear Non-Proliferation Act of 1978 shall provide that the Commission shall immediately initiate review of any application for a license under this section and to the maximum extent feasible shall expeditiously process the application concurrently with the executive branch review, while awaiting the final executive branch judgment. In initiating its review, the Commission may identify

a set of concerns and requests for information associated with the projected issuance of such license and shall transmit such concerns and requests to the executive branch which shall address such concerns and requests in its written communications with the Commission. Such procedures shall also provide that if the Commission has not completed action on the application within sixty days after the receipt of an executive branch judgment that the proposed export or exemption is not inimical to the common defense and security or that any export in the category to which the proposed export belongs would not be inimical to the common defense and security because it lacks significance for nuclear explosive purposes, the Commission shall inform the applicant in writing of the reason for delay and provide follow-up reports as appropriate. If the Commission has not completed action by the end of an additional sixty days (a total of one hundred and twenty days from receipt of the executive branch judgment), the President may authorize the proposed export by Executive order, upon a finding that further delay would be excessive and upon making the findings required for such Presidential authorizations under this subsection, and subject to the Congressional review procedures set forth herein. However, if the Commission has commenced procedures for public participation regarding the proposed export under regulations promulgated pursuant to subsection (b) of section 304 of the Nuclear Non-Proliferation Act of 1978, or—within sixty days after receipt of the executive branch judgment on the proposed export—the Commission has identified and transmitted to the executive branch a set of additional concerns or requests for information, the President may not authorize the proposed export until sixty days after public proceedings are completed or sixty days after a full executive branch response to the Commission's additional concerns or requests has been made consistent with subsection a. (1) of this section: *Provided further*, That nothing in this section shall affect the right of the Commission to obtain data and recommendations from the Secretary of State at any time as provided in subsection a. (1) of this section.

"c. In the event that the House of Representatives or the Senate passes a joint resolution which would adopt one or more additional export criteria, or would modify any existing export criteria under this Act, any such joint resolution shall be referred in the other House to the Committee on Foreign Relations of the Senate or the Committee on International Relations of the House of Representatives, as the case may be, and shall be considered by the other House under applicable procedures provided for the consideration of resolutions pursuant to section 130 of this Act."

(b) Within one hundred and twenty days of the date of enactment of this Act, the Commission shall, after consultations with the Secretary of State, promulgate regulations establishing procedures (1) for the granting, suspending, revoking, or amending of any nuclear export license or exemptions pursuant to its statutory authority; (2) for public participation in nuclear export licensing proceedings when the Commission finds that such participation will be in the public interest and will assist the Commission in making the statutory determinations required by the 1954 Act, including such public hearings and access to information as the Commission deems appropriate: *Provided*, That judicial review as to any such finding shall be limited to the determination of whether such finding was arbitrary and capricious; (3) for a public written Commission opinion accompanied by the dissenting or separate views of any Commissioner, in those proceedings where one or more Commissioners have dissenting or separate views on the issuance of an export license; and (4) for public

notice of Commission proceedings and decisions, and for recording of minutes and votes of the Commission: *Provided further*, That until the regulations required by this subsection have been promulgated, the Commission shall implement the provisions of this Act under temporary procedures established by the Commission.

(c) The procedures to be established pursuant to subsection (b) shall constitute the exclusive basis for hearings in nuclear export licensing proceedings before the Commission and, notwithstanding section 189 a. of the 1954 Act, shall not require the Commission to grant any person an on-the-record hearing in such a proceeding.

(d) Within sixty days of the date of enactment of this Act, the Commission shall, in consultation with the Secretary of State, the Secretary of Energy, the Secretary of Defense, and the Director, promulgate (and may from time to time amend) regulations establishing the levels of physical security which in its judgment are no less strict than those established by any international guidelines to which the United States subscribes and which in its judgment will provide adequate protection for facilities and material referred to in paragraph (3) of section 127 of the 1954 Act taking into consideration variations in risks to security as appropriate.

CRITERIA GOVERNING UNITED STATES NUCLEAR EXPORTS

SEC. 305. Chapter 11 of the 1954 Act, as amended by section 304, is further amended by adding at the end thereof the following:

“SEC. 127. CRITERIA GOVERNING UNITED STATES NUCLEAR EXPORTS.—

“The United States adopts the following criteria which, in addition to other requirements of law, will govern exports for peaceful nuclear uses from the United States of source material, special nuclear material, production or utilization facilities, and any sensitive nuclear technology:

“(1) IAEA safeguards as required by Article III(2) of the Treaty will be applied with respect to any such material or facilities proposed to be exported, to any such material or facilities previously exported and subject to the applicable agreement for cooperation, and to any special nuclear material used in or produced through the use thereof.

“(2) No such material, facilities, or sensitive nuclear technology proposed to be exported or previously exported and subject to the applicable agreement for cooperation, and no special nuclear material produced through the use of such materials, facilities, or sensitive nuclear technology, will be used for any nuclear explosive device or for research on or development of any nuclear explosive device.

“(3) Adequate physical security measures will be maintained with respect to such material or facilities proposed to be exported and to any special nuclear material used in or produced through the use thereof. Following the effective date of any regulations promulgated by the Commission pursuant to section 304(d) of the Nuclear Non-Proliferation Act of 1978, physical security measures shall be deemed adequate if such measures provide a level of protection equivalent to that required by the applicable regulations.

“(4) No such materials, facilities, or sensitive nuclear technology proposed to be exported, and no special nuclear material produced through the use of such material, will be retransferred to the jurisdiction of any other nation or group of nations unless the prior approval of the United States is obtained for such retransfer. In addition to other require-

ments of law, the United States may approve such retransfer only if the nation or group of nations designated to receive such retransfer agrees that it shall be subject to the conditions required by this section.

"(5) No such material proposed to be exported and no special nuclear material produced through the use of such material will be reprocessed, and no irradiated fuel elements containing such material removed from a reactor shall be altered in form or content, unless the prior approval of the United States is obtained for such reprocessing or alteration.

"(6) No such sensitive nuclear technology shall be exported unless the foregoing conditions shall be applied to any nuclear material or equipment which is produced or constructed under the jurisdiction of the recipient nation or group of nations by or through the use of any such exported sensitive nuclear technology."

ADDITIONAL EXPORT CRITERION AND PROCEDURES

SEC. 306. Chapter 11 of the 1954 Act, as amended by sections 304 and 305, is further amended by adding at the end thereof the following:

"SEC. 128. ADDITIONAL EXPORT CRITERION AND PROCEDURES.—

"a. (1) As a condition of continued United States export of source material, special nuclear material, production or utilization facilities, and any sensitive nuclear technology to non-nuclear-weapon states, no such export shall be made unless IAEA safeguards are maintained with respect to all peaceful nuclear activities in, under the jurisdiction of, or carried out under the control of such state at the time of the export.

"(2) The President shall seek to achieve adherence to the foregoing criterion by recipient non-nuclear-weapon states.

"b. The criterion set forth in subsection a. shall be applied as an export criterion with respect to any application for the export of materials, facilities, or technology specified in subsection a. which is filed after eighteen months from the date of enactment of this section, or for any such application under which the first export would occur at least twenty-four months after the date of enactment of this section, except as provided in the following paragraphs:

"(1) If the Commission or the Department of Energy, as the case may be, is notified that the President has determined that failure to approve an export to which this subsection applies because such criterion has not yet been met would be seriously prejudicial to the achievement of United States non-proliferation objectives or otherwise jeopardize the common defense and security, the license or authorization may be issued subject to other applicable requirements of law: *Provided*, That no such export of any production or utilization facility or of any source or special nuclear material (intended for use as fuel in any production or utilization facility) which has been licensed or authorized pursuant to this subsection shall be made to any non-nuclear-weapon state which has failed to meet such criterion until the first such license or authorization with respect to such state is submitted to the Congress (together with a detailed assessment of the reasons underlying the President's determination, the judgment of the executive branch required under section 126 of this Act, and any Commission opinion and views) for a period of sixty days of continuous session. (as defined in subsection 130 g. of this Act) and referred to the Committee on International Relations of the House of Representatives and the Committee on Foreign Relations of the Senate, but such export shall not occur if during such sixty-day period the Congress adopts a concurrent resolution stating in substance that the Congress does not favor the proposed export. Any such license or authorization shall be considered

pursuant to the procedures set forth in section 130 of this Act for the consideration of Presidential submissions.

"(2) If the Congress adopts a resolution of disapproval pursuant to paragraph (1), no further export of materials, facilities, or technology specified in subsection a. shall be permitted for the remainder of that Congress, unless such state meets the criterion or the President notifies the Congress that he has determined that significant progress has been made in achieving adherence to such criterion by such state or that United States foreign policy interests dictate reconsideration and the Congress, pursuant to the procedure of paragraph (1), does not adopt a concurrent resolution stating in substance that it disagrees with the President's determination.

"(3) If the Congress does not adopt a resolution of disapproval with respect to a license or authorization submitted pursuant to paragraph (1), the criterion set forth in subsection a. shall not be applied as an export criterion with respect to exports of materials, facilities and technology specified in subsection a. to that state: *Provided*, That the first license or authorization with respect to that state which is issued pursuant to this paragraph after twelve months from the elapse of the sixty-day period specified in paragraph (1), and the first such license or authorization which is issued after each twelve-month period thereafter, shall be submitted to the Congress for review pursuant to the procedures specified in paragraph (1): *Provided further*, That if the Congress adopts a resolution of disapproval during any review period provided for by this paragraph, the provisions of paragraph (2) shall apply with respect to further exports to such state."

CONDUCT RESULTING IN TERMINATION OF NUCLEAR EXPORTS

SEC. 307. Chapter 11 of the 1954 Act, as amended by sections 304, 305, and 306, is further amended by adding at the end thereof:

"SEC. 129. CONDUCT RESULTING IN TERMINATION OF NUCLEAR EXPORTS.—

"No nuclear materials and equipment or sensitive nuclear technology shall be exported to—

"(1) any non-nuclear-weapon state that is found by the President to have, at any time after the effective date of this section,

"(A) detonated a nuclear explosive device; or

"(B) terminated or abrogated IAEA safeguards; or

"(C) materially violated an IAEA safeguards agreement; or

"(D) engaged in activities involving source or special nuclear material and having direct significance for the manufacture or acquisition of nuclear explosive devices, and has failed to take steps which, in the President's judgment, represent sufficient progress toward terminating such activities; or

"(2) any nation or group of nations that is found by the President to have, at any time after the effective date of this section,

"(A) materially violated an agreement for cooperation with the United States, or, with respect to material or equipment not supplied under an agreement for cooperation, materially violated the terms under which such material or equipment was supplied or the terms of any commitments obtained with respect thereto pursuant to section 402(a) of the Nuclear Non-Proliferation Act of 1978; or

"(B) assisted, encouraged, or induced any non-nuclear-weapon state to engage in activities involving source or special nuclear material and having direct significance for the manufacture or acquisition of nuclear explosive devices, and has failed to take steps which, in the President's judgment, represent sufficient progress toward terminating such assistance, encouragement, or inducement; or

"(C) entered into an agreement after the date of enactment of this section for the transfer of reprocessing equipment, materials, or technology to the sovereign control of a non-nuclear-weapon state except in connection with an international fuel cycle evaluation in which the United States is a participant or pursuant to a subsequent international agreement or understanding to which the United States subscribes; unless the President determines that cessation of such exports would be seriously prejudicial to the achievement of United States non-proliferation objectives or otherwise jeopardize the common defense and security: *Provided*, That prior to the effective date of any such determination, the President's determination, together with a report containing the reasons for his determination, shall be submitted to the Congress and referred to the Committee on International Relations of the House of Representatives and the Committee on Foreign Relations of the Senate for a period of sixty days of continuous session (as defined in subsection 130 g. of this Act), but any such determination shall not become effective if during such sixty-day period the Congress adopts a concurrent resolution stating in substance that it does not favor the determination. Any such determination shall be considered pursuant to the procedures set forth in section 130 of this Act for the consideration of Presidential submissions."

CONGRESSIONAL REVIEW PROCEDURES

SEC. 308. Chapter 11 of the 1954 Act, as amended by sections 304, 305, 306, and 307, is further amended by adding at the end thereof the following:

"SEC. 130. CONGRESSIONAL REVIEW PROCEDURES.—

"a. Not later than forty-five days of continuous session of Congress after the date of transmittal to the Congress of any submission of the President required by subsection 123 d., 126 a. (2), 126 b. (2), 128 b., 129, 131 a. (3), or 131 f. (1) (A) of this Act, the Committee on Foreign Relations of the Senate and the Committee on International Relations of the House of Representatives, and in addition, in the case of a proposed agreement for cooperation arranged pursuant to subsection 91 c., 144 b., or 144 c., the Committee on Armed Services of the House of Representatives and the Committee on Armed Services of the Senate, shall each submit a report to its respective House on its views and recommendations respecting such Presidential submission together with a resolution, as defined in subsection f., stating in substance that the Congress approves or disapproves such submission, as the case may be: *Provided*, That if any such committee has not reported such a resolution at the end of such forty-five day period, such committee shall be deemed to be discharged from further consideration of such submission and if, in the case of a proposed agreement for cooperation arranged pursuant to subsection 91 c., 144 b., or 144 c. of this Act, the other relevant committee of that House has reported such a resolution, such committee shall be deemed discharged from further consideration of that resolution. If no such resolution has been reported at the end of such period, the first resolution, as defined in subsection f., which is introduced within five days thereafter within such House shall be placed on the appropriate calendar of such House.

"b. When the relevant committee or committees have reported such a resolution (or have been discharged from further consideration of such a resolution pursuant to subsection a.) or when a resolution has been introduced and placed on the appropriate calendar pursuant to subsection a., as the case may be, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) for any Member of the respective House to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. The mo-

tion shall not be subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the resolution is agreed to, the resolution shall remain the unfinished business of the respective House until disposed of.

"c. Debate on the resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than ten hours, which shall be divided equally between individuals favoring and individuals opposing the resolution. A motion further to limit debate is in order and not debatable. An amendment to a motion to postpone, or a motion to recommit the resolution, or a motion to proceed to the consideration of other business is not in order. A motion to reconsider the vote by which the resolution is agreed to or disagreed to shall not be in order. No amendment to any concurrent resolution pursuant to the procedures of this section is in order except as provided in subsection d.

"d. Immediately following (1) the conclusion of the debate on such concurrent resolution, (2) a single quorum call at the conclusion of debate if requested in accordance with the rules of the appropriate House, and (3) the consideration of an amendment introduced by the Majority Leader or his designee to insert the phrase, 'does not' in lieu of the word 'does' if the resolution under consideration is a concurrent resolution of approval, the vote on final approval of the resolution shall occur.

"e. Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to such a resolution shall be decided without debate.

"f. For the purposes of subsections a. through e. of this section, the term 'resolution' means a concurrent resolution of the Congress, the matter after the resolving clause of which is as follows: 'That the Congress (does or does not) favor the _____ transmitted to the Congress by the President on _____', the blank spaces therein to be appropriately filled, and the affirmative or negative phrase within the parenthetical to be appropriately selected.

"g. For the purposes of this section—

"(1) continuity of session is broken only by an adjournment of Congress sine die; and

"(2) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of any period of time in which Congress is in continuous session.

"h. This section is enacted by Congress—

"(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions described by subsection f. of this section; and they supersede other rules only to the extent that they are inconsistent therewith; and

"(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House."

COMPONENT AND OTHER PARTS OF FACILITIES

SEC. 309. (a) Section 109 of the 1954 Act is amended to read as follows:

"SEC. 109. COMPONENT AND OTHER PARTS OF FACILITIES.—

"a. With respect to those utilization and production facilities which are

so determined by the Commission pursuant to subsection 11 v. (2) or 11 cc. (2) the Commission may issue general licenses for domestic activities required to be licensed under section 101, if the Commission determines in writing that such general licensing will not constitute an unreasonable risk to the common defense and security.

"b. After consulting with the Secretaries of State, Energy, and Commerce and the Director, the Commission is authorized and directed to determine which component parts as defined in subsection 11 v. (2) or 11 cc. (2) and which other items or substances are especially relevant from the standpoint of export control because of their significance for nuclear explosive purposes. Except as provided in section 126 b. (2), no such component, substance, or item which is so determined by the Commission shall be exported unless the Commission issues a general or specific license for its export after finding, based on a reasonable judgment of the assurances provided and other information available to the Federal Government, including the Commission, that the following criteria or their equivalent are met: (1) IAEA safeguards as required by Article III (2) of the Treaty will be applied with respect to such component, substance, or item; (2) no such component, substance, or item will be used for any nuclear explosive device or for research on or development of any nuclear explosive device; and (3) no such component, substance, or item will be retransferred to the jurisdiction of any other nation or group of nations unless the prior consent of the United States is obtained for such retransfer; and after determining in writing that the issuance of each such general or specific license or category of licenses will not be inimical to the common defense and security: *Provided*, That a specific license shall not be required for an export pursuant to this section if the component, item or substance is covered by a facility license issued pursuant to section 126 of this Act.

"c. The Commission shall not issue an export license under the authority of subsection b. if it is advised by the executive branch, in accordance with the procedures established under subsection 126 a., that the export would be inimical to the common defense and security of the United States."

(b) The Commission, not later than one hundred and twenty days after the date of the enactment of this Act, shall publish regulations to implement the provisions of subsections b. and c. of section 109 of the 1954 Act. Among other things, these regulations shall provide for the prior consultation by the Commission with the Department of State, the Department of Energy, the Department of Defense, the Department of Commerce, and the Arms Control and Disarmament Agency.

(c) The President, within not more than one hundred and twenty days after the date of enactment of this Act, shall publish procedures regarding the control by the Department of Commerce over all export items, other than those licensed by the Commission, which could be, if used for purposes other than those for which the export is intended, of significance for nuclear explosive purposes. Among other things, these procedures shall provide for prior consultations, as required, by the Department of Commerce with the Department of State, the Arms Control and Disarmament Agency, the Commission, the Department of Energy, and the Department of Defense.

(d) The amendments to section 109 of the 1954 Act made by this section shall not affect the approval of exports contracted for prior to November 1, 1977, which are made within one year of the date of enactment of such amendments.

TITLE IV—NEGOTIATION OF FURTHER EXPORT CONTROLS

COOPERATION WITH OTHER NATIONS

SEC. 401. Section 123 of the 1954 Act is amended to read as follows:

“SEC. 123. COOPERATION WITH OTHER NATIONS.—

“No cooperation with any nation, group of nations or regional defense organization pursuant to section 53, 54 a., 57, 64, 82, 91, 103, 104, or 144 shall be undertaken until—

“a. the proposed agreement for cooperation has been submitted to the President, which proposed agreement shall include the terms, conditions, duration, nature, and scope of the cooperation; and shall include the following requirements:

“(1) a guaranty by the cooperating party that safeguards as set forth in the agreement for cooperation will be maintained with respect to all nuclear materials and equipment transferred pursuant thereto, and with respect to all special nuclear material used in or produced through the use of such nuclear materials and equipment, so long as the material or equipment remains under the jurisdiction or control of the cooperating party, irrespective of the duration of other provisions in the agreement or whether the agreement is terminated or suspended for any reason;

“(2) in the case of non-nuclear-weapon states, a requirement, as a condition of continued United States nuclear supply under the agreement for cooperation, that IAEA safeguards be maintained with respect to all nuclear materials in all peaceful nuclear activities within the territory of such state, under its jurisdiction, or carried out under its control anywhere;

“(3) except in the case of those agreements for cooperation arranged pursuant to subsection 91 c., a guaranty by the cooperating party that no nuclear materials and equipment or sensitive nuclear technology to be transferred pursuant to such agreement, and no special nuclear material produced through the use of any nuclear materials and equipment or sensitive nuclear technology transferred pursuant to such agreement, will be used for any nuclear explosive device, or for research on or development of any nuclear explosive device, or for any other military purpose;

“(4) except in the case of those agreements for cooperation arranged pursuant to subsection 91 c. and agreements for cooperation with nuclear-weapon states, a stipulation that the United States shall have the right to require the return of any nuclear materials and equipment transferred pursuant thereto and any special nuclear material production through the use thereof if the cooperating party detonates a nuclear explosive device or terminates or abrogates an agreement providing for IAEA safeguards;

“(5) a guaranty by the cooperating party that any material or any Restricted Data transferred pursuant to the agreement for cooperation and, except in the case of agreements arranged pursuant to subsection 91 c., 144 b. or 144 c., any production or utilization facility transferred pursuant to the agreement for cooperation or any special nuclear material produced through the use of any such facility or through the use of any material transferred pursuant to the agreement, will not be transferred to unauthorized persons or beyond the jurisdiction or control of the cooperating party without the consent of the United States;

“(6) a guaranty by the cooperating party that adequate physical security will be maintained with respect to any nuclear material transferred pursuant to such agreement and with respect to any special nuclear material used in or produced through the use of any material, production facility, or utilization facility transferred pursuant to such agreement;

“(7) except in the case of agreements for cooperation arranged pursuant to subsection 91 c., 144 b., or 144 c., a guaranty by the cooperating

party that no material transferred pursuant to the agreement for cooperation and no material used in or produced through the use of any material, production facility, or utilization facility transferred pursuant to the agreement for cooperation will be reprocessed, enriched or (in the case of plutonium, uranium 233, or uranium enriched to greater than twenty percent in the isotope 235, or other nuclear materials which have been irradiated) otherwise altered in form or content without the prior approval of the United States;

"(8) except in the case of agreements for cooperation arranged pursuant to subsection 91 c., 144 b., or 144 c., a guaranty by the cooperating party that no plutonium, no uranium 233, and no uranium enriched to greater than twenty percent in the isotope 235, transferred pursuant to the agreement for cooperation, or recovered from any source or special nuclear material so transferred or from any source or special nuclear material used in any production facility or utilization facility transferred pursuant to the agreement for cooperation, will be stored in any facility that has not been approved in advance by the United States; and

"(9) except in the case of agreements for cooperation arranged pursuant to subsection 91 c., 144 b. or 144 c., a guaranty by the cooperating party that any special nuclear material, production facility, or utilization facility produced or constructed under the jurisdiction of the cooperating party by or through the use of any sensitive nuclear technology transferred pursuant to such agreement for cooperation will be subject to all the requirements specified in this subsection.

The President may exempt a proposed agreement for cooperation (except an agreement arranged pursuant to subsection 91 c., 144 b., or 144 c.) from any of the requirements of the foregoing sentence if he determines that inclusion of any such requirement would be seriously prejudicial to the achievement of United States non-proliferation objectives or otherwise jeopardize the common defense and security. Except in the case of those agreements for cooperation arranged pursuant to subsection 91 c., 144 b., or 144 c., any proposed agreement for cooperation shall be negotiated by the Secretary of State, with the technical assistance and concurrence of the Secretary of Energy and in consultation with the Director of the Arms Control and Disarmament Agency ('the Director'); and after consultation with the Commission shall be submitted to the President jointly by the Secretary of State and the Secretary of Energy accompanied by the views and recommendations of the Secretary of State, the Secretary of Energy, the Nuclear Regulatory Commission, and the Director, who shall also provide to the President an unclassified Nuclear Proliferation Assessment Statement regarding the adequacy of the safeguards and other control mechanisms and the peaceful use assurances contained in the agreement for cooperation to ensure that any assistance furnished thereunder will not be used to further any military or nuclear explosive purpose. In the case of those agreements for cooperation arranged pursuant to subsection 91 c., 144 b., or 144 c., any proposed agreement for cooperation shall be submitted to the President by the Secretary of Energy or, in the case of those agreements for cooperation arranged pursuant to subsection 91 c. or 144 b. which are to be implemented by the Department of Defense, by the Secretary of Defense;

"b. the President has approved and authorized the execution of the proposed agreement for cooperation and has made a determination in writing that the performance of the proposed agreement will promote, and will not constitute an unreasonable risk to, the common defense and security;

"c. the proposed agreement for cooperation (if not an agreement subject to subsection d.), together with the approval and determination of the President, has been submitted to the Committee on International Relations of the House of Representatives and the Committee on Foreign Relations of the Senate for a period of thirty days of continuous session (as defined in subsection 130 g.): *Provided, however,* That these committees, after having received such agreement for cooperation, may by resolution in writing waive the conditions of all or any portion of such thirty-day period; and

"d. the proposed agreement for cooperation (if arranged pursuant to subsection 91 c., 144 b., or 144 c., or if entailing implementation of section 53, 54 a., 103, or 104 in relation to a reactor that may be capable of producing more than five thermal megawatts or special nuclear material for use in connection therewith) has been submitted to the Congress, together with the approval and determination of the President, for a period of sixty days of continuous session (as defined in subsection 130 g. of this Act) and referred to the Committee on International Relations of the House of Representatives and the Committee on Foreign Relations of the Senate, and in addition, in the case of a proposed agreement for cooperation arranged pursuant to subsection 91 c., 144 b., or 144 c., the Committee on Armed Services of the House of Representatives and the Committee on Armed Services of the Senate, but such proposed agreement for cooperation shall not become effective if during such sixty-day period the Congress adopts a concurrent resolution stating in substance that the Congress does not favor the proposed agreement for cooperation; *Provided,* That the sixty-day period shall not begin until a Nuclear Proliferation Assessment Statement prepared by the Director of the Arms Control and Disarmament Agency, when required by subsection 123 a., has been submitted to the Congress. Any such proposed agreement for cooperation shall be considered pursuant to the procedures set forth in section 130 of this Act for the consideration of Presidential submissions.

"Following submission of a proposed agreement for cooperation (except an agreement for cooperation arranged pursuant to subsection 91 c., 144 b., or 144 c.) to the Committee on International Relations of the House of Representatives and the Committee on Foreign Relations of the Senate, the Nuclear Regulatory Commission, the Department of State, the Department of Energy, the Arms Control and Disarmament Agency, and the Department of Defense shall, upon the request of either of those committees, promptly furnish to those committees their views as to whether the safeguards and other controls contained therein provide an adequate framework to ensure that any exports as contemplated by such agreement will not be inimical to or constitute an unreasonable risk to the common defense and security.

"If, after the date of enactment of the Nuclear Non-Proliferation Act of 1978, the Congress fails to disapprove a proposed agreement for cooperation which exempts the recipient nation from the requirement set forth in subsection 123 a. (2), such failure to act shall constitute a failure to adopt a resolution of disapproval pursuant to subsection 128 b. (3) for purposes of the Commission's consideration of applications and requests under section 126 a. (2) and there shall be no congressional review pursuant to section 128 of any subsequent license or authorization with respect to that state until the first such license or authorization which is issued after twelve months from the elapse of the sixty-day period in which the agreement for cooperation in question is reviewed by the Congress."

ADDITIONAL REQUIREMENTS

SEC. 402. (a) Except as specifically provided in any agreement for co-operation, no source or special nuclear material hereafter exported from the United States may be enriched after export without the prior approval of the United States for such enrichment: *Provided*, That the procedures governing such approvals shall be identical to those set forth for the approval of proposed subsequent arrangements under section 131 of the 1954 Act, and any commitments from the recipient which the Secretary of Energy and the Secretary of State deem necessary to ensure that such approval will be obtained prior to such enrichment shall be obtained prior to the submission of the executive branch judgment regarding the export in question and shall be set forth in such submission: *And provided further*, That no source or special nuclear material shall be exported for the purpose of enrichment or reactor fueling to any nation or group of nations which has, after the date of enactment of this Act, entered into a new or amended agreement for cooperation with the United States, except pursuant to such agreement.

(b) In addition to other requirements of law, no major critical component of any uranium enrichment, nuclear fuel reprocessing, or heavy water production facility shall be exported under any agreement for cooperation (except an agreement for cooperation pursuant to subsection 91 c., 144 b., or 144 c. of the 1954 Act) unless such agreement for cooperation specifically designates such components as items to be exported pursuant to the agreement for cooperation. For purposes of this subsection, the term "major critical component" means any component part or group of component parts which the President determines to be essential to the operation of a complete uranium enrichment, nuclear fuel reprocessing, or heavy water production facility.

PEACEFUL NUCLEAR ACTIVITIES

SEC. 403. The President shall take immediate and vigorous steps to seek agreement from all nations and groups of nations to commit themselves to adhere to the following export policies with respect to their peaceful nuclear activities and their participation in international nuclear trade:

(a) No nuclear materials and equipment and no sensitive nuclear technology within the territory of any nation or group of nations, under its jurisdiction, or under its control anywhere will be transferred to the jurisdiction of any other nation or group of nations unless the nation or group of nations receiving such transfer commits itself to strict undertakings including, but not limited to, provisions sufficient to ensure that—

(1) no nuclear materials and equipment and no nuclear technology in, under the jurisdiction of, or under the control of any non-nuclear-weapon state, shall be used for nuclear explosive devices for any purpose or for research on or development of nuclear explosive devices for any purpose, except as permitted by Article V, the Treaty;

(2) IAEA safeguards will be applied to all peaceful nuclear activities in, under the jurisdiction of, or under the control of any non-nuclear-weapon state;

(3) adequate physical security measures will be established and maintained by any nation or group of nations on all of its nuclear activities;

(4) no nuclear materials and equipment and no nuclear technology intended for peaceful purposes in, under the jurisdiction of, or under the control of any nation or group of nations shall be transferred to the jurisdiction of any other nation or group of nations which does not agree to stringent undertakings meeting the objectives of this section; and

(5) no nation or group of nations will assist, encourage, or induce any non-nuclear-weapon state to manufacture or otherwise acquire any nuclear explosive device.

(b) (1) No source or special nuclear material within the territory of any nation or group of nations, under its jurisdiction, or under its control anywhere will be enriched (as described in paragraph aa. (2) of section 11 of the 1954 Act) or reprocessed, no irradiated fuel elements containing such material which are to be removed from a reactor will be altered in form or content, and no fabrication or stockpiling involving plutonium, uranium 233, or uranium enriched to greater than 20 percent in the isotope 235 shall be performed except in a facility under effective international auspices and inspection, and any such irradiated fuel elements shall be transferred to such a facility as soon as practicable after removal from a reactor consistent with safety requirements. Such facilities shall be limited in number to the greatest extent feasible and shall be carefully sited and managed so as to minimize the proliferation and environmental risks associated with such facilities. In addition, there shall be conditions to limit the access of non-nuclear-weapon states other than the host country to sensitive nuclear technology associated with such facilities.

(2) Any facilities within the territory of any nation or group of nations, under its jurisdiction, or under its control anywhere for the necessary short-term storage of fuel elements containing plutonium, uranium 233, or uranium enriched to greater than 20 percent in the isotope 235 prior to placement in a reactor or of irradiated fuel elements prior to transfer as required in subparagraph (1) shall be placed under effective international auspices and inspection.

(c) Adequate physical security measures will be established and maintained with respect to all nuclear activities within the territory of each nation and group of nations, under its jurisdiction, or under its control anywhere, and with respect to any international shipment of significant quantities of source or special nuclear material or irradiated source or special nuclear material, which shall also be conducted under international safeguards.

(d) Nothing in this section shall be interpreted to require international control or supervision of any United States military activities.

RENEGOTIATION OF AGREEMENTS FOR COOPERATION

SEC. 404. (a) The President shall initiate a program immediately to renegotiate agreements for cooperation in effect on the date of enactment of this Act, or otherwise to obtain the agreement of parties to such agreements for cooperation to the undertakings that would be required for new agreements under the 1954 Act. To the extent that an agreement for cooperation in effect on the date of enactment of this Act with a cooperating party contains provisions equivalent to any or all of the criteria set forth in section 127 of the 1954 Act with respect to materials and equipment transferred pursuant thereto or with respect to any special nuclear material used in or produced through the use of any such material or equipment, any renegotiated agreement with that cooperating party shall continue to contain an equivalent provision with respect to such transferred materials and equipment and such special nuclear material. To the extent that an agreement for cooperation in effect on the date of enactment of this Act with a cooperating party does not contain provisions with respect to any nuclear materials and equipment which have previously been transferred under an agreement for cooperation with the United States and which are

under the jurisdiction or control of the cooperating party and with respect to any special nuclear material which is used in or produced through the use thereof and which is under the jurisdiction or control of the cooperating party, which are equivalent to any or all of those required for new and amended agreements for cooperation under section 123 a. of the 1954 Act, the President shall vigorously seek to obtain the application of such provisions with respect to such nuclear materials and equipment and such special nuclear material. Nothing in this Act or in the 1954 Act shall be deemed to relinquish any rights which the United States may have under any agreement for cooperation in force on the date of enactment of this Act.

(b) The President shall annually review each of requirements (1) through (9) set forth for inclusion in agreements for cooperation under section 123 a. of the 1954 Act and the export policy goals set forth in section 401 to determine whether it is in the interest of United States non-proliferation objectives for any such requirements or export policies which are not already being applied as export criteria to be enacted as additional export criteria.

(c) If the President proposes enactment of any such requirements or export policies as additional export criteria or to take any other action with respect to such requirements or export policy goals for the purpose of encouraging adherence by nations and groups of nations to such requirements and policies, he shall submit such a proposal together with an explanation thereof to the Congress.

(d) If the Committee on Foreign Relations of the Senate or the Committee on International Relations of the House of Representatives, after reviewing the President's annual report or any proposed legislation, determines that it is in the interest of United States non-proliferation objectives to take any action with respect to such requirements or export policy goals, it shall report a joint resolution to implement such determination. Any joint resolution so reported shall be considered in the Senate and the House of Representatives, respectively, under applicable procedures provided for the consideration of resolutions pursuant to subsection 130 b. through g. of the 1954 Act.

AUTHORITY TO CONTINUE AGREEMENTS

SEC. 405. (a) The amendments to section 123 of the 1954 Act made by this Act shall not affect the authority to continue cooperation pursuant to agreements for cooperation entered into prior to the date of enactment of this Act.

(b) Nothing in this Act shall affect the authority to include dispute settlement provisions, including arbitration, in any agreement made pursuant to an Agreement for Cooperation.

REVIEW

SEC. 406. No court or regulatory body shall have any jurisdiction under any law to compel the performance of or to review the adequacy of the performance of any Nuclear Proliferation Assessment Statement called for in this Act or in the 1954 Act.

PROTECTION OF THE ENVIRONMENT

SEC. 407. The President shall endeavor to provide in any agreement entered into pursuant to section 123 of the 1954 Act for cooperation be-

tween the parties in protecting the international environment from radioactive, chemical or thermal contamination arising from peaceful nuclear activities.

TITLE V—UNITED STATES ASSISTANCE TO DEVELOPING COUNTRIES

POLICY; REPORT

SEC. 501. The United States shall endeavor to cooperate with other nations, international institutions, and private organizations in establishing programs to assist in the development of non-nuclear energy resources, to cooperate with both developing and industrialized nations in protecting the international environment from contamination arising from both nuclear and non-nuclear energy activities, and shall seek to cooperate with and aid developing countries in meeting their energy needs through the development of such resources and the application of non-nuclear technologies consistent with the economic factors, the material resources of those countries, and environmental protection. The United States shall additionally seek to encourage other industrialized nations and groups of nations to make commitments for similar cooperation and aid to developing countries. The President shall report annually to Congress on the level of other nations' and groups of nations' commitments under such program and the relation of any such commitments to United States efforts under this title. In cooperating with and providing such assistance to developing countries, the United States shall give priority to parties to the Treaty.

PROGRAMS

SEC. 502. (a) The United States shall initiate a program, consistent with the aims of section 501, to cooperate with developing countries for the purpose of—

(1) meeting the energy needs required for the development of such countries;

(2) reducing the dependence of such countries on petroleum fuels, with emphasis given to utilizing solar and other renewable energy resources; and

(3) expanding the energy alternatives available to such countries.

(b) Such program shall include cooperation in evaluating the energy alternatives of developing countries, facilitating international trade in energy commodities, developing energy resources, and applying suitable energy technologies. The program shall include both general and country-specific energy assessments and cooperative projects in resource exploration and production, training, research and development.

(c) As an integral part of such program, the Department of Energy, under the general policy guidance of the Department of State and in cooperation with the Agency for International Development and other Federal agencies as appropriate, shall initiate, as soon as practicable, a program for the exchange of United States scientists, technicians, and energy experts with those of developing countries to implement the purposes of this section.

(d) For the purposes of carrying out this section, there is authorized to be appropriated such sums as are contained in annual authorization Acts for the Department of Energy, including such sums which have been authorized for such purposes under previous legislation.

(e) Under the direction of the President, the Secretary of State shall ensure the coordination of the activities authorized by this title with other related activities of the United States conducted abroad, including the programs authorized by sections 103(c), 106(a)(2), and 119 of the Foreign Assistance Act of 1961.

REPORT

SEC. 503. Not later than twelve months after the date of enactment of this Act, the President shall report to the Congress on the feasibility of expanding the cooperative activities established pursuant to section 502(c) into an international cooperative effort to include a scientific peace corps designed to encourage large numbers of technically trained volunteers to live and work in developing countries for varying periods of time for the purpose of engaging in projects to aid in meeting the energy needs of such countries through the search for and utilization of indigenous energy resources and the application of suitable technology, including the widespread utilization of renewable and unconventional energy technologies. Such report shall also include a discussion of other mechanisms to conduct a coordinated international effort to develop, demonstrate, and encourage the utilization of such technologies in developing countries.

TITLE VI—EXECUTIVE REPORTING

REPORTS OF THE PRESIDENT

SEC. 601. (a) The President shall review all activities of Government departments and agencies relating to preventing proliferation and shall make a report to Congress in January of 1979 and annually in January of each year thereafter on the Government's efforts to prevent proliferation. This report shall include but not be limited to—

(1) a description of the progress made toward—

(A) negotiating the initiatives contemplated in sections 104 and 105 of this Act;

(B) negotiating the international arrangements or other mutual undertakings contemplated in section 403 of this Act;

(C) encouraging non-nuclear-weapon states that are not party to the Treaty to adhere to the Treaty or, pending such adherence, to enter into comparable agreements with respect to safeguards and to forswear the development of any nuclear explosive devices, and discouraging nuclear exports to non-nuclear-weapon states which have not taken such steps;

(D) strengthening the safeguards of the IAEA as contemplated in section 201 of this Act; and

(E) renegotiating agreements for cooperation as contemplated in section 404(a) of this Act;

(2) an assessment of the impact of the progress described in paragraph (1) on the non-proliferation policy of the United States; an explanation of the precise reasons why progress has not been made on any particular point and recommendations with respect to appropriate measures to encourage progress; and a statement of what legislative modifications, if any, are necessary in his judgment to achieve the non-proliferation policy of the United States;

(3) a determination as to which non-nuclear-weapon states with which the United States has an agreement for cooperation in effect or under negotiation, if any, have—

- (A) detonated a nuclear device; or
- (B) refused to accept the safeguards of the IAEA on all of their peaceful nuclear activities; or
- (C) refused to give specific assurances that they will not manufacture or otherwise acquire any nuclear explosive device; or
- (D) engaged in activities involving source or special nuclear material and having direct significance for the manufacture or acquisition of nuclear explosive devices;

(4) an assessment of whether any of the policies set forth in this Act have, on balance, been counterproductive from the standpoint of preventing proliferation; and

(5) a description of the progress made toward establishing procedures to facilitate the timely processing of requests for subsequent arrangements and export licenses in order to enhance the reliability of the United States in meeting its commitments to supply nuclear reactors and fuel to nations which adhere to effective non-proliferation policies.

(b) In the first report required by this section, the President shall analyze each civil agreement for cooperation negotiated pursuant to section 123 of the 1954 Act, and shall discuss the scope and adequacy of the requirements and obligations relating to safeguards and other controls therein.

ADDITIONAL REPORTS

SEC. 602. (a) The annual reports to the Congress by the Commission and the Department of Energy which are otherwise required by law shall also include views and recommendations regarding the policies and actions of the United States to prevent proliferation which are the statutory responsibility of those agencies. The Department's report shall include a detailed analysis of the proliferation implications of advanced enrichment and reprocessing techniques, advanced reactors, and alternative nuclear fuel cycles. This part of the report shall include a comprehensive version which includes any relevant classified information and a summary unclassified version.

(b) The reporting requirements of this title are in addition to and not in lieu of any other reporting requirements under applicable law.

(c) The Department of State, the Arms Control and Disarmament Agency, the Department of Commerce, the Department of Energy, and the Commission shall keep the Committees on Foreign Relations and Governmental Affairs of the Senate and the Committee on International Relations of the House of Representatives fully and currently informed with respect to their activities to carry out the purposes and policies of this Act and to otherwise prevent proliferation, and with respect to the current activities of foreign nations which are of significance from the proliferation standpoint.

(d) Any classified portions of the reports required by this Act shall be submitted to the Senate Foreign Relations Committee and the House International Relations Committee.

(e) Three years after enactment of this Act, the Comptroller General shall complete a study and report to the Congress on the implementation and impact of this Act on the nuclear non-proliferation policies, purposes, and objectives of this Act. The Secretaries of State, Energy, Defense, and

Commerce and the Commission and the Director shall cooperate with the Comptroller General in the conduct of the study. The report shall contain such recommendations as the Comptroller General deems necessary to support the nuclear non-proliferation policies, purposes, and objectives of this Act.

SAVING CLAUSE

SEC. 603. (a) All orders, determinations, rules, regulations, permits, contracts, agreements, certificates, licenses, and privileges—

(1) which have been issued, made, granted, or allowed to become effective in the exercise of functions which are the subject of this Act, by (i) any agency or officer, or part thereof, in exercising the functions which are affected by this Act, or (ii) any court of competent jurisdiction, and

(2) which are in effect at the time this Act takes effect, shall continue in effect according to their terms until modified, terminated, superseded, set aside, or repealed as the case may be, by the parties thereto or by any court of competent jurisdiction.

(b) Nothing in this Act shall affect the procedures or requirements applicable to agreements for cooperation entered into pursuant to sections 91 c., 144 b., or 144 c. of the 1954 Act or arrangements pursuant thereto as it was in effect immediately prior to the date of enactment of this Act.

(c) Except where otherwise provided, the provisions of this Act shall take effect immediately upon enactment regardless of any requirement for the promulgation of regulations to implement such provisions.

Approved March 10, 1978.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 95-587 (Comm. on International Relations).

SENATE REPORT No. 95-467 accompanying S. 897 (Comms. on Governmental Affairs, Energy and Natural Resources, and Foreign Relations).

CONGRESSIONAL RECORD:

Vol. 123 (1977): Aug. 5, S. 897 considered in Senate.

Sept. 22, 28, considered and passed House.

Nov. 2, S. 897 considered in Senate.

Vol. 124 (1978): Feb. 2, 7, considered and passed Senate, amended, in lieu of S. 897.

Feb. 9, House concurred in Senate amendment.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS:

Vol. 14, No. 10 (1978): Mar. 10, Presidential statement.

INTERNATIONAL LEGAL MATERIALS *

CONTENTS

VOL. XVII, No. 2 (March 1978)

	PAGE
TREATIES AND AGREEMENTS	
African National Council (Sithole)-Rhodesian Government-United African National Council-Zimbabwe United People's Organization: <i>Rhodesian Constitutional Agreement</i>	261
Council of Europe: European Convention on the <i>Service Abroad of Documents relating to Administrative Matters</i>	265
Denmark-Federal Republic of Germany: Agreement Regulating the <i>Exchange of Information on the Construction of Nuclear Installations along the Border</i>	274
United Nations Commission on International Trade Law: Draft Convention on the <i>Formation of Contracts for the International Sale of Goods</i>	277
World Intellectual Property Organization: Budapest Treaty on the <i>International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure</i>	285
REPORTS	
Reports on the Work of the Special Commission on the <i>Operation of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters</i>	312
JUDICIAL AND SIMILAR PROCEEDINGS	
European Communities Court of Justice: Judgment in United Brands Company and United Brands Continental B.V. v. Commission of the European Communities (<i>Interpretation of Article 86 of the Treaty of Rome; Determination of Dominant Market Position; Supply and Pricing Practices</i>)	333
United States:	
Court of Customs and Patent Appeals Decision in the Matter of the Application of Ananda M. Chakrabarty (<i>Patentability of New Microorganisms</i>)	363
State of New Mexico District Court Decision in United Nuclear Corporation v. General Atomic Company, et al. (<i>Uranium Contracts; Compliance with Discovery Orders; Canadian Security Regulations</i>)	376
LEGISLATION AND REGULATIONS	
Andean Commission: Decisions Specifying <i>International Financial Institutions and Foreign Development Corporation as Neutral Capital under Foreign Investment Code</i>	394
United States: <i>Nuclear Non-Proliferation Act of 1978</i>	397
OTHER DOCUMENTS	
Conference on Security and Co-operation in Europe: Concluding Document of the <i>Belgrade Meeting</i> in Follow-up to the Conference	414

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International Chamber of Commerce: Commission on Ethical Practices Recommendations to Combat <i>Extortion and Bribery in Business Transactions</i>	417
International Labor Organization: Tripartite Declaration of Principles concerning <i>Multinational Enterprises and Social Policy</i>	422
Israel: Ministry of Foreign Affairs Memorandum of Law on the <i>Right to Develop New Oil Fields in Sinai and the Gulf of Suez</i> ..	432
Organisation for Economic Co-operation and Development: Council Decision on Establishing a <i>Multilateral Consultation and Surveillance Mechanism for Sea Dumping of Radioactive Waste</i>	445
United Nations Conference on Trade and Development: Draft Texts Submitted to the Intergovernmental Group of Experts on an <i>International Code of Conduct on Transfer of Technology</i>	453
United Nations Security Council Resolutions on: <i>Israeli Withdrawal from Lebanon and U.N. Interim Force</i>	491
<i>Rhodesian Settlement</i>	492
RECENT ACTIONS REGARDING TREATIES TO WHICH THE UNITED STATES IS A PARTY	494
RECENT ACTIONS REGARDING TREATIES TO WHICH THE UNITED STATES IS NOT A PARTY	499
NOTICE OF OTHER RECENT DOCUMENTS (not reprinted)	500

VOL. XVII, No. 3 (MAY 1978)

TREATIES AND AGREEMENTS

Bahrain-Iran-Iraq-Kuwait-Oman-Qatar-Saudi Arabia-United Arab Emirates: Agreements from the Kuwait Regional Conference on the <i>Protection and Development of the Marine Environment and the Coastal Areas</i>	
Action Plan	501
Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution	511
Protocol concerning Regional Co-operation in Combatting Pollution by Oil and Other Harmful Substances in Cases of Emergency	526
Resolutions Adopted by the Conference	536
Inter-Governmental Maritime Consultative Organization: Agreements from the International Conference on <i>Tanker Safety and Pollution Prevention</i> , 1978	
United States Note on the Results of the Conference and Plan for Regulatory Implementation	541
Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973	546
Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, 1974	579
United Nations Conference on the <i>Carriage of Goods by Sea</i> :	
Final Act	603
United Nations Convention on the Carriage of Goods by Sea, 1978	608
Common Understanding on Liability	630
Resolution of the Conference	631

JUDICIAL AND SIMILAR PROCEEDINGS

Argentina-Chile: <i>Beagle Channel Arbitration</i>	
Declaration of Her Majesty Queen Elizabeth II on the Decision of the Court of Arbitration	632

Report and Decision of the Court	634
European Court of Human Rights: Judgment in Ireland v. United Kingdom (<i>Inhumane and Degrading Treatment and Torture</i>)...	680
United States:	
District Court for the Southern District of New York Decision in Gray v. Permanent Mission of the People's Republic of the Congo to the United Nations (<i>Permanent Missions to the U.N. under the Foreign Sovereign Immunities Act; Service of Process under the Act</i>)	714
District Court for the Southern District of New York Decision in Yessenin-Volpin v. Novosti Press Agency, et al. (<i>Status of Defendants under the Foreign Sovereign Immunities Act; Commercial Activities</i>)	720
Supreme Court Decision in Ray et al. v. Atlantic Richfield Co. et al. (<i>Tanker Safety; State Requirements v. Federal Requirements</i>)	726
OTHER DOCUMENTS	
Argentina-Chile: Exchange of Diplomatic Notes concerning the <i>Beagle Channel Arbitration</i>	738
United Nations Documents on <i>Namibia</i> :	
General Assembly Resolution Containing the Declaration on Namibia and the Program of Action in Support of Self-Determination and National Independence	754
Western Proposal for the Settlement of the Namibian Situation ..	762
United Nations Security Council Resolutions:	
On <i>Invasion of Angola by South Africa</i>	770
On the <i>U.N. Interim Force in Lebanon</i>	772
United States: Letter of the State Department Legal Adviser concerning the <i>Legality of Israeli Settlements in the Occupied Territories</i>	777
RECENT ACTIONS REGARDING TREATIES TO WHICH THE UNITED STATES IS A PARTY	780
RECENT ACTIONS REGARDING TREATIES TO WHICH THE UNITED STATES IS NOT A PARTY	790
NOTICE OF OTHER RECENT DOCUMENTS (not reprinted)	791

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VOL. 72

October 1978

NO. 4

CONTENTS

	PAGE
The Jurisprudence of International Trade: The DISC Case in GATT <i>John H. Jackson</i>	747
International Protection of the Baltic Sea Environment Against Pollution <i>Boleslaw A. Boczek</i>	782
The Function of the Oath in the Ancient Near Eastern International Treaty <i>Donald L. Magnetti</i>	815
Declarations by Judges of the International Court of Justice <i>Farrokh Jhabvala</i>	830
Notes and Comments	
Trust Funds in International Law <i>Joseph Gold</i>	856
The 50-Mile Military Boundary Zone of North Korea <i>Choon-ho Park</i>	866
A New Restatement of the Foreign Relations Law of the United States <i>R. R. Baxter</i>	875
Correspondence: Letter from Seymour Maxwell Finger	878
Contemporary Practice of the United States Relating to International Law <i>Marian L. Nash</i>	879
Judicial Decisions <i>Alona E. Evans</i>	923
Book Reviews and Notes <i>Edited by Leo Gross</i>	
Lauterpacht, Elihu, and John C. Collier (eds.). <i>Individual Rights and the State in Foreign Affairs</i>	929
Knight, H. Gary. <i>Managing the Sea's Living Resources. Legal and Political Aspects of High Seas Fisheries</i>	931
Walsh, Don (ed.). <i>The Law of the Sea. Issues in Ocean Resource Management</i>	933
Knight, H. Gary, J. D. Nyhart, and Robert E. Stein (eds.). <i>Ocean Thermal Energy Conversion. Legal, Political and Institutional Aspects</i>	934
Institut de Droit International. <i>Livre du Centenaire 1873-1973. Evolution et perspectives du droit international</i>	935
<i>Annuaire de l'Institut de Droit International, 1973. Volume 55. Session du Centenaire, Rome, Septembre 1973</i>	935
Shaker, Mohamed Ibrahim. <i>The Treaty on the Non-Proliferation of Nuclear Weapons: A Study Based on the Five Principles of UN General Assembly Resolution 2028 (XX)</i>	943
Schreuer, Christoph. <i>Die Behandlung internationaler Organakte durch staatliche Gerichte</i>	944
Neuhold, Hanspeter. <i>Internationale Konflikte—verbotene und erlaubte Mittel ihrer Austragung</i>	945
Schweling, Otto. <i>Die deutsche Militärjustiz in der Zeit des Nationalsozialismus</i>	946

Luk, I. <i>Sotsializm i Mezhdunarodnoe Pravo</i> (Socialism and International Law)	948
Minasian, N. M. <i>Sotsializm i Mezhdunarodnoe Pravo</i> (Socialism and International Law)	948
Duboff, Leonard D. <i>Art Law: Domestic and International</i>	950
Inter-American Institute of International Legal Studies. <i>Instruments of Economic Integration in Latin America and in the Caribbean. Vols. I and II</i>	951
<i>Netherlands Yearbook of International Law, Volume VIII, 1977</i>	953
<i>Foreign Relations of the United States, 1949, Vol. VI, The Near East, South Asia, and Africa</i>	954
Akehurst, Michael. <i>A Modern Introduction to International Law</i> (3rd ed.)	956
Briefer Notices: Schwarzenberger and Brown, 957; Starke, 957; Hazard, Butler, and Maggs, 958; Atkins, 959; de Zayas, 959, <i>Réalités du Droit International Contemporain</i> . Actes des seconde et troisième rencontres de Reims, 960; Gaja (ed.), 961; Florio, 961; Arnaud, 962; Vambery, 962; Eversen, Sperl, and Usher, 963; Mosler and Bernhardt, 964; Larson, 964; López, 965.	
Books Received	966
International Legal Materials. Contents, Vol. XVII, No. 4 (July) 1978	970

OFFICIAL DOCUMENTS

Vienna Convention on Succession of States in Respect of Treaties	971
Table of Cases	989
Index	991

The views expressed in the articles, editorial comments, book reviews, and notes, and other contributions which appear in the JOURNAL are those of the individual authors and are not to be taken as representing the views of the Board of Editors or of The American Society of International Law.

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THE JURISPRUDENCE OF INTERNATIONAL TRADE: THE DISC CASE IN GATT

*By John H. Jackson **

Law in the setting of international relations is a curious institution. Idealists proclaim it to be the potential savior of the planet; cynics thumb their noses at it and direct attention to the difficulty of enforcing its rules. Even in the more regularized setting of international economic relations there is considerable ambiguity and conflict as to the role which law or rules should play, and much worry that recent economic stresses are creating a breakdown in the compliance with those few rules that do exist. Such breakdown can, it is alleged, lead at worst to trends similar to corresponding breakdowns in the 1930's, or at least to the loss of one otherwise effective implement of diplomacy (rulemaking). Why negotiate new treaty rules if there is little chance they will be observed?

Despite the fears and cynical prognostications concerning the international rules, however, there continues to exist considerable opinion that rules of international economic behavior are essential to the improvement of world well-being and peace. Currently, for example, a major round of trade negotiations is under way in Geneva with the express goal of formulating more rules.¹ The careful observer will note that the international rules do have some effect—they may tilt policy proposals being debated within national governments, especially when opposing factions are nearly balanced; they are used as arguments to the public to oppose or propose particular courses of action; and when the rules are designed so that if breached they authorize counterresponses from other nations, they may create considerable realistic constraints on policy.²

All too often, however, international rules are drafted with little sensitivity to their total context; indeed there is a certain naïveté about the “viability” of rules. There are important differences between domestic legal rules—in the context of legal systems involving elaborate procedural rules and a monopoly of force—and international rules which are often *un-*accompanied by enforcement or application procedures and which do not benefit from a well-established “legal system.” In a national setting there is often a degree of public consensus on ethical and other philosophical values that enables even vaguely formulated rules and procedures to operate effectively (*e.g.*, the British “Constitution”), while on an international

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¹ See the Ministerial Declaration which launched the negotiation, approved at Tokyo on 14 Sept. 1973, GATT Doc. MIN (73)1, *reprinted in* GATT, 20th Supp. Basic Instruments and Selected Documents (hereinafter BISD) 19 (1974). See also the United States Trade Act of 1974 Pub. L. No. 93-618, §121, 88 Stat. 1978 (1975) (codified at 19 U.S.C. §§2101-2487, Supp. V, 1975).

² A domestic law analogy would be that of a carefully crafted private contract between business firms, employing “concurrent conditions” to obligations on each side.

plane the extraordinary differences of language, culture, religion, and political philosophy necessitate greater care in constructing the total "legal system" needed for rules to be effective.

The naïveté at the international level extends to reliance on false analogies between national legal rules and international legal rules. National court techniques of interpretation or construction, for example, may not apply in the international consideration of a similar problem. The degree to which courts will be trusted (and thus the leeway for "creative interpretation") is likely to be quite different in a national setting from that of an international setting. The perception of a rule as an "ethical goal" as opposed to a pragmatic description of consequences (the "ought" versus the "is") will differ substantially in the two contexts.

One of the most interesting systems of international rule existing today is that of the Treaty called "GATT," the General Agreement on Tariffs and Trade.³ The GATT, formulated in the period 1946-1948, has been forced to assume the role of the central regulatory institution for the great majority of world trade, although it was not originally designed for that purpose. In the last decade the GATT has been heavily criticized for its inability to keep its rules abreast of changes in economic conditions. With the great increase and diversity of membership, it is generally felt to be impossible to amend GATT. In addition, although the original GATT draftsmen clearly had in mind binding precise rules,⁴ and although the procedures of GATT tended to reinforce that view during the first decades of its existence, in recent years the GATT has been increasingly criticized for its institutional inability to maintain compliance with the rules. Rule departures (breaches) have in some cases become so frequent and so tolerated that the rules are now simply traps for the unwary, inexpert, or naïve. The United States Congress, for example, has complained in official reports,⁵ "Today, many GATT principles are observed more in the breach," and mandated the President to seek improvements in the procedures. Executive branch officials have also criticized this aspect of GATT and the Director General of GATT has stated,⁶ referring to the GATT rules, "The trouble is that governments do not always respect them, or tend to pay more attention to their letter than their spirit."

An extraordinarily complex but interesting dispute has been considered recently under GATT procedures. Because this case illustrates most of the difficulties and dilemmas of the GATT in today's interdependent eco-

³ See generally, work by the same author entitled: *WORLD TRADE AND THE LAW OF GATT—A LEGAL ANALYSIS OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE* (1969) (hereinafter cited as *WORLD TRADE AND THE LAW OF GATT*).

⁴ Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law* 66 MICH. L. REV. 249, 285, n. 199 (1967). See UN Doc. EPCT/C.II/PV2 at 8 (1946).

⁵ SENATE COMM. ON FINANCE, TRADE REFORM ACT OF 1974, S. REP. NO. 93-1298, 93d Cong. 2d Sess. 83 (1974).

⁶ Address by Mr. Olivier Long, Director General, General Agreement on Tariffs and Trade to the Zurich Economic Society, Zurich, 9 Nov. 1977, GATT press release 1199 at 10.

conomic world, I propose in this article to use this case as the basis for a number of comments on the "jurisprudence of international trade." My basic proposition is as follows: Agreed rules have great importance as a tool of modern diplomacy, particularly in international economic matters which are so complex and which engender difficult-to-control domestic political pressures that could be detrimental to world well-being. But these rules are incapable of playing their important role unless they are set in a framework of an effective "legal system"; a system that provides for application of the rules to particular facts, objective methods of determining those facts, trusted interpretations of the rules, and methods by which these actions are kept consistent and reasonably predictable. In the GATT (and in world economic relations generally) this well-constructed system is missing. Thus the effectiveness of agreements on new substantive rules will be uncertain and future noncompliance could even engender further angry political pressures for policies damaging to the world economy.

The case to be examined here is the so-called "DISC" case, together with related countercomplaints.⁷ These cases involve the single most difficult substantive problem of international trade today—the problem of "subsidies"; namely, what are appropriate or inappropriate governmental measures which, incidentally or purposely, aid exports? This substantive problem is a high priority subject of the Geneva Tokyo Round negotiations, and one which has occasioned considerable near-bitter diplomatic activity in recent years. But apart from the substantive question (which will not be discussed in detail in this article), I wish to examine the procedures of the particular controversy, and to show failures at three stages: 1) the process of getting the procedures in motion; 2) the reasoning of the "judges"; and 3) the lack of implementation of the result. These failures are related to a lack of an effective legal system for the rules concerned. In Part I, I will describe the DISC case and will also briefly explain two other subjects as background necessary for an understanding of the analysis of this case and its counterparts, which follows in Part II. In Part III, I will state some conclusions.

I: THE DISC CASE AND ITS CONTEXT

A. *The DISC and Related Tax Practices*

The DISC is an acronym for the United States tax provisions on "Domestic International Sales Corporations." Unlike a number of foreign income tax systems which tax on a "territoriality" basis—that is, tax only income arising from activity within the territory of the country—United States

⁷ These cases are reported in a series of GATT documents, most important of which are those giving the report of the various panels: regarding DISC, GATT doc. L/4422 of 2 Nov. 1976, *reprinted in* 23d Supp. BISD 98 (1977); Income Tax Practices Maintained by Belgium, L/4424 of 12 Nov. 1976, *reprinted in* 23d Supp. BISD 127 (1977); Income Tax Practices Maintained by France, L/4423 of 12 Nov. 1976, *reprinted in* 23d Supp. BISD 114 (1977); and Income Tax Practices Maintained by the Netherlands, L/4425 of 12 Nov. 1976, *reprinted in* 23d Supp. BISD 114 (1977).

law taxes income arising in foreign territory if the income is attributable to a corporation of the United States or a business which is a "United States resident." One way to avoid some of this result is for a United States corporation to establish a foreign subsidiary. The earnings of the foreign subsidiary will not normally be taxed in the United States until they are repatriated (*e.g.*, as dividends). If the subsidiary is located in a "tax haven country" which has a zero or low tax rate, then the subsidiary earnings can sometimes be kept or reinvested without incurring United States tax—a substantial advantage.⁸

A country that follows a territoriality tax principle, in contrast, will not tax the earnings arising outside its borders without the additional existence of a foreign corporate subsidiary: even a branch office abroad can be immune from home country taxation.⁹ United States tax law, of course, has elaborate provisions allowing a United States corporation or resident that pays foreign taxes on its earnings abroad to credit such payments against United States income taxes, but that is not the significant issue for the DISC case.¹⁰

Before 1971 the United States tax law was basically as described above. During that period, under the International Monetary Fund rules for fixed exchange rates, the United States dollar had become substantially overvalued—*i.e.*, the United States was running a persistent balance of payments deficit which was considered dangerous to the economic stability of most of the world involved in liberal trade. United States policymakers were searching for ways to reduce this deficit. In 1967 Europe, then progressively unifying into a common market under the 1957 EEC Treaty of Rome, took major steps to harmonize its "value added tax" system which also affected its "border tax" adjustments.¹¹ In effect, Europe, including Germany (which was then as now in a strong balance of payments surplus position), took steps to increase the remission of value added taxes on goods which were exported and to impose on imports an additional amount of taxes equivalent to value added taxes imposed on domestically produced

⁸ *Id.*; International Revenue Code of 1954 [hereinafter cited as I.R.C.] §§881-882; U.S. Dept. of Treasury, Tax Reform Option Paper on International Taxation, reprinted in International Trade Reporters U.S. Export Weekly, #177, Oct. 11, 1977, Section M, particularly at M-2; see generally Nolan, *United States Taxation of Export Income and the DISC Proposal*, 2 J. MAR. L. & COM. 779-786 (1971). The panel did not consider the effect of the 1975 and 1976 amendments to DISC. Tax Reform Act of 1976, Pub.L. No. 94-455, §1101, 90 Stat. 1520 (1976); Tax Reduction Act of 1975, Pub.L. No. 94-12, §603, 89 Stat. 26 (1975). In an attempt to eliminate the motive of domestic corporations to seek foreign tax havens the Congress included a series of regulations designed to reduce the tax benefits achieved through domestic control of foreign corporations in the Revenue Act of 1962. I.R.C. §§951-964; see also B. BITTKER & L. EBB, UNITED STATES TAXATION OF FOREIGN INCOME AND FOREIGN PERSONS 338-348 (2d ed. 1968); L. KRAUSE & K. DAM, FEDERAL TAX TREATMENT OF FOREIGN INCOME 30-43 (1964). Further limitations are placed on the tax haven status of foreign countries by the definitions of foreign source income. I.R.C. §§861-864.

⁹ As described in GATT documents L/4423, L/4424, and L/4425, *supra* note 7.

¹⁰ I.R.C. §§901, 904-905.

¹¹ N.Y. Times, March 26, 1957, at 12, col. 1.

goods. This was (arguably) permissible under GATT rules,¹² because the European taxes concerned are so-called "indirect" taxes, *i.e.* taxes applied on a product, in contrast to an income tax on firms. In a fixed exchange rate system the European actions arguably had an effect similar to a small devaluation of German and other European currencies (thus increasing exports and inhibiting imports) at precisely a time when Germany was being urged to revalue its currency upwards. The effect was to exacerbate the balance of payments deficit of other countries including the United States. United States administration and Congressional leaders were very critical of this action, and indeed searched for ways to retaliate.¹³

Most techniques of retaliation were rejected by United States policy-makers, some as self-defeating, but one proposal remained under consideration—the "DISC" proposal. If a United States corporation were allowed to establish a United States subsidiary which was exclusively devoted to exporting goods, and the export earnings of this corporation were deferred from United States taxation, then the tax effect on the firm would be similar to that on a foreign subsidiary, except—key to the measure—the earnings would be retained in a United States subsidiary and thus in the United States, and so would count to increase United States receipts and reduce its balance of payments deficit. The incentive for United States businesses to export would also be a sort of mild retaliation for the European Border Tax Adjustment charges.¹⁴

The DISC tax measures were proposed to the Congress in 1969, but did not then receive approval. Opponents saw it as simply another "tax loop-

¹² The subject is termed "Border Tax Adjustments," *see* GATT ART. II §2(a) and III: 2, VI: 4, XVI, XX and interpretive notes relating to Arts. II, III, and XVI: WORLD TRADE AND THE LAW OF GATT, §12.7 at 294.

¹³ U.S. DEPT. OF TREASURY, 1976 ANNUAL REPORT TO CONGRESS ON THE OPERATION AND EFFECT OF THE DOMESTIC INTERNATIONAL SALES CORPORATION LEGISLATION, ch.5, DISC and Foreign Tax Practices, *reprinted in* International Trade Reporters U.S. Export Weekly, #203, April 18, 1978, Section M, particularly at M-10. Congressional resentment of the European border tax adjustment actions can be seen reflected in the Trade Act of 1974, *supra* note 1, §121(a)(5). The Administration justified the 1971 DISC legislation to Congress as a response to European border tax adjustment actions. *Hearings on the Nomination of John B. Connally to be Secretary of the Treasury Before the Senate Comm. on Finance*, 92d Cong., 1st Sess. 40 (1971) (statement of John B. Connally). It should be noted, however, that the DISC is an "income tax" measure, whereas the European border tax adjustment relates to a "value added tax" (V.A.T.) which has been considered a tax on products, or "indirect" tax. Only the latter can take advantage of the GATT Border Tax rules. A recurring complaint of the United States is that by relying on the income tax for most of its government revenue, it is put to a disadvantage under the GATT trade rules compared to the Europeans who rely more heavily on the V.A.T.

¹⁴ *Hearings on the Administration's Legislative Tax Proposals Included in the Economic Program Released on Aug. 15, 1971 Before the House Comm. on Ways and Means*, 92d Cong. 1st Sess. 530 (1971) (statement of Melvin C. Holm). Because DISC was perceived as retaliation to European border taxes, Congressional refusal to repeal DISC totally through the 1975 or 1976 amendments was in part based upon the desire to keep DISC as a "bargaining chip" in future trade negotiations. 122 CONG. REC. S9101 (daily ed. June 11, 1976) (remarks of Sen. Williams).

hole," a measure benefiting the pockets of rich companies (many of whom exported anyway and would merely reap a "tax windfall"). In the summer of 1971, under heavy balance of payments deficit pressure, President Nixon introduced a series of measures labelled the "New Economic Policy." United States Treasury officials included their favorite "DISC" proposal as part of this broader package of legislation and other measures, and this time a DISC was enacted, "on the coattails" of the broader NEP.¹⁵ Ironically, another of these NEP measures was an effective devaluation of the United States dollar (refusal to purchase dollars for gold under IMF obligations) and the first of a series of steps that lead to the floating exchange rate system (destroying the fixed exchange rate system mandated by the then Articles of the International Monetary Fund). I say ironically because many argue that the DISC rules have no place in a floating exchange rate world; they were designed as a balance of payments measure in a fixed exchange rate system.

The DISC law as adopted by Congress in 1971 allows a United States company to establish a United States subsidiary which, if it meets various requirements including one that specifies at least 95% of its gross receipts must consist of "qualified export receipts," can qualify for "DISC" treatment.¹⁶ Under the original law, DISC tax treatment allows the DISC to defer United States income tax on 50% of its export-related profit (retained in the DISC). The other profit is treated as distributed to the parent. (DISC revisions in 1975 and 1976 limited the amount of profit which would receive DISC treatment, but this article focuses on the DISC as it was examined by the GATT panel, *i.e.*, before revisions.)

A key question in most DISC cases is that of "intercompany pricing." Suppose P = parent company, establishes a DISC and sells widgets to the DISC at P's cost = \$100. The DISC then sells these abroad at a price which after expenses yields gross income of \$200. Nominally the DISC profit is \$100 per widget; P's profit is zero. But the United States tax

¹⁵ No action was taken on the original DISC legislation introduced on Nov. 19, 1969 in H.R. 14870 as part of the Trade Act of 1969. The House passed the DISC legislation as part of the Trade Act of 1970 in H.R. 18970, 91st Cong., 2d Sess. §§401-408 (1970). The bill, however, died in Senate committee after an attempt was made to attach it as a rider to more popular social security legislation. The DISC legislation was finally passed as part of the Revenue Act of 1971, Pub. L. No. 92-178, §§501-507, 85 Stat. 497 (1971). The legislative history of DISC includes the following Committee Reports: H.R. REP. No. 92-533, 92d Cong., 1st Sess. (1971), *reprinted in* [1971] U.S. CODE & AD. NEWS 1825, 1918; S. REP. No. 92-437, 92d Cong., 1st Sess. (1971), *reprinted in* [1971] U.S. CODE & AD. NEWS 1825, 1918; H.R. (CONFERENCE) REP. No. 92-708, 92d Cong., 1st Sess. (1971), *reprinted in* [1971] U.S. CODE & AD. NEWS 1825, 2053.

¹⁶ U.S. DEPT. OF TREASURY, DOMESTIC INTERNATIONAL SALES CORPORATION—A HANDBOOK FOR EXPORTERS (1972); Pub. L. No. 92-178, §§501-507 (codified in scattered sections of 26 U.S.C.); *see also* description in Note, *Domestic International Sales Corporation—A Tax Incentive for Exporters*, 56 MINN. L. REV. 407-462 (1972); Note, *Domestic International Sales Corporations—A New Concept for American Trade Policy*, 4 N.Y.U. J. INT'L. L. & POL. 92-105 (1971); Rindel, *Use of A Domestic International Sales Corporation to Reduce Federal Income Tax on Export Earnings*, 11 SAN DIEGO L. REV. 138-178 (1973).

officials refuse to allow this device to reap so large a tax advantage. Instead, explicit intercompany pricing rules provide that the DISC can claim as *its* share of the total profit on the exported goods only 4% of the price received, or 50% of the combined P and DISC total profit on the widget. In our example, 50% of the \$100 profit would be the DISC share (\$50), and 50% of *that* (\$25) would be eligible for deferred tax.

This is the key then: The 1971 United States DISC law allowed an effective *deferral* of income tax on 25% of the profit on export sales, if conducted through the "DISC" form.

In recent years there have been a number of suggestions that the DISC should be repealed. The DISC tax deferrals (revenue cost) now (1976 data) total \$1,146 million and are projected to go to \$1,320 million in 1980.¹⁷ Critics argue this tax loss (deferral?) is too high a price to pay for the minimal advantage received by the United States. Some argue that the DISC merely increases corporate profits and does not induce more exports. Others argue that with floating exchange rates, if DISC tax deferrals enabled export price reductions, the exchange rate would adjust for them and wipe out any advantage. More recently the Carter Administration is reported to be considering recommending repeal of the DISC. On the other hand, a lobbying group entitled "Special Committee for United States Exports" has been organized to oppose such repeal.¹⁸

B. The GATT Dispute Settlement Mechanism

The articles of the GATT agreement contain a number of provisions which govern how disputes or other differences between nation members of GATT shall be handled.¹⁹ Some of these provide in particular situations, for unilateral responses of an offended party, sometimes (but not always) subject to later review by the GATT "CONTRACTING PARTIES" (the plenary governing body). The most general clauses relating to disputes and breaches of the GATT agreement, however, are Articles XXII and XXIII.

Article XXII merely (but usefully) provides that parties are obligated to consult on GATT matters when any other member so requests. Article XXIII is the more significant (and difficult) article²⁰ and provides the

¹⁷ U.S. DEPT. OF TREASURY, 1976 ANNUAL REPORT TO CONGRESS ON THE OPERATION AND EFFECT OF THE DOMESTIC INTERNATIONAL SALES CORPORATION LEGISLATION, ch. 4, Effect of DISC on Tax Revenue, *supra* note 13. New revenue cost estimates and data are on the basis of the current (1977-78) law, after the revisions of 1975 and 1976 which reduced the revenue cost of the original DISC provision of 1971. See also note 56 *infra*.

¹⁸ See International Trade Reporters' Export Weekly, #168 Aug. 9, 1977, 0-1 to 0-7. Telfer, *U.S. Retention of DISC Held Vital to Trade*, J. COM., Aug. 3, 1977, at 1; Mullaney, *Defending the DISC Export-Aid Plan*, N.Y. Times, Aug. 5, 1977, at D1.

¹⁹ See WORLD TRADE AND THE LAW OF GATT, ch. 8; R. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (1975); Jackson, *GATT As An Instrument for the Settlement of Trade Disputes*, 61 ASIL PROC. 144 (1967).

²⁰ GATT Article XXIII "Nullification or Impairment" reads in full as follows:

Nullification or Impairment

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attain-

framework for the GATT dispute settlement procedures. The outlines of Article XXIII can be summarized as follows: If any contracting party believes a benefit it should get under GATT has been "nullified or impaired" as a result of another contracting party's breach or *other* measure, then it may seek consultation and if that fails, the complainant may ask the plenary GATT body to authorize (by majority vote) suspension of GATT obligations (a sort of "retaliation") as a response.

This Article has a number of serious interpretative difficulties. It should be noted that the triggering criterion for Article XXIII is primarily "nullification or impairment." This can be caused by a breach of GATT obligations or "any measure." Thus a failure to carry out a GATT obligation is neither a necessary nor a sufficient prerequisite to an Article XXIII action. Rather it is "nullification or impairment," (N & I) that is central. Thus:

- a) a breach without N or I is *insufficient*
- b) N or I without a breach is *sufficient*.

The key interpretative question is what is "nullification or impairment." Through the "jurisprudence" of a number of prior cases in GATT, one can generalize that this concept is close to "harm" or an "injury" requirement (injury to trade relations).²¹

In the early "classic" GATT case of *Chile v. Australia*, the GATT Contracting Parties agreed that,²²

... such impairment would exist if the action of the Australian Government which resulted in upsetting the competitive relationship between

ment of any objective of the Agreement is being impeded as the result of

- (a) the failure of another contracting party to carry out its obligations under this Agreement, or
- (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
- (c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. THE CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

²¹ WORLD TRADE AND THE LAW OF GATT, at 183; see note 19 *supra*.

²² GATT, 2d Supp. BISD 188 (1952).

sodium nitrate and ammonium sulfate could not reasonably have been anticipated by the Chilean government, taking into consideration all pertinent circumstances and the provisions of the General Agreement, at the time it negotiated for the duty-free binding on sodium nitrate.

In other cases this notion has been reiterated, *i.e.*, that nullification or impairment results when the "reasonable expectations" of a GATT party as to its trade opportunities that should arise as a result of tariff negotiations (and possibly other GATT measures) are disappointed. Needless to say, the concept is ambiguous and can occasion widely divergent opinions.

Perhaps partly because of the ambiguities of the nullification or impairment concept, a doctrine has developed in GATT practice termed "prima facie nullification or impairment." In several circumstances, panel reports have adopted the "prima facie" concept, and presumed in those circumstances that nullification or impairment is present, unless the defendant nation carried a burden of proof to show that there had been no nullification or impairment (*i.e.*, shows that there had been no "injury"). Three situations in particular have been identified as giving rise to the prima facie nullification or impairment: 1) whenever there is imposed a quantitative restriction on a product; 2) whenever a domestic production subsidy is introduced on a product which has previously been the subject of a tariff concession resulting from tariff negotiations (the effect of such subsidy will be to lessen imports of the product, which defeats the expectation of the party who has bargained for the tariff concession); and 3) most relevant to our case, whenever a nation is determined by a GATT Panel to have violated its GATT obligations. Such a violation amounts to a prima facie nullification or impairment which should require a panel to recommend that the offending practice be ceased, unless the offending country can show that its action has caused no harm to the complainant or others.²³

Other problems of Article XXIII should be briefly noted. The requirement of a GATT membership majority vote pushes the whole process into political considerations that can undermine the rigor (if any) of the system. A group of nations, such as the LDC's or the EEC with its large number of affiliates), may be effectively insulated from an Article XXIII vote to approve countermeasures. Even if actual votes under this article are rare (as has been the case), it has been argued that knowledge that the process has as its penultimate step such a voting procedure, infuses backward into the whole process, and affects the approach of the participants to this process. Likewise, even if countermeasures are permitted (as they have been only once), they may be totally ineffective, particularly if it is a small country which is trying to retaliate against a larger one.²⁴

The procedures under Article XXIII are not explicitly stated. Instead they have been "invented" in GATT and now form a traditional practice.

²³ WORLD TRADE AND THE LAW OF GATT, at 182; GATT, 11th Supp. BISD 95, 100 (1963).

²⁴ The only case of permitted "suspension of obligations" under Article XXIII in GATT was one involving a complaint by the Netherlands against United States quotas on the importation of dairy products. The Netherlands was permitted by the GATT in a 1953

The typical pattern²⁵ is for a complaining country first to consult with an "offender" and seek private redress. Failing satisfaction the complainant "tables" a complaint in GATT and seeks an agenda item for a GATT "Council" meeting. Normally, if differences remain unresolved, the Council will approve a resolution setting up a "panel" of three to five persons who will investigate the matter, pursuant to "terms of reference" in the resolution (drafted with concurrence of the disputants). The persons on the panel are (in theory) neutral third parties not allied to the disputants and acting in their individual capacity. They are usually, however, drawn from the cadre of government official representatives to GATT. GATT normally has had no way to compensate these individuals; their residence in Geneva makes them available, and often disputants desire panel members who are knowledgeable in the mysteries and folkways of "GATT lore," sometimes termed the "priesthood." There seems to be some fear of outside experts, suggesting that political and pragmatic considerations are to some parties fairly central to the process. (The DISC case, however, saw an innovation in this regard—the first use of "outside experts" on a GATT dispute panel.)

The panel then receives arguments (oral and written) from both sides. It usually must rely on these for its understanding of the facts, having essentially no independent way to investigate. After the argumentation, the panel meets alone (with no disputant representation) and formulates a draft report or "decision." Portions of this may be circulated to the parties for comment before it is finalized. When the panel finalizes the report, it is forwarded to the GATT Council which acts for the Contracting Parties (or it may be considered directly by the CONTRACTING PARTIES if it comes at the time of the annual meeting). The CONTRACTING PARTIES may then "accept" the report, reject it, or do nothing. The report rarely calls for retaliatory action. It usually states whether a GATT obligation has been breached, whether nullification or impairment exists, and sometimes goes on to make recommendations (such as urging the offending party to cease its practice, or suggesting changes in national domestic procedures that will alleviate the harm, or even noting extenuating circumstances that might call for a waiver).

decision followed by a series of renewals to in effect retaliate against the United States by limiting its imports of wheat from the United States. There is no evidence that this action of the Netherlands has an effect on the U.S. dairy restriction practice. GATT, 1st Supp. BISD 32 (1953); GATT, 7th Supp. BISD 23 (1959); WORLD TRADE AND THE LAW OF GATT, at 172.

²⁵ See note 19 *supra*; WORLD TRADE AND THE LAW OF GATT, at 177; GATT docs. COM. TD/F/1-4; COM. TD/F/W/1-7 (1966-67). See also notes 5 and 6 *supra*. For a survey of actions brought to GATT through its art. XXIII dispute settlement process see STAFF OF SENATE COMM. ON FINANCE, 93d CONG., 2d SESS., EXECUTIVE BRANCH GATT STUDIES 155 (Comm. Print 1974). For a detailed description of a particular dispute settlement through GATT processes, the conflict between the United States and the European Community concerning processed fruits and vegetables, see *European Community Restrictions on Imports of United States Specialty Agricultural Products: Hearings on H.R. 238 and H.R. 320 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 95th Cong., 1st Sess. 21 (1977) (statement of James Starkey).

The panel's role is not well defined. In addition to coming to conclusions on the various fact and law issues, it often deems its responsibilities to include acting as mediator or conciliator between the parties to get them to "settle their differences." In addition, as noted, it may make recommendations—*i.e.*, play a policy or rule-forming role.

Over the years many proposals have been made to reform this process, and to reform the substantive criteria of Article XXIII.²⁶ In the early decades of GATT this procedure appeared to work fairly well. But in the last 10–15 years, a number of defects have become obvious. It has been hard to find qualified persons to serve on the panel who are not in one form or another "allied" to one of the disputants. Likewise, since consensus is considered necessary for each step (an offending nation can drag its feet) causing almost endless delay. A "fait accompli" can be achieved by a nation's putting into practice a measure, then dragging out the GATT process until the measure has become so politically entrenched that any original hope that a GATT determination might influence a change is lost.

C. *Subsidies and International Trade*

Consider the following hypothetical case: In country A, an entrepreneur starts a widget manufacturing enterprise and over the course of years succeeds in making it a profitable business without any special assistance from the government. In country B a widget manufacturer desires to expand its production but to do so will require substantial exports since the B market will not absorb all of the added widgets. B's government wishes to promote exports and so it pays the B widget company a sum of \$20 per widget *exported*. This enables B to ship widgets to A, and sell them there lower than A's widget company price, even after allowing for the freight and tariff costs. A's widget company feels "aggrieved," and argues that such competition is unfair.

This simple model has enormously difficult implications for international trade policy, particularly when it is realized that the "subsidy" may not be so obvious or overt. For example, suppose the government aid takes the form of income tax relief (credits? deductions? accelerated depreciation?) or low interest rate loans, or worker training grants, or property tax relief?

In the GATT there are a series of measures dealing with the "subsidy" problem, but the ambiguities are so great that the subject is one of constant diplomatic tension.²⁷

²⁶ See *e.g.*, GATT, 7th Supp. BISD 24 (1959). A major concern of Article XXIII reform is preserving the effectiveness of consultation when a less-developed contracting party is involved. See GATT, 14th Supp. BISD 18 (1966); GATT doc. L/2614 of 5 April 1966, *reprinted in* 14th Supp. BISD 129 (1966).

²⁷ See J. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS*, §12.3 (1977); Barcelo, *Subsidies and Countervailing Duties—Analysis and Proposal*, 9 L. & POL. INT'L. BUS. 779 (1977); and works therein cited.

The relevant provisions of the GATT are found primarily in Articles VI and XVI of GATT, with the accompanying interpretative notes of Annex I.²⁸

²⁸ GATT Article VI, §§ 3, 4, 5, 6:

3. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise.*

4. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

5. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

6. (a) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

(b) The CONTRACTING PARTIES may waive the requirement of sub-paragraph (a) of this paragraph so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting dumping or subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party. The CONTRACTING PARTIES shall waive the requirements of sub-paragraph (a) of this paragraph, so as to permit the levying of a countervailing duty, in cases in which they find that a subsidy is causing or threatening material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party.*

(c) In exceptional circumstances, however, where delay might cause damage which would be difficult to repair, a contracting party may levy a countervailing duty for the purpose referred to in sub-paragraph (b) of this paragraph without the prior approval of the CONTRACTING PARTIES; *Provided* that such action shall be reported immediately to the CONTRACTING PARTIES and that the countervailing duty shall be withdrawn promptly if the CONTRACTING PARTIES disapprove.

Article XVI

Subsidies

Section A—Subsidies in General

1. If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.

Section B—Additional Provisions on Export Subsidies *

2. The contracting parties recognize that the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.

They establish the following:

1) Article VI authorizes an importing nation unilaterally to impose a "countervailing duty" on any imported product, to the extent necessary to offset any "bounty or subsidy" granted in the country of origin, when the subsidized imports cause "injury" in the importing country. This is a permissive provision; there is no obligation to avoid giving bounties or subsidies. There is only a permitted unilateral response.

2) Article XVI paragraph 1 requires reporting (but no other obligation) of any subsidy which operates directly or indirectly to increase exports or decrease imports.

3) Article XVI paragraph 3 exhorts nations to avoid using *export subsidies* on primary goods.

4) Most critical to the DISC case, Article XVI paragraph 4 prohibits

any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market.

This measure does not obligate all GATT members, for reasons we need not

3. Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.*

4. Further, as from 1 January 1958 or the earliest practicable date thereafter, contracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market. Until 31 December 1957 no contracting party shall extend the scope of any such subsidization beyond that existing on 1 January 1955 by the introduction of new, or the extension of existing, subsidies.*

5. The CONTRACTING PARTIES shall review the operation of the provisions of this Article from time to time with a view to examining its effectiveness, in the light of actual experience, in promoting the objectives of this Agreement and avoiding subsidization seriously prejudicial to the trade or interests of contracting parties.

GATT Annex I, ad Article VI §§ 2 and 3
Paragraphs 2 and 3

1. As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.

2. Multiple currency practices can in certain circumstances constitute a subsidy to exports which may be met by countervailing duties under paragraph 3 or can constitute a form of dumping by means of a partial depreciation of a country's currency which may be met by action under paragraph 2. By "multiple currency practices" is meant practices by governments or sanctioned by governments.

Ad XVI § 4
Paragraph 4

The intention of paragraph 4 is that the contracting parties should seek before the end of 1957 to reach agreement to abolish all remaining subsidies as from 1 January 1958; or, failing this, to reach agreement to extend the application of the standstill until the earliest date thereafter by which they can expect to reach such agreement.

discuss here,²⁹ but it does obligate all the industrialized nations in GATT, including the United States, Canada, Japan and the EEC member nations.

It will be noticed that the term "subsidy" is critical in all these clauses, *i.e.*, what is a subsidy? This interpretative question is one of the crucial ones in the DISC case. It will also be noticed that as to nonprimary (industrial) goods, only item 4 above, *i.e.* Article XVI:4, provides a substantive prohibition of action, and that this obligation has two prerequisites:

- 1) subsidy on the export, and
- 2) result in a price for export lower than the comparable domestic price (bilevel pricing test).

Most of the diplomatic tension on the subsidy issue in recent years has arisen in the context of countervailing duty applications, especially those of the United States. Article VI of GATT requires that the domestic industry in the importing country be "injured" before countervailing duties are permitted, but the United States law on countervailing duties predated GATT, and is not subject to the "injury" requirement and in fact does not have one.³⁰ This has long been a sore point against the United States, and is part of the general discussion on the whole matter of subsidies and their treatment, which is a priority subject in the Tokyo Round negotiations currently occurring in Geneva.

II: THE GATT CASES AND PANEL REPORTS

With this background outlined, we can now turn to consideration of the "DISC and Related Cases" themselves. It seems sensible to discuss this subject in four parts: A) The process of getting the procedure started; B) The "Decision" or Report of the Panel, itself; first on the DISC; then C) on the European tax practices; D) The followup process, *i.e.*, implementation or lack thereof.

A. *Initiating the GATT DISC Process*³¹

Soon after the August 1971 United States "New Economic Policy" announcements including the announcement of the DISC tax measures, the GATT Council in Geneva discussed the situation and at the meeting the representatives of Canada and the European Economic Community expressed the opinion that DISC would amount to direct subsidization of

²⁹ See WORLD TRADE AND THE LAW OF GATT, §15.3, at 371.

³⁰ 19 U.S.C. §1303; *see also* note 27 *supra*. *See also* Trade Act of 1974, §331 and corresponding House and Senate reports. The countervailing subsidies issues are considered by many to be the highest priority issue for the Geneva "Tokyo Round" negotiations. The issue has been accentuated by the procedural amendments to the U.S. Countervailing Duty Law contained in the Trade Act of 1974. *See* United States v. Zenith Radio Corp., 562 F.2d 1209 (C.C.P.A. 1977), *aff'd* United States v. Zenith Radio Corp., 98 S.Ct. 2441 (1978).

³¹ The following GATT documents are relevant to support the facts outlined in the text: C/M/71 of 2 Sept. 1971, at 4; L/3574 of 13 Sept., 1971; C/M89 of 30 July 1973; L/4422 of 2 Nov. 1976; L/3860 of 17 May 1973.

exports inconsistent with GATT principles. A working party was set up to consider the United States NEP actions, particularly the tariff surcharge, but when the group wished to discuss the DISC, the United States representative objected that this subject was not within the terms of reference of the Working Party, and so the United States' representative refused to participate. Nevertheless others in the group discussed the DISC, repeating arguments of its inconsistency with GATT, and noting that once in place, the DISC would be "very difficult to eliminate because the industries concerned would insist on keeping it as long as possible."

The DISC became United States law on January 1, 1972 and on 4 February the European Economic Community formally requested consultation with the United States pursuant to GATT Article XXIII paragraph 1. Soon thereafter the United States requested consultations with France, Belgium, and the Netherlands, arguing that their tax practices exempted profits of foreign sales subsidiaries and therefore were analogous to the DISC; if the DISC contravened GATT, so too did these other tax practices.

All of these consultations failed to produce a "satisfactory adjustment," so a year later, the EEC formally tabled a complaint under Article XXIII paragraph 2, and the matter was discussed at the next GATT Council meeting in July. The Council established a panel with the terms of reference as follows:

To examine the matter referred by the European Communities to the CONTRACTING PARTIES pursuant to paragraph 2 of Article XXIII, relating to United States tax legislation on Domestic International Sales Corporations, and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or rulings provided for in paragraph 2 of Article XXIII.

Likewise the United States (on May 14, 1973) countered with formal complaints under Article XXIII:2 against France, Belgium, and the Netherlands. The United States position was that the GATT rules did not adequately cover these tax practices, and that what was needed was a general investigation leading towards "establishing appropriate principles regarding the application of the General Agreement to the taxation of profits derived from export sales, whether through domestic or foreign sales entities." However, since the Europeans refused to suspend their formal complaint, the Council proceeded also on the United States formal complaints and established a panel for each of the three United States complaints, with terms of reference substantially as follows:

To examine the matter referred by the United States to the CONTRACTING PARTIES pursuant to paragraph 2 of Article XXIII, relating to income tax practices maintained by [France, Belgium, the Netherlands] and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or rulings provided for in paragraph 2 of Article XXIII.

Behind the United States statements, and countercomplaints, was the issue whether this dispute on tax measures was appropriate for settlement under

the procedures of Article XXIII of GATT. The United States took the view that the issue called for *new rule* making ("legislating"), rather than interpreting old rules ("adjudication"). It is this issue of the appropriateness of dispute settlement procedure in the face of ambiguous, out-of-date obligations, that forms one of the important facets of our analysis of the DISC case; but more on that later.

Four complaint panels were formally established to deal with the issue of taxation of exports but the members of the panels had not yet been selected, and that stage of the process proved to be most difficult. In fact, it was not until two and a half years later that the personnel for the panel were specified (by agreement of the parties). There were several reasons for this delay.

The United States sought recognition of several procedural principles, if the Article XXIII complaints were to go forward. First, the United States wanted to be sure that the four different complaints were linked, so that it would be difficult or impossible for the panel or for the GATT Council to conclude that a United States tax practice (the DISC) was invalid under GATT, without also concluding that analogous tax practices of other countries were also invalid. The United States preferred that neither would be found to be invalid, but if the DISC were invalid, the United States position was that other tax practices also were. Consequently, the United States would have preferred a single panel to consider the four complaints (not unprecedented in GATT³²). But this was adamantly opposed by the European representatives. Consequently, although the Council established four separate panels each with its own terms of reference, the United States fought for identical composition of the panels so that the same persons who had to consider the GATT principles as related to DISC would also have to consider those principles as related to the other tax practices complaints.

A second procedural position of the United States was that there should be included on the panel some "tax experts." As stated earlier, GATT panels had always been composed of individuals who were "GATT experts." It has been increasingly difficult to find such individuals, and in a dispute between the United States and the EEC, it is particularly difficult to find persons who have no special allegiance to one of the parties. EEC "allegiances" consist of connections not only with any of the nine members but also with any of the network of associated European states and over 46 associated developing countries around the world. Any governmental employee of any of those related governments would be arguably disqualified as prejudiced in that his government's interest in its trade relationships with the European Economic Community might influence him, even though theoretically he was supposed to be acting in his individual capacity and not as a representative of his government. The United States hoped to

³² See WORLD TRADE AND THE LAW OF GATT, 172-173; Jackson, *supra* note 19 at 147; and particularly the panel for the Uruguayan complaints in 1962, GATT, 11th Supp. BISD 95 (1963) and the panel set up at the 9th Session of the Contracting Parties in 1955 to investigate all complaints at that session, GATT, 3d Supp. BISD 77, 81 (1955).

lent of including "outside experts" on the panels, that not employed by governments and who were not necessary. One of the problems in this respect may have been part of the United States that GATT experts tend to be can be read as being willing to "compromise for political weight of EEC influence in GATT is now so great, an legitimately worry about such GATT experts being y or explicitly, by the weight of that influence (and the report the panel produced, if it went against the interests sociates, would probably not be accepted by the GATT ing Parties under GATT voting procedures). Another States may have derived from a belief that tax experts y to link the issues of the four complaints.

ie of two and a half years a number of names were sides, but many of them were found unacceptable to r a variety of reasons. In addition to the difficulty of agreeing on the personnel composition of the panel, there were other causes for the delay as well. For long periods during this time, neither side pressed the issue. The Europeans could see political opposition to the DISC tax measures developing within the United States. Bills had been introduced in Congress to repeal the DISC, and Europeans were probably willing to wait in the hope that the United States might unilaterally repeal the DISC, and thus moot the question. The DISC tax measures were altered in such a way as to make them less valuable to exporters, but the DISC was preserved, and there was even testimony before Congress by executive branch officials that one purpose of preserving the DISC was to utilize it as a "negotiating chip" in trying to wring concessions concerning analogous tax practices from foreign trading partners.³³

Finally, after many months of stalemate, the United States and Europeans came to an agreement on the personnel of the committee. The United States won two of its procedural points: the personnel were the same for all four panels; and among the five members of the panel were two "outside tax experts." Interestingly enough, both outside tax experts were European professors; apparently the United States was not as worried about professors (even though they were citizens and resided in member states of the EEC) as it was worried about government-paid employees of those associated countries.

One curious aspect of the case should be noted. Although the Europeans refused to pursue the issues as a "negotiating" or rule-formulating matter, preferring the "adjudicatory" route under GATT, no suggestions or consideration seems to have been given by the Europeans to using the "unilateral" response technique of applying countervailing duties to United States products. Such an action under GATT requires no showing of bi-

³³ U.S. DEPT. OF TREASURY, 1976 ANNUAL REPORT, ch. 5, Border Tax Adjustments, *supra* note 13, at M-10. *Hearings on Tax Reform Before the House Comm. on Ways and Means*, 94th Cong., 2d Sess. 12 (1975) (statement of William E. Simon).

level pricing, although it does require a showing of the worry of a countervailing counter response from the (and thus the oft mentioned danger of a "trade war"), an element against the countervailing duty route. But it also Europeans genuinely preferred to have an international rule as a prior step to specific action, or perhaps as the sole step. The mere existence of a "decision" that DISC violated GATT in the minds of European policymakers, have appeared sufficient argumentation that the United States should repeal the law, expecting any "quid pro quo" from the side of the European

B. *The DISC Panel Report*

Over the course of GATT history, there have been a number of Panel reports on Article XXIII:2 complaints, and a number of excellent expositions of facts and legal reasoning, with a "jurisprudential consciousness" befitting finer domestic courts, particularly true in earlier years of GATT, and was even true although some reports indulged in "recommendations" which certainly went beyond the normal "adjudicative" function, and sometimes played a more "political" or compromising role than a domestic court judgment would likely do.³⁴

Unfortunately this high standard of legal craftsmanship was not achieved in the DISC and Tax Panel reports. As we shall see, although the Panel's statements of fact and the parties' argumentation is thorough, the reasoning expressed in the *conclusions* of the Panel is opaque, questionable and incomplete. One can only speculate on why this was so, when the individuals concerned were so well qualified. Were there political compromises being made behind the scenes? Did the fact that some of the Panels' work on their reports was carried on "through a postal procedure" affect the quality of the report? Were the individuals too busy to devote the necessary time to the complex issues raised? Were they paying too much attention to the "sale ability" (possibility of rejection) of their conclusions? Were the advocacy and argumentation of the parties inadequate to give the Panels the assistance they needed?

Basically the Article XXIII:2 complaint against the United States involved three key issues:³⁵

- 1) Is the DISC tax practice a "subsidy" within the meaning of that term

³⁴ For example, the Panel Report in the case of Italy v. Sweden, GATT Doc. L/386 (1955), reprinted in 3d Supp. BISD 81 (1955).

³⁵ In this article I will not deal with a number of minor or subsidiary issues, for example: the U.S. DISC law provision which allows 10% of export promotion expenses to be assigned to the DISC (see L/4422 ¶ 49); the provision allowing a DISC to make loans to help finance U.S. production; the allocation of freight expenses; nor to the "flag discrimination" feature of the DISC legislation (see L/4422, ¶ 63). It should also be recalled that the U.S. Congress amended the DISC law in 1975 and 1976 in ways that reduce its impact and its tax cost. See Tax Reform Act of 1976, Pub. L. No. 94-455, §1101, 90 Stat. 1520 (1976); Tax Reduction Act of 1975, Pub. L. No. 94-12, §603, 89 Stat. 26 (1975).

subsidy, translates *totally* into a price difference that would have supported only a tiny price reduction, one can argue both: (a) that no real injury could result from this (no substantial increase in exports); and (b) that a reasonable and practical definition of "subsidy" or "bilevel pricing" would exclude the "de minimis" cases. Thus it is important to examine what effect the DISC tax measure *could* have on prices, and this, oddly enough, the Panel did not do in its report (although it noted briefly that some evidence on this point was presented).⁴³

At best the DISC arrangements offer a tax benefit equal to the *deferral* of United States income tax on 25% of the total profit on exported products (50% of total profit is attributed to the DISC and half of this is deferrable). The United States corporate tax rate is 48%, but we will simplify and use 50%. Thus the tax amount *deferred* is 50% of 25% of the profit, or 12.5% of the profit. Two approaches can be taken here. The Panel's restricted conclusion is that only the interest on the deferred amount is the "subsidy." At a normal annual interest rate in the United States of, say 12%, this would mean the subsidy is worth 1.5% of the *profit*.

To translate this information into a possible effect on *prices*, one has to know the profit margin, or portion of the final price that is represented by profit. If, for example, the margin is 50% (goods are sold for double their cost), we find the "subsidy" to be:

Panel Restricted View: 1.5% of 50% = 0.75% of Price

Full Deferral: 12.5% of 50% = 6.25% of Price

Any smaller profit margin, of course, translates to an even smaller price difference.

Thus to accept the Panel's restrictive view of the "subsidy" probably means that the subsidy amount is less than 1% of final sales price, *i.e.*, arguably trivial (when compared to exchange rate movements of 10% and 20%, or government industrial development loans, or many other tax practices). To accept the "full deferral" as "subsidy" is to find a somewhat greater amount, but still not a sum that appears overwhelming. And in either case, the amount of subsidy appears to be substantially less than the "benefit effect" of tax practices of European countries which exempt the

⁴³ *Ibid.*, ¶ 55. Interestingly enough, some of the American Law Reform literature performs this exercise in detail and very ably. Yet, there is no hint in the GATT DISC Panel Report, that there ever was consideration by the GATT DISC Panel of any of the published secondary literature on the DISC (or related cases), and this author has been informed orally that it is unlikely that the Panel did consider any of the secondary literature. Concerning the potential price effect of the DISC (before it was amended in 1975 and 1976), see note 8 *supra*. Law review literature which analyzes the potential price effect of DISC tax benefits includes: Considine, *The DISC Legislation: An Evaluation*, 7 N.Y.U. J. INT'L. L. & POL. 217, 237 (summer, 1974), estimating the price effect to be from 1.4 to 1.8%; Enninger, *DISC and GATT: International Trade Aspects of Bringing Deferral Home*, 13 HARV. INT'L. L. J. 391, 408 (1972), estimating the price effect from 1.0 to 1.5%. See also Note, MINN. L. REV., *supra* note 16, at 443; Schmalz, *Domestic International Sales Corporation as a Subsidy Under GATT: Possible Remedies*, 5 CASE W. RES. J. INT'L. L. 87, 99 (1972).

The Panel's conclusion at this stage of its reasoning is, however, extraordinarily cautious. It states,

74. The Panel therefore concluded that the DISC legislation in some cases had effects which were not in accordance with the United States' obligations under Article XVI:4.

As stated, it is very hard to refute. A panel could, with normal inference, conclude that there were almost always "some cases" where the technicalities of action "inconsistent with GATT obligations" were present. But that is hardly the real issue addressed to the Panel. The real issue surely must be: is there any significant breach of the GATT obligations (*significant* to mean more than just "accidental," or more than "statistically likely to occur at least once or twice")? Otherwise, the dispute procedures could bog down in trivia or be misused for particular political or negotiating purposes.

If the matter ended at this point in the Panel's reasoning, we might even conclude that such a restricted conclusion as paragraph 74 was a victory for the defendant. The problem and importance of this conclusion, however, comes at the next stage of the reasoning. This narrow conclusion is used as justification for the "prima facie nullification or impairment" conclusion discussed below.

3) *Nullification or Impairment*. The general thrust of an Article XXIII:2 proceeding, as stated earlier (I:B), seems to be toward "real" rather than technical injuries. A breach of GATT obligations is in itself neither sufficient nor necessary. However, a doctrine of "prima facie nullification or impairment" has been propounded in prior cases and apparently accepted by the disputants in this case.⁴² Under this theory, if breach of a GATT obligation is determined, then nullification or impairment will be *presumed* unless rebutted by the offending nation. The Panel here relied wholly on this presumption to conclude that there was a "prima facie case of nullification or impairment of benefits" by the DISC.

Some argumentation on nullification was reportedly presented by the complainants, relying particularly on United States Treasury reports and other United States official sources to show that exports had increased because of the DISC. (Again these arguments had been designed by the United States executive branch to persuade Congress to keep the DISC in the law. Such statements designed for internal consumption are certainly not *inappropriate* for use in an international determination; the question is rather how much weight to give them.)

Apart from the "prima facie" presumption, at least two arguments need to be considered concerning the question of "real injury." One is an analysis of the real or potential effect of the subsidy on prices. (It is not enough to show exports have increased; one must show that they have done so *because* of the illegitimate practice, which under Article XVI:4 also requires a showing of bilevel pricing.) This analysis also relates to the earlier phases of the Panel's rationale, discussed above. For example, if the

⁴² L/4422, ¶¶ 64-66.

Article XVI:4 meaning. But the factual proof of this situation may be very difficult or expensive. Even assuming all other conditions of sale are the same (warranties, credit terms, labelling and packaging, delivery times, quantity discounts, etc.) a sample survey to establish the price difference could be costly (as any antitrust lawyer can tell you). Who should bear this cost? Furthermore, suppose there *are* differences on the other terms of sale; is the Article XVI:4 criterion meant to cover these also? And if so, what price should be attached to such terms as a one-year warranty compared to a three-month warranty? Or the higher goodwill value of a brand name in a domestic market?

Furthermore, even if bilevel pricing is established, there is still the *cause* requirement, *i.e.*, the lower export prices must be the *result* of the "subsidy." In a fast changing interdependent world economy with shifting exchange rates, international mass media influences on taste, and rapid technological innovations, how can one sort out the *subsidy* as the cause of bilevel pricing? Yet, to admit all these interpretative difficulties with Article XVI:4 would be virtually to emasculate it, as was pointed out in one argument.⁴⁰

For this phase of the case, therefore, there were several approaches used by the disputants. First, some evidence (statistical and anecdotal) of actual lower export prices was apparently presented. Second, the Europeans urged that because of the Article XVI paragraph 1 reporting requirement (interpreted and elaborated by an extensive GATT questionnaire), the United States was obligated to report the *effect* of any subsidies; then the *burden* was on the subsidizing government to present evidence of "increased exports" caused by the subsidy which would be evidence of "a price lower than it would have been in the absence of the export subsidy." (This would be a sort of "required self-incrimination.") Third, it was argued that any measure embraced by the 1960 list of "subsidies under XVI:4" would be *presumed* to cause bilevel pricing. Finally, arguments based on general known patterns of economic behavior of firms could be utilized to suggest that export prices were lowered.

The first approach, statistical and anecdotal evidence, was mentioned in the Panel conclusion as a sort of "makeweight"; and the second approach, the Article XVI:1 burden of proof argument was ignored in the Panel conclusions (appropriately, in the view of this author). But the other two approaches—both involving extremely shaky inferences—were utilized by the Panel to support its conclusion that bilevel pricing existed, and since this conclusion was essential to the presumption of the final phase of the rationale (discussed below), it appears that the entire conclusion of the Panel rests on two very weak inferences.

One of these is the proposition that any measure on the 1960 list "could be presumed to result in bilevel pricing." This presumption is stated in the complainant arguments, and at least according to the Panel was *accepted* by the United States representative (who argued DISC was not within the

⁴⁰ L/4422, ¶ 25.

1960 list). If so, this certainly must be an unfortunate admission of the United States advocate (unless there is strong evidence for this interpretation that has not been made public). The 1960 report does not require this presumption. The list can be understood to refer only to the question "what is a 'subsidy'?" (leaving for other factual proof whether subsidization causes bilevel pricing). In fact, a subsidy could have many other effects without causing any bilevel pricing.

The other approach used in the Panel conclusions borders on the absurd:

73. The Panel considered that, from an economic point of view there was a presumption that an export subsidy would lead to any or a combination of the following consequences in the export sector: (a) lowering of prices, (b) increase of sales effort and (c) increase of profits per unit. Because the subsidy was both significant and broadly based it was to be expected that all of these effects would occur and that, if one occurred, the other two would not necessarily be excluded. A concentration of the subsidy benefits on prices could lead to substantial reductions in prices. The Panel did not accept that a reduction in prices in export markets needed automatically to be accompanied by similar reductions in domestic markets. These conclusions were supported by statements by American personalities and companies and the Panel felt that it should pay some regard to this evidence.

It appears that one can almost paraphrase this as follows: "cause *s* can have results *x*, *y*, or *z* or any combination of them. Therefore, we conclude that it had some of result *z*!" In fact, it must be noted that each of the following could be the *sole* result of a subsidy related only to exports:

- (a) Higher profits (but no price changes);
- (b) Increased export sales efforts (advertising, credit terms, salesmen's commission, and the like) but no price changes;
- (c) Uniform reduction of *both* domestic and export prices, but no *bilevel* pricing;
- (d) Bilevel pricing, involving lower-export prices;
- or*
- (e) Bilevel pricing, involving lower domestic prices.

There are even more possibilities, and to disprove all but one of the above alternatives will not prove that one. In fact, there is at least substantial anecdotal evidence that result (a) was a common one, and indeed this "windfall profit" is one of the domestic United States political arguments used to urge repeal of the DISC.⁴¹

Thus this author is forced to conclude that the *reasoning* of the Panel does not definitely support the essential bilevel pricing criterion for a successful Article XXIII:2 complaint, unless the United States "acceptance" of the presumption of bilevel pricing is the essential link in the logic.

⁴¹ Note, MINN. L. REV., *supra* note 16, at 461; U.S. HOUSE OF REPRESENTATIVES, BUDGET COMMITTEE, STAFF OF TASK FORCE ON TAX EXPENDITURES, AN ANALYSIS OF DOMESTIC INTERNATIONAL SALES CORPORATIONS, Sept. 1975, Part II A, *reprinted in* INTERNATIONAL TRADE REPORTERS' EXPORT WEEKLY #75, Sept. 30, 1975, at M-2.

in Article XVI paragraph 1 or 4? If the answer is "no," then no inconsistency with GATT obligations has occurred, and without a significant independent showing of "nullification or impairment," the complaint fails.

2) If a "subsidy" is found, then under Article XVI:4 there must also be a finding of "bilevel pricing," *i.e.*, that the subsidy results in the sale of such product for export at a price lower than the comparable "domestic price." If a subsidy but no bilevel pricing is found, Article XVI:1 of the GATT requires only that the country report the practice.³⁶

3) Whether or not 1) and 2) can be found, Article XXIII:2 requires "nullification or impairment." If 1) and 2) are established so that a breach of GATT obligations is found, however, a panel can utilize the "prima facie" nullification or impairment doctrine to impose on the defending nation the burden to show that no "nullification or impairment" occurred.

To a large extent, the whole DISC case involved much consideration of burdens of proof. This is probably because of the extraordinary expense of showing either "injury" (nullification or impairment) or "bilevel pricing."

1) "*Subsidy*?" There is no term in GATT which combines ambiguity and importance to international trade policy to a degree greater than the term "subsidy." The issue is particularly murky in relation to tax practices, especially "income taxes" on firms, often termed "direct" taxes. This is because almost *any* tax advantage (interest deduction?, accelerated depreciation?) or indeed, even *low* taxes, could be arguably a subsidy. The language of Article XVI:4 however specifies "subsidy on the export," so a nexus with exports must be established. It seems not to be challenged that the DISC tax provisions have a nexus to exports (their whole purpose). But the tougher issue is whether this tax measure—a *deferral* on a percentage of export profits—is a "subsidy," within the meaning of that term in Article XVI:4.

The most important document for the interpretation of Article XVI:4 was a 1960 GATT Working Party Report dealing expressly with the "Provisions of Article XVI:4."³⁷ This portion of Article XVI had been added to GATT by a 1955 protocol, effective in 1957. However, the wording of Article XVI:4 postponed implementation of that paragraph until a later action was taken, and the 1960 Report was considering that action. In doing so the Report gave a list of measures which governments prepared to implement Article

³⁶ There could be an argument under GATT "precedent" that a domestic subsidy caused import displacement and was a "prima facie" nullification and impairment when applied on products for which tariff concessions had been granted, but this argument was only made by the Canadians, briefly mentioned in the report (GATT DISC Report L/4422, ¶ 62) and not considered in the panel conclusions. It depends on the reasoning that the subsidy enabled domestic producers to sell at a lower price so as to compete more effectively against imports. Such a showing in this case would undercut the bilevel pricing argument, and the "subsidy," if it were one, spread over a much higher quantity of domestic goods (as well as exported goods) would have had even less impact on the price per product (and therefore "competitiveness" or injury).

³⁷ Report adopted 19 November, 1960, GATT doc. L/1381, *reprinted in* GATT, 9th Supp. BISD 185, at 186-187 (February 1961).

XVI:4 agreed were "practices generally . . . to be considered as subsidies in the sense of Article XVI:4," . . . although the list was "not . . . considered exhaustive. . . ." The governments were "not able to subscribe at this juncture to a precise interpretation of the term 'subsidies,'" however. The measures on the list which were urged as most closely relevant or analogous to the DISC were:

(c) The remission, calculated in relation to exports, of direct taxes or social welfare charges on industrial or commercial enterprises;

(d) The exemption, in respect of exported goods, of charges or taxes, other than charges in connection with exportation or indirect taxes levied at one or several stages on the same goods if sold for internal consumption; or the payment, in respect of exported goods, of amounts exceeding those effectively levied at one or several stages on these goods in the form of indirect taxes or of charges in connection with importation or in both forms.

The key words appear to be "remission" and "exemption." Thus the question narrowed precisely to: Is the DISC deferral either a "remission" or an "exemption"? The Europeans argued³⁸ that:

An unlimited deferral of taxes was . . . the equivalent in economic terms to an exemption since the deferral granted by the DISC legislation was unlimited because there was no rule in the legislation which in practice prevented the deferral from being maintained indefinitely. There was, similarly, no rule that the profits of a DISC must be distributed within a certain period of time and the DISC system provided many ways in which the profits could be used without being distributed and thereby attracting tax, *e.g.*, assets of a DISC could include producer's loans and stocks or securities of a related foreign export corporation. The system, therefore, did not afford a limited advantage but total exemption from direct federal corporation taxes for one half of the profits of a DISC accruing from exports.

The United States argued in response,

Items (c) and (d) were included in the list, whereas neither tax deferral, tax exemption for foreign source income nor other more complex specific direct tax practices were referred to in the Working Party Report. The illustrative list did not cover the DISC legislation because it was only a deferral and not a remission or exemption, cancellation, release or forgiveness of direct taxes calculated in respect of exports. A number of arguments dealt with under the section "relation to practices of other countries" below were also relevant.

and further noted that

[u]ncertainties had led many major accounting firms to require their clients to provide currently for the full amount of deferred tax, supporting the view that the DISC legislation provided only for a deferral.

The United States also argued the analogy of the European tax practices to suggest that since GATT practice had never suggested that European exemption of foreign source income was a XVI:4 "subsidy," this amounted to a consensus or customary interpretation of the GATT clause.

³⁸ L/4422, ¶ 28 and ¶¶ 31, 33, 42.

As to this precise question, the Panel's report³⁹ is very cautious. It concluded that a deferral, even though indeterminate, is *not* necessarily a "remission or exemption." However, it stated that the deferral "did not attract the interest component of the tax normally levied for late or deferred payment and therefore concluded that, to this extent, the DISC legislation constituted a partial exemption . . ." within items (c) and (d) of the list.

Is this then the only *subsidy* of DISC—the interest on the deferred tax? If so, it is miniscule (as will be demonstrated below) and hardly worth all the fuss. Even so, of course, the Panel has taken a slightly expansive approach to interpretation of the GATT obligation—not so expansive as to equate "deferral" with subsidy, but certainly going beyond a strict definition of "exemption of taxes" to include "exemption of *interest* on taxes deferred." Furthermore, it seems to ignore the substantial United States argument about *practices* of other countries in GATT, even though in its other reports (*infra*) it finds those practices are like the DISC in amounting to subsidies.

This raises an important but narrow issue in these "adjudicative"-type international proceedings. Should interpretations or constructions be narrow or expansive? It can be argued that unlike courts in national legal systems, panels in international proceedings should always use narrow interpretations, because to do otherwise in the imperfect international legal system will discourage nations from accepting agreements or submitting interpretative disputes to international third party determinations.

The Panel's conclusion, however, goes considerably beyond the narrow finding mentioned above, and it is not at all clear what it is saying about the interpretation of "subsidy." In three troublesome paragraphs, for example, it said,

67. The Panel started by examining the effects of the DISC legislation in economic terms. The Panel concluded that it conferred a tax benefit and that this benefit was essentially related to exports. The Panel considered that if the corporation income tax was reduced with respect to export related activities and was unchanged with respect to domestic activities for the internal market this would tend to lead to an expansion of export activity. Therefore the DISC would result in more resources being attracted to export activities than would have occurred in the absence of such benefits for exports.

68. The Panel noted that the United States Treasury had acknowledged that exports had increased as a result of the DISC legislation and the Panel considered that the fact that so many DISCs had been created was evidence that DISC status conferred a substantial benefit.

69. The Panel noted that the DISC legislation was intended, in its own terms, to increase United States exports and concluded that, as its benefits arose as a function of profits from exports, it should be regarded as an export subsidy.

These paragraphs seem to say that the interpretation of "subsidy" will be influenced towards inclusiveness whenever a practice involves: i) a

³⁹ L/4422, ¶ 71.

benefit; ii) increased exports; and iii) intent to increase exports. These are not necessarily inappropriate factors. However, paragraph 67 quoted above seems to suggest an extremely expansive approach to the interpretation of subsidy, *i.e.*, that any *benefit* could be a subsidy.

On balance it seems to this author that the question of DISC tax practices being a "subsidy" is a very close one. An international body might appropriately conclude that in such close cases a restrictive approach to interpretation is better because it leaves the parties the opportunity through negotiation to create new rules; that the Panel here made a precise determination that a deferral is not a subsidy but the excused interest on the deferral is; *and* that the Panel somewhat inconsistently and unnecessarily used some extraordinarily broad language which if utilized in future disputes could carry the interpretation of "subsidy" very far indeed.

Why did the Panel seem so ambivalent in this stage of the case? Was it trying to diplomatically "split the difference"? Certainly the strong evidence of United States Government *intent* to increase exports through the DISC—intent established by executive branch statements designed to sell Congress on the value of enacting and then maintaining the DISC provisions—was influential to suggest that the United States was engaging in behavior designed to "distort international trade" in a way contrary to free market economic policy goals, and this could be criticized. But if intent is to be a prominent factor, this will raise many proof problems in future cases. Furthermore, was the intended goal borne out? Everyone is aware of fruitless governmental programs. But this aspect—the actual *effects* of the program—leads us into the next phase of our analysis.

2) *Bilevel Pricing*. Assuming from the discussion above that there was a finding of *some* subsidy related to exports, the next step under Article XVI:4 is to determine whether this subsidy resulted in lower prices on exports than for domestic goods. It is this portion of the Panel's conclusions that seems the most questionable. When combined with the conclusions of the next portion, discussed below, the Panel seems to be indulging in a "double presumption" to achieve its final result.

First, however, it should be noted how difficult the "bilevel pricing" question is. In general commerce with some competition, there will normally be a range of prices for the same product in any market. The Article XVI:4 bilevel pricing requirement certainly cannot be fulfilled when *any* single export price is found to be lower than a single domestic price. For example, suppose five domestic transactions are at prices: 100, 101, 102, 103, and 104; likewise, suppose five export transactions are at the same five prices. There are several export prices lower than several domestic prices, although the averages and the medians are the same. No policy related to Article XVI:4 would support an interpretation that this condition alone violates the Article XVI:4 obligation.

What then is meant? *Average* prices for domestic goods can be compared with average export prices for products "benefitting" from the "subsidy" (a subclass of total exports), and this could be deemed to fulfill the

full amount of foreign source profits (conditioned, of course, by intra-company pricing decisions, as discussed below).

Why did the Panel not do this analysis for us, so that we could see what we are dealing with? Why did the Panel seem to be so compelled to find even a *de minimis* violation of Article XVI:4? And also: why did the United States representative not present evidence of minimal *possible* price impact to rebut the presumption of nullification or impairment? Furthermore, what sense does it make for the "GATT law" to allow a panel to conclude in favor of an Article XXIII:2 complainant, even when the *possible* impact of a measure complained is minimal, and little or no evidence can be presented of even *that* impact?

A second argument, which may have been made orally but was not mentioned in the Panel's report, deals with the operation of a floating exchange rate system in the face of a DISC. The economic argument is as follows:⁴⁴ Assuming the DISC applies broadly to most exported products, and operates in virtually all cases to allow lower export prices, the effect of this will be similar to a partial devaluation of the dollar, which will stimulate exports, which will build United States reserves or enhance its balance of payments, which will "strengthen the dollar," which currency will tend to rise in price to offset the DISC pricing effect. Obviously the causal connections in a complex world are difficult if not impossible to prove, but it seems reasonable to suppose that whatever overall average advantage to export DISC might cause soon will be reduced by exchange rate adjustments. If so, then arguably increased exports due to DISC do not continue, and there is little or no "injury," nullification, or impairment.

As we end this analysis of the DISC case, and turn briefly to a comparison of the other three cases on European practices, it is interesting to note one additional fact about the Panel conclusions. Although asked to do so by the Canadian argument, the Panel did not make any "recommendation." In the case which is precedent for the "prima facie nullification or impairment" concept, the statement was made that absent rebutting evidence the Panel had "in all cases" under Article XXIII:2 recommended that activity breaching an obligation of GATT be ceased.⁴⁵ The DISC Panel did not do this. It simply made its findings (the same holds true for the other three cases) and rested. Is it thus saying implicitly that the case does not merit any action?

⁴⁴ STAFF OF THE SENATE COMM. ON THE BUDGET, 95TH CONG., 1ST SESS., BACKGROUND PAPER ON U.S. GOVERNMENT INVOLVEMENT IN COMMERCIAL EXPORTS 19 (1977); U.S. DEPT. OF TREASURY, 1976 ANNUAL REPORT TO CONGRESS ON THE OPERATION AND EFFECT OF THE DOMESTIC INTERNATIONAL SALES CORPORATION LEGISLATION, *supra* note 13, ch. 3, Estimating the Impact Effect of DISC on U.S. Exports at M-4; LIBRARY OF CONGRESS, REPORT ON DISC AND ITS EFFECT ON EXPORTS AND UNEMPLOYMENT, Part III, The International Monetary System, INTERNATIONAL TRADE REPORTERS' EXPORT WEEKLY, #105, May 4, 1976, at 0-2. See also, *Hearings on the Trade Reform Act of 1973 Before the Senate Comm. on Finance*, 93d Cong., 2d Sess. 1644 (1974) (statement of Fred Bergsten).

⁴⁵ Uruguayan recourse to Article XXIII, GATT Report adopted 16 Nov. 1962, L/1923, reprinted in 11th Supp. BISD 95, 101.

C. *The European Cases*

At the same time that the Panel reported on the United States DISC measure, three other panels (all composed of the same persons) reported on the complaints of the United States that certain income tax practices of, respectively, France, Belgium, and the Netherlands were inconsistent with GATT.⁴⁶ Although technically separate cases, the conclusions of the three reports are very similar, in some cases utilizing paragraphs that are verbatim equivalents of those in the DISC report.

Each of the three tax systems is slightly different from the others, but the general thrust, as it relates to the GATT problems here considered, is the same. A basic common notion of the three tax systems is that earnings which arise outside the country are not subjected to income tax at home. The theory is that profits should be taxed where the activity occurs which engenders them, so as to avoid double taxation. A system of tax treaties often reinforces this overall scheme. Leaving aside the details, it appears from the argumentation and panel reports that as to a foreign corporate subsidiary or other foreign subdivision, which carries on real activities abroad including sales of exports from the home country, the profits on the export activity are not taxed at home until they are repatriated (*e.g.*, as dividends), and even then they are very favorably treated. (France, for example, exempts 95% of repatriated foreign dividends; Belgium taxes them at only one quarter the normal rate.) A key problem of course, is the tax accounting principles in each country that allocate the costs and profits of the exported goods between the home country activity and the foreign activity. If the bulk of the profit on an exported item is allowed to be "captured" by the foreign branch or subsidiary by means of a low price to the branch or subsidiary on the exported goods, which then are sold at much higher prices abroad, proportionally more of the profit is established as "foreign" and receives favorable home country tax treatment. Consequently, there is a difficult fact question about the administrative tax practices of each tax authority, if one tries to quantify the "benefit to exports" involved.

Assuming, however, that the European practices are at least as favorable toward allocating profits to the foreign activity as the precise United States rules under DISC are, it would appear that the United States arguments are persuasive that the foreign tax practices give at least as much benefit to the exports as does the DISC. Arguably in some cases the benefit is 100% tax exemption (not merely deferral), or four to fifty times as great as the DISC at tax rates in roughly the 50% category. How the overall averages work out is not discussed in the panel reports.

The Panel conclusions in all three cases are almost identical. In each case the Panel concluded that "there was a partial exemption from direct taxes," and that the practices were covered by both items (c) and (d) of the 1960 list. Again, almost without any evidence, the Panel reports indulged in the same presumption as the DISC report, using virtually the

⁴⁶ GATT Doc. L/4423, L/4424, L/4425, *supra* note 7.

same words, concluding that the export subsidy could lead to "any or a combination" of results, including the possibility of bilevel pricing, and that therefore the "subsidy benefits could lead to substantial reductions in prices," and thus "in some cases had effects" inconsistent with Article XVI:4.

Much of the discussion above relating to the DISC report can be applied also to the reports on the European practices—the criticism of the logic, the lack of substantial evidence of bilevel pricing, the interpretative implications of long-unchallenged practice of analogous tax approaches, the failure to quantify the "subsidy effect" to see if it is really meaningful in causing bilevel pricing which in turn might cause increased exports (and thus the criticism of the application of the *prima facie* nullification or impairment doctrine). There are two important distinctions to notice, however. First, in contrast to the United States DISC practice, the European tax systems do not appear to have been designed with intent to favor exports. Second, the European systems are integral to their tax systems and have been long-standing practices, going back to the early 1900's (long before GATT). Each of these is worth some consideration.

Should *intent* be a distinguishing characteristic; *i.e.*, should a finding of breach of Article XVI:4 depend on evidence of *intent* to favor exports? Clearly the language of the GATT clause does not require this. Also it should be noted that evidence of intent is much more likely to be available in an open, democratic-type government which requires public discussion and persuasion before introducing a measure. Thus if intent alone were a significant characteristic, it would seem to discriminate in favor of more secret or elitist-type governments. Nevertheless, if "intent to favor exports" were used as a criterion for establishing breach of an obligation in conjunction with actual effect, to buttress otherwise incomplete evidence of effect, this could be a salutary international principle; at least it would suggest to nations that it is improper international behavior to argue domestically for a proposal on grounds that would establish harm to neighbor countries. It seems doubtful, however, that the GATT rule as now phrased would include this notion unless it is interpreted expansively.

The fact that the European tax approaches have been long in existence is a much more important argument because of some highly technical aspects of the GATT treaty itself.⁴⁷ The GATT, *qua* GATT, has never been "definitively" accepted or applied. It is applied by the "Protocol of Provisional Application," which applies portions of GATT including Articles VI and XVI only "to the fullest extent not inconsistent with existing legislation." Conceived as a temporary measure, the Protocol and "grandfather rights" clause have become virtually a permanent qualification on the GATT obligations. Although the contrary could be argued, it is general GATT practice to assume that the "existing legislation" exception applies also to *amendments* to the GATT, and paragraph 4 of Article XVI was an amendment added in 1955–57. Thus, *prima facie*, all mandatory legislation

⁴⁷ See *WORLD TRADE AND THE LAW OF GATT*, §3.2, at 60; Jackson, *supra* note 4, at 294.

in existence prior to GATT is exempt from the obligation until such time as the GATT is accepted and applied "definitively."

The text of paragraph 4 of Article XVI and its history suggest a contrary argument, however, which was made by the United States advocates. The language reads:⁴⁸ "as from" a future "practicable date" to be determined, the contracting parties shall "cease to grant" the export subsidies so defined there. The article provided a "standstill" prohibiting extension of existing practices until the end of 1957 (when the new obligation to "cease to grant" might have come into effect) and this standstill was extended by annual "procès-verbaux" for several years until in 1962 a "Declaration Giving Effect to the Provision of Article XVI Paragraph 4" came into force for those nations which accepted it. The Declaration merely specified the date which was described in Article XVI:4 as the "earliest practicable date." The key question is: does the language of Article XVI:4, "cease to apply," override the normal GATT presumption of grandfather rights? If not, all the European practices are exempt, and the Panel could not find a breach of GATT nor a *prima facie* nullification or impairment (although it could still find, if sufficient evidence supported it, actual nullification or impairment). In such a case, under the remainder of the Panel reasoning, the United States would lose the Article XXIII:2 complaint against it, while the Europeans would win—not a very "diplomatic" result, perhaps. The Panel reports merely state:⁴⁹

The Panel considered that the fact that these arguments might have existed before the General Agreement was not a justification for them and noted that Belgium [France, Netherlands] had made no reservation with respect to the standstill agreement or to the 1960 Declaration.

Much can be said for the European side of the argument. In 1955, as the amendments to XVI were being drafted, there were a series of other proposals, some bearing on the institutional and organizational aspects of GATT. One of these was a proposal to establish "definitive application" of GATT, extinguishing the Protocol of Provisional Application, and allowing GATT members to specifically "reserve" their grandfather rights "existing legislation." Since this proposal was put forward at the same time as the GATT amendments, it could be argued that nations accepted the amendments under the understanding that their grandfather rights were excepted until the new "Definitive Application" proposals came into effect.

Against this must be weighed other arguments. In accepting the 1955 Amendments, a number of countries (including the United States) expressly reserved "existing legislation." France, Belgium and the Netherlands did *not* so reserve, and thus can be deemed to have accepted an interpretation of those Amendments that they did not except "existing legislation." Furthermore, these European countries did not reserve at the time they accepted the 1960 Declaration Implementing Article XVI:4 (as the Panel reports noted), and so could be deemed again to accept

⁴⁸ See text quoted in note 28 *supra*.

⁴⁹ L/4423 re France, ¶ 56; L/4424 re Belgium, ¶ 43; L/4425 re Netherlands, ¶ 43.

application of XVI:4 without exception. Finally, in 1955 countries were asked to notify GATT of all measures they deemed excepted from GATT by the "existing legislation" clause. While many countries (including again the United States) did so, no notification was listed for these three European nations.⁵⁰ This could once again be taken as evidence that they claimed no "existing legislation" exceptions.

One refutation of these arguments is, however, that the European countries in 1955 had no notion that their basic longstanding tax practices would be interpreted as contravening Article XVI:4, and therefore did not feel it was necessary to notify these practices as exceptions. In fact, this lack of reservation reinforces the idea that the longstanding tax practices of these nations were never considered to be among those prohibited by Article XVI:4.

D. Implementation of the Panel Reports—Or Lack Thereof

Under normal procedures the four Panel Reports, rendered November 2, 1976, have been considered at a number of subsequent monthly GATT Council meetings. The question is whether the Council, acting on behalf of the GATT *CONTRACTING PARTIES* would adopt the reports. The disputants have taken divergent positions: The United States indicated its willingness to see all four reports adopted and in that event to take seriously the Panel findings as to DISC (but in the face of Congressional support for the DISC, it is not certain that an executive branch decision to comply with the Panel Report by eliminating the DISC could be carried out). The European countries and the EEC representative, however, took the view that the Council should adopt the report as to DISC and refuse to accept the three reports on the European practices. In the face of such disagreement the Council has agreed "to revert to these matters at a later meeting," and the matter remains on the agenda of the Council.⁵¹

At the Council meetings, new arguments have been presented in an attempt to distinguish the DISC measure from that of particular European tax measures. A statement by the International Chamber of Commerce said,⁵²

The ICC regards the exemption method of avoiding international double taxation on income derived by a resident of one country from business carried on in another country, and taxed there, as the ideal policy.

It would be most regrettable therefore if, due to failure to analyze and comprehend the nature of separate trading activities, this ideal method of solving the problem of international double taxation were to be interpreted as a nullification or impairment of other contracting parties' benefits under GATT.

⁵⁰ GATT Doc. L/309 (19 January 1955), *reprinted in* L/2375 (19 March 1965).

⁵¹ GATT Council agenda and information supplied by staff of the Office of the U.S. Special Representative for Trade.

⁵² GATT Doc. L/4505 of 3 June 1977.

The delegate of the Netherlands noted,⁵³

My authorities also feel that the fact that the Panel has allowed itself to be drawn into making comparisons between two basically different principles of tax-legislation may give rise to unfounded doubts on the validity of the territoriality principle, which lies at the base of the Netherlands income tax and company tax legislation.

The French have attempted to analyze⁵⁴ the "concept of export and export activity," suggesting five stages:

- Manufacturing
- Sales by manufacturer to intermediary
- Export stage (product moves across frontiers)
- Import stage (product crosses frontier into country of destination)
- Distribution stage (in country of destination)

France argues that the first three are within the jurisdiction of the country of origin, the last two of the country of destination, and that the GATT Panel view of "export" embraced all five stages; whereas France argues that the GATT test is much more restricted.

The French representative, for example, states:

the wording of the report on the French tax practices, like that of the report on the tax practices maintained by Belgium and the Netherlands leads one to believe that the Panel has taken an extremely broad view of the concept of export or export activity, going well beyond that deriving from the letter, spirit and practice of the GATT. This, therefore, leads one to wonder about the scope of the Panel's terms of reference.

In the GATT sense, it is obvious that export is the sale abroad of a domestic product or service, the criterion being the crossing of the customs frontier of the exporting country. In any case, the export ends with crossing of the customs frontier of the importing country. This is evident from the letter, the spirit and the practice of the General Agreement.

The statement then criticizes the Panel report on French tax provisions as going "well beyond the customs frontier of the importing country." If the Panel report is followed, the French statement suggests then "economic distortions" would occur, in that the proposed GATT rule would cause discrimination in the level of total taxation in an importing market between independent enterprises and those which are branches or subsidiaries. It would tend to require the adoption of a uniform tax system based on the principle of "fiscal consolidation" at the level of the parent corporation, which infringes a basic component of sovereignty.

The United States has countered with a note⁵⁵ that suggests there are many stages between "export" and "import" (especially in the tax-haven situation) and that,

[t]he basic concern of the United States is that this additional, tax-haven stage is not subject to domestic taxation under the territorial

⁵³ GATT Doc. C/99 of 15 March 1977, third paragraph.

⁵⁴ GATT Doc. C/97, Add. 1, of 21 July 1977, and C/97/Rev. 1 of 21 March 1977.

⁵⁵ GATT Doc. C/102 of 24 November 1977, third paragraph.

principle. The country of origin ceases to collect tax, not when the product moves into the country of ultimate destination, but as soon as it is passed to a subsidiary in a tax-haven country.

The argumentation now going on in the GATT Council is, unfortunately, in the context of the Article XXIII:2 proceeding. Insofar as the French "definitional" approach to GATT jurisdiction involves arguments on the interpretation of GATT Article XVI:4, these arguments should have been presented to the Panel at the earlier stage. But insofar as these arguments are a rudimentary beginning to a process of better understanding and regulating the relation of tax policy to trade policy (by newly negotiated rules), they should go on free of the constraints of the Article XXIII:2 procedures.

The whole situation poses an unfortunate dilemma for the GATT: To refuse to adopt the reports would be an unfortunate precedent for the Panel procedures of Article XXIII, casting greater doubt on that process. To adopt all reports would be to brand certain long-established European tax measures as inconsistent with GATT obligations and risks a situation—not improbable—of European governments refusing to comply, thus again weakening the GATT processes. To adopt some reports and not others would give the appearance of discriminatory application of GATT rules. In the United States in particular, Congressional and other political groups would hardly understand a GATT decision adopting the DISC report but refusing to adopt the reports on European practices. Such an approach would confirm many Congressional suspicions that the GATT is weak, and unfairly tilted against the United States. This would most certainly weaken the already frail United States political support for the GATT, and make it easier for political groups in Congress to prevail on measures that might otherwise be avoided as inconsistent with United States GATT obligations.

In the United States, there continue to be reports of a new government initiative to repeal DISC.⁵⁶ Consequently, in terms of pragmatic results, the Europeans have some incentive merely to delay, hoping DISC will be repealed, leaving the Panel reports "on the table," and thus not be forced to change their own practices. This too, of course, would demonstrate weakness in the GATT dispute settlement process.

III: SOME CONCLUSIONS

There appears to be no way to avoid damage to the prestige of GATT and its dispute settlement procedures in these cases. It is possible that some type of compromise arrangement could be negotiated and substituted for the Panel reports as an "agreed interpretation" or formulation of a new

⁵⁶ Lynch, *DISC's Demise—Corporate Tax Break on Exports is Likely to be Rescinded Soon*, Wall St. J., Jan. 5, 1977 at 1; Connors, *Carter Tax Reform Plan Likely to End DISC Referral Break*, J. COM., July 20, 1977, at 1; Farnsworth, *Washington and Business—Carter vs. Industry on DISC Benefits*, N.Y. Times, Aug. 18, 1977, at 55; U.S. Dept. of Treasury, *Tax Reform Option Paper on International Taxation*, *supra* note 8, at M-1; U.S. DEPT. OF TREASURY, 1976 ANNUAL REPORT TO CONGRESS, *supra* note 13, ch. 2, History and Provisions of DISC's Statute, at M-3. See also, notes 17 and 18 *supra*.

rule on the relation of tax measures to exports. But it seems doubtful that the four Panel reports can or should be adopted and implemented, as they now stand.

Looking briefly at the substance of the problem, it seems unwise as a matter of policy for France, Belgium or the Netherlands to be required to make fundamental changes in their tax measures simply to comply with an international ruling that is highly theoretical in approach, backed by slim evidence, and probably (in this author's view) illogically reasoned. An overhaul of a domestic tax system because of an international rule affecting a modest portion of the transactions covered by the tax measures is too much "the tail wagging the dog." Whether more modest modification of the European tax practices could substantially diminish the coincidental tax benefit "subsidy" effect on exports, without a fundamental change, remains to be seen, but is more appropriately a "negotiating" objective than an "interpretation" of an existing rule.

Furthermore, the principles proposed by the Panel interpretations of Article XVI:4 are probably unworkable. To hold that any "benefit" to exports is a subsidy, and thereby *presume* the "bilateral price" effect, is to open a Pandora's box of trade policy problems, at the very time when the whole complex issue of subsidies is under great tension and in the process of negotiation in the Geneva Tokyo Round trade talks. The precedent could be taken to authorize GATT members acting under Article VI to apply countervailing duties against hundreds of tax and other practices by many governments. Additionally, whenever it can be shown (or "presumed") that any of these hundreds of practices causes either i) bilateral pricing or ii) increased exports or decreased imports, then respectively paragraph 4 or paragraph 1 of Article XVI is breached, and the *prima facie* nullification doctrine exposes the measure to counteraction under Article XXIII.

The critical question is where and how to draw the line between hundreds of governmental measures often taken for legitimate domestic policy reasons, and those measures which are to be deemed so "predatory" in nature that the international trading system cannot long tolerate them. This question is *not* now well regulated by GATT; it is far too complex for the existing rules, and it will take considerable knowledge and sophistication to design future appropriate rules. The tax practices alone will be an intricate and complex subject, probably requiring years of negotiation, if not perpetual attention of some international body. Perhaps conscious intent to favor exports (as discussed in ILC above) will become part of those rules.

More broadly, what do the DISC and related cases tell us about "the jurisprudence of international trade" and the GATT system? In this author's view they demonstrate the weakness of the GATT dispute resolution or rule-application-interpretation procedures, in several respects: 1) the procedures for getting the process under way are faulty and subject to delay and foot dragging; 2) the delay plays into the hands of a "fait

accompli" approach to trade policy; 3) meager resources of personnel, and money, may contribute to inadequate consideration of the cases and faulty reasoning; 4) factfinding resources and procedures are inadequate; 5) the role of the decision panel is not well defined; 6) the procedures for reopening a complex case that seems to have gone astray are inadequate; 7) the ambiguity of the "nullification or impairment criteria of Article XXIII" weakens the whole process; 8) the "prima facie nullification or impairment" doctrine in GATT, formulated to respond to the ambiguity of "nullification or impairment," can itself be abused and cause weighty consideration of trivia, undermining the traditional GATT notion of confining its dispute procedures to matters of real, and not just theoretical importance; and 9) the implementation phases of the procedures are too loose, too ill defined, and too much subject to the criticism that they involve political forces and calculations that are inappropriate to an adjudicatory procedure that needs to develop confidence and trust.

One important question not adequately considered in the GATT dispute settlement process is the question of what issues can be appropriately handled by those procedures. In other words, when is a disputed issue so inextricably bound up in the need for "rule making" as opposed to "rule applying," that the dispute settlement mechanism of GATT ought not to be the technique for resolving the differences? This is a very complex and important issue, virtually unaddressed in GATT practice. In national government practice this issue is troublesome also, and in some jurisdictions courts have developed techniques to aid them in refusing to accept cases through concepts such as "nonjusticiability." An international dispute settlement mechanism must also address this question, or continuously run the risk of trying to perform tasks beyond its capacity. The DISC and related cases are a prime illustration of this problem.

These tax measure cases are the most complex ever to be considered under the GATT Article XXIII procedures, and the procedures failed. Thus these cases have set back the potential for evolutionary improvement of this process. Let us hope that the diplomats and government representatives can conceive of some amicable way to minimize the damage, to begin serious rule-formulation consideration on the complex tax issues involved, and perhaps most important, to begin fundamental improvements in the GATT dispute settlement process⁵⁷ which is part of the larger "legal system" which, in turn, is vital to the usefulness and effectiveness of world economic rules.

⁵⁷ For some suggestions regarding improvements to the GATT dispute settlement process see REPORT OF THE PANEL ON INTERNATIONAL TRADE POLICY INSTITUTIONS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW, *Remaking the System of World Trade: A Proposal for Institutional Reform*, STUDIES IN TRANSNATIONAL LEGAL POLICY #12 (1976); Jackson, *The Crumbling Institutions of International Trade* 12 J. WORLD TRADE L. 93 (1978). See also, Trade Act of 1974, §121, *supra* note 1; R. HUDEC, *supra* note 19; ABA SUMMARY OF ACTION OF THE HOUSE OF DELEGATES, REPORTS OF SECTIONS, No. 102 (Feb. 1978).

INTERNATIONAL PROTECTION OF THE BALTIC SEA ENVIRONMENT AGAINST POLLUTION: A STUDY IN MARINE REGIONALISM

By Boleslaw A. Boczek *

I.

INTRODUCTION

Protection of the physical environment of man is one of the most elemental and pressing problems of today's world. In the past dozen years or so numerous dramatic and disastrous events have focused domestic and international attention on the growing danger of environmental deterioration and provided stimulus for national and international action to protect man against all kinds of pollution hazards. Among these environmental hazards marine pollution is perhaps the most dangerous in the long run. The sea, which covers about 70 percent of the planet, plays a vital role in maintaining the fundamental biological and ecological balance by supplying much of the oxygen on which life ultimately depends.

Although concern about adverse effects of marine pollution, stimulated by the notorious *Torrey Canyon* case in 1967, reached its peak by the early 1970's and then declined in the climate of energy crisis and international and national economic problems, the challenge of pollution has remained. What is more, the danger of oil pollution has even increased in view of the growing size and number of supertankers and more intensive offshore drilling for oil. The disastrous oil spill resulting from the grounding of the supertanker *Amoco Cadiz* off the coast of Brittany and the oil blowout in the North Sea are only two well publicized reminders of the continuing danger of marine pollution to man's environment.

But oil, though the major source of pollution worldwide, is not the only pollutant of the sea and its living resources. Harmful substances and effluents entering the marine environment from land and even from the air may, under certain conditions, pose greater hazards to some marine areas than oil.

The seas, moreover, are not homogeneous; their vulnerability varies depending on their geography, their depth, temperature, salinity, currents, and age, as well as on the economic and political development of the coastal areas that surround them. The management of pollution must transcend the national boundaries. Pollution can be dealt with effectively only on the international level. However, the strategy applied in marine pollution control need not be exclusively global. There are situations where special geophysical features of the sea area may produce unique pollution problems for the littoral nations which are thus confronted with a

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common environmental challenge. Instead of relying on, or waiting for, a global solution these nations may choose to undertake a regional action on their own. The Baltic region is an excellent example of such a situation.

The purpose of this article is to explore the way in which the seven Baltic states have approached the problem of combating the pollution of their common marine heritage. The study begins with an analysis of the geographic, hydrographic, and ecological features of the Baltic Sea area which pose special problems to the marine environment of that water body and then presents basic facts about the sources and extent of the pollution of the Baltic and the effects of various pollutants upon its environment. Sections IV, V, and VI deal with three general approaches to pollution management in the Baltic area. First, a brief review of the unilateral policies, laws, and actions relating to marine pollution control appears appropriate for inclusion in this study, since the implementation and enforcement of anti-pollution measures ultimately depends on national action. Second, major global international agreements on pollution control which apply to the Baltic Sea are identified and briefly sketched. The study then analyzes the regional cooperation of the Baltic states in the area of marine pollution from its beginning in the form of bilateral and "subregional," mostly Nordic, agreements to a fully regional cooperation which, starting with a convention on fishing and conservation of the living resources of the Baltic Sea (1973),¹ culminated in a regionwide comprehensive arrangement to manage pollution in the Baltic Sea area (1974).² An evaluation of the Baltic program of marine regionalism in pollution management, its chances for carrying out the intended objectives, its relationship to the global codification of the law of the sea, and its value as a model for analogous arrangements in other marine regions, conclude this study in marine regionalism.

II.

THE BALTIC MARINE ENVIRONMENT

As noted in the Preamble to the Baltic Convention, the Baltic Sea has exceptional hydrographic and ecological characteristics. This fact makes it particularly interesting to marine scientists but, at the same time, produces instability and stresses in its marine environment which may, even without human polluting activity, result in the destruction of the Baltic ecosystem and the death of the sea itself.

The Baltic, a semienclosed sea,³ is the largest body of brackish water in the world.⁴ It is a remnant of a region which emerged as the melting ice

¹ Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and the Belts, Sept. 13, 1973, 12 ILM 1291 (1972); (effective July 28, 1974). See also *infra* note 97.

² Convention on the Protection of the Marine Environment of the Baltic Sea Area, March 22, 1974, 13 ILM 546 (1974) (not yet in force) (hereinafter the Baltic Convention).

³ See text at notes 88, 89 *infra*.

⁴ Basic data on the geography and hydrography of the Baltic Sea are taken from: *Baltic Sea*, in 2 *ENCYCLOPAEDIA BRITANNICA* 667-70 (1974); B. Lundholm, *The Oceans*

sheet retreated toward the Arctic during the Ice Age some 7,000 years ago. The Baltic covers an area of roughly 366,000 square kilometers (123,000 square miles),⁵ extending like a large and long fiord approximately from southwest to northeast on the eastern side of the Scandinavian peninsula from latitude 54° to near the Arctic Circle. The Baltic is connected with the North Sea by a channel between Denmark and the south of Sweden. A line, drawn between the northern tip of Denmark (the Skaw) and the Swedish coast is usually considered the boundary between the two seas. The North Sea section of the channel is called the Skagerrak. At its southern end the Kattegat, the Baltic section of the channel, is split by the Danish islands into three sections which are narrow and too shallow for easy navigation by big ships. These three straits are: the Sound (Öresund) between Sweden and the Danish island of Sjaelland, and the Danish straits of the Great Belt (Store Baelt) and the Little Belt (Lille Baelt). The Danish island of Bornholm and the Swedish islands of Öland and Gotland lie in the southwestern Baltic proper. The Finnish Åland Islands (Åhvenanmaa) lie farther north at the entrance to the Gulf of Bothnia, a large northern arm of the Baltic Sea. Two other major subsidiary bodies of water are the Gulf of Finland, stretching eastward of the Åland Islands between Finland and the U.S.S.R. (Estonian S.S.R.), and south of it the Gulf of Riga, separated from the sea proper by the islands of Saaremaa (Ezel) and Hiiumaa (Dago) and a few smaller islands. The littoral countries of the Baltic Sea are: Denmark, Sweden, Finland, the U.S.S.R., Poland, the German Democratic Republic, and the Federal Republic of Germany. Because of the geography of their semienclosed sea, all of them except Denmark and the Soviet Union, were members of the "Land-locked and Geographically Disadvantaged" group at the Third United Nations Conference on the Law of the Sea (UNCLOS III).⁶ The Baltic is very shallow and its seabed is, in virtually the whole area, only continental shelf. The average depth of the sea is only 60 meters. At their shallowest point the inlets are only 17 meters deep. In the central Baltic there are, however, several deeps or basins separated from one another by sills. The maximum depths of the four major basins are: 459m (Landsort Deep in the Central Basin), 301m (Åland Deep), 293m (Bothnian Deep), and 249m (Gotland Deep in the Central Basin).

The hydrography of the Baltic Sea is unique but has not yet been

—*Their Production and Pollution with the Baltic as a Case Study*, 4 PACEM IN MARIBUS 50-58 (E. H. Burnell & P. von Simson, eds. 1971); *Id.*, *Problems of Baltic Ecosystems Analysis*, 3 PACEM IN MARIBUS 55-87 (N. Ginsburg, S. Holt, & W. Murdoch, eds. 1974); Report of the ICES Working Group on Pollution of the Baltic Sea, ICES Cooperative Research Report, Series A, No. 15 (International Council for the Exploration of the Sea, February 1970) (hereinafter ICES Report); B. I. Dybern, *Pollution in the Baltic*, MARINE POLLUTION AND SEA LIFE 15 (M. Ruivo, ed. 1972).

⁵ The figures in *ENCYCLOPAEDIA BRITANNICA*, *supra* note 4, at 667, are 160,000 square miles (420,000 square kilometers).

⁶ L. M. Alexander, *Regional Arrangements in the Oceans*, 71 AJIL 84, at 85 note 10 (1977).

investigated in a definitive way. The Baltic water has a very low salinity because of its nearly landlocked nature and shallow outlets and because of a great influx (about 471 cubic kilometers per year) of fresh water from some 200 rivers, most of them in the north but the two longest (the Vistula and the Oder) in the south. The sea receives the drainage of a land area more than four times as large as its own area. This fact accounts for much of the land-based pollution of the Baltic Sea. The low salinity of this sea is also responsible for the long winter freezeup of the ports and for the poverty of the marine life. Only one-tenth of the species present in the North Sea can be found in the Baltic. Although the Baltic has virtually no tidal movements, there is a two-way flow of water. The fresh waters from the rivers and runoff flow on the surface into the North Sea while a deeper countercurrent of the saltier North Sea water flows into the Baltic through the Belts (chiefly the Great Belt) and—to a lesser extent—through the Sound. This two-way flow results in two rather separate layers of water: the surface layer of low salinity (0.7% average salinity in the Baltic proper) and the bottom layer of the saltier water (1.1% average salinity).⁷ The surface layers of water are separated from deeper more saline layers by a "halocline" lying at 50 to 70 meters in the central part of the sea and at 15 to 30 meters in the Gulf of Bothnia and the Gulf of Finland. Because of the difference in salinity, the bottom layers are insulated from the surface. Oxygen from the upper layers has difficulty in penetrating the otherwise oxygen-poor bottom waters. This, in turn, has an adverse effect upon the living resources which have not entirely adapted themselves to their brackish environment. In addition, the exchange of water is rather slow: the residence time for the Baltic water has been estimated at at least twenty years. In general, despite slightly higher salinity caused by periodic salt water inflows through the entrance channels from the North Sea,⁸ the oxygen content of the bottom water has decreased during recent decades. There is no definitive explanation of this phenomenon. Some theories point to the fact that increased salinity may have actually strengthened the halocline and made the bottom water more stagnant. The prevailing theory attributes the deoxygenization of the Baltic water to the increased supply of organic material sinking through the halocline into the bottom layer where it is broken down, in the process consuming

⁷ The lowest salinity is recorded in the Gulf of Bothnia where it is 0.1%–0.4% at the surface and 0.3%–0.4% near the bottom, while the highest is in the Southwest Baltic proper where the figures are 0.7%–0.8% and 1.5%–1.7% respectively. Dybern, *supra* note 4, at 16.

⁸ Since 1900 the salinity of the Baltic Sea has increased by about 0.1%–0.2%. *Ibid.* In 1951, 200 cubic kilometers of saline water were pushed into the Baltic in three weeks. More recently, storms which flooded parts of Denmark in January 1976 were a blessing for the sea region, pushing record amounts of saline ocean water into the stagnating Baltic, thus renewing its water and speeding up the flow of the surface brackish layer out into the North Sea. Ch. Science Monitor, January 14, 1976, at 4. The inflow of the oxygen-rich seawater into the Baltic may have contributed to higher fish catches in the recent years. J. E. Carroz, *The Management of Living Resources in the Baltic and the Belts*, 4 OCEAN DEV. & INT'L. L.J. 213, 215 (1977).

the oxygen reserves of the deeper layers and stimulating an increase in the hydrogen sulfide so poisonous to higher organisms. Furthermore, and this is the most important change, large amounts of nutrients, mostly phosphates, are flushed upward, initially causing a blooming of phytoplankton and an increase in the number of fish but eventually increased organic breakdown, with the resulting new areas contaminated with hydrogen sulfide and de-oxygenization of the deeper layers and eutrophication of the entire sea.⁹ That is what has happened to the Black Sea, as evidenced by large amounts of hydrogen sulfide and lack of any deep sea life below 650 feet in that sea.¹⁰

III.

POLLUTION IN THE BALTIC

Thus far the discussion of the Baltic marine environment has implied that natural causes alone may have brought about the environmental crisis of that sea and may even spell its doom. However, as established by marine research, the roughly threefold increase in phosphate content in the deeper layers of the Baltic in the post-World War II period coincides with increased outflow of nutrients from land due to human activity. In addition other kinds of pollutants, such as various harmful and toxic substances, wastes dumped into the sea, and oil, have contaminated the Baltic Sea and, they alone, have made it one of the most dangerously polluted seas. Thus the delicate ecological balance of the Baltic, otherwise strained by the unique features of that sea, has been further disturbed by man. Yet, if man has contributed to this predicament, there then exists a possibility of at least delaying, if not averting, the ecological disaster that threatens the Baltic Sea.

Although no definitive and comprehensive set of scientific data exists on the dimension, rate, and relative impact upon the Baltic environment of the natural processes on the one hand and the human activities on the other, research has proven beyond any doubt that man has contributed heavily to the deterioration of the environmental quality of the Baltic Sea area.¹¹

⁹ S. H. Fonselius, *On Eutrophication and Pollution in the Baltic Sea*, MARINE POLLUTION AND SEA LIFE 23 (M. Ruivo, ed. 1972); Lundholm, *The Oceans*, *supra* note 4, at 53-57.

¹⁰ Lundholm, *The Oceans*, *supra* note 4, at 55.

¹¹ The first basic source of information was the ICES Report, note 4 *supra*. It was prepared by the Working Group on Pollution of the Baltic, established in 1968 by the International Council for the Exploration of the Sea (ICES). ICES is an international organization, founded in Copenhagen in 1902, whose objective is to encourage scientific research relating to the exploration of the sea and to coordinate the activities of its members. The members of ICES are Belgium, Canada, Denmark, Federal Republic of Germany, Finland, France, Iceland, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Spain, the Soviet Union, the United Kingdom, the United States, and the German Democratic Republic. Alexander, *supra* note 6, at 99 note 45; N.Y. Times, January 26, 1975 at 36, cols. 3-6. ICES has cooperated closely with research organizations and governments of the Baltic countries both before the conclusion of the Helsinki Baltic Convention in 1974 and thereafter. Its latest report is a prestudy entitled *Assessment of the Marine Environment of the Baltic Sea Area*, presented for the use of the Interim Commission at

Although, as discussed below, relatively minor but potentially dangerous oil spills have occurred in the Baltic, the main threat to that sea is from the land-based sources because, first, up to 80% of marine pollution is land-based in any case and, second, phosphates discharged into the sea from land aggravate the deoxygenization and eutrophication of the water saturated with phosphate nutrients as a result of the unique hydrology of the Baltic.

The littoral states of the Baltic Sea area are all highly developed industrialized countries accounting for about 15% of the world's industrial output. Some 140 million people live within the Baltic catchment area, which in many parts is highly urbanized, and with intensive agriculture and forestry. A large amount of domestic, industrial, and agricultural runoff is discharged into the sea through rivers, outfalls, pipelines, and other effluent points. Organic material discharged into the sea needs oxygen for its decomposition. In marine science the amount of oxygen needed in this process is known as Biologic Oxygen Demand (BOD). It is used to quantify the amount of pollutant entering the sea. The conventional method is to use the amount of oxygen used in five days under certain studied conditions (BOD₅).¹² The ICES working group and other marine scientists roughly estimate that in 1970 the organic BOD₅ in tons per year from all the Baltic coastal countries amounted to 1,183,000 tons, of which 503,000 originated in Sweden, 281,000 in Finland, 266,000 in the Soviet Union, 93,000 in Denmark, 20,000 in the German Democratic Republic, and 10,000 each in Poland and the Federal Republic of Germany.¹³ These figures show that Sweden, Finland, and the Soviet Union contribute most to pollution by organic waste. In the Gulf of Bothnia industrial pollution by far outweighs pollution from sewage effluents because of sparse population and great concentration of wood processing industry, including woodpulp, cellulose, paper, and cardboard industry in Finland and Sweden. In some places, especially where the coast is fringed by rocky islands and archipelagoes, the coastal waters have suffered very seriously despite the progress made in the past few years in eliminating waste.¹⁴ In most of the Baltic proper, the Gulf of Finland, and the Kattegat, pollution from

the 4th meeting of the Scientific and Technological Working Group at Turku, Finland, August 23-26, 1977. See Report of the 4th Meeting of the Interim Baltic Marine Environment Protection Commission, Helsinki, November 15-18, 1977 (hereinafter Interim Commission Report 1977). See also text at notes 174, 175 *infra*. On pollution in the Baltic Sea see also Dybern, and the two articles by Lundholm, all note 4 *supra*; Fonselius, *supra* note 9. See further L. J. Lundqvist, *Saving the Baltic*, SCANDINAVIAN REV. No. 4, 46-53 (1976); G. Reintanz, *The Baltic—Special Pollution Problems*, in 3 NEW DIRECTIONS IN THE LAW OF THE SEA 219-22 (R. Churchill, K. R. Simmonds, & J. Welch, eds. 1974). Among many presentations of pollution in the Baltic see e.g. *Ein Meer voller Unrat und Hässlichkeit*, DER SPIEGEL (No. 27) 36-51 (1973).

¹² Dybern, *supra* note 4, at 18-19.

¹³ *Id.* at 18 (Table 3).

¹⁴ The paper industry appears to share the blame for large dead water areas, 1,000 square miles or more, that occasionally form on the surface of the Baltic. N.Y. Times, January 26, 1975, at 36, cols. 3-6.

sewage waste equals industrial pollution. In the densely populated areas of the southern coast, the Sund, and the Belts, pollution from sewage effluents is a more serious problem than industrial pollution.¹⁵ As noted above, the hydrography of the Baltic is characterized by deoxygenization of the deep layers of water due to an excess of phosphate nutrients. However, man's influence at least equals the natural processes and, what is worse, has been on the increase in the past two decades or so. The yearly outflow of phosphorus, very much caused by increasing use of detergents, is the heaviest in the urban areas around Malmö, Copenhagen, Stockholm, Helsinki, Gdańsk-Gdynia, Riga, and Leningrad. The net supply of phosphorus seems rather small (somewhere between 7,000 and 20,000 tons per year) if compared with the very large amount of phosphorus in the deep water (300,000 to 400,000 tons), but continued accumulation aggravates the oxygen conditions of the Baltic.¹⁶ In 1970 most of the sewage entering the Baltic was not treated or underwent only primary, mechanical treatment.¹⁷ Twenty percent was subjected to biological treatment. The greatest progress seems to have been made in cleaning the Sound, mostly as a result of a joint Danish-Swedish program.¹⁸ Sewage treatment also improved greatly in the West German part of the Baltic.¹⁹ However, it still remains a problem.²⁰ The construction of appropriate facilities requires large long-term investments. In addition, chemical precipitation methods must be used in the sewage treatment plants if phosphorus discharge is to be brought under control.

Nitrates found in fertilizers running off into the Baltic environment are less of a danger than phosphates. However, increasing human activity

¹⁵ See Dybern, *supra* note 4, at 18. (Table 2 showing detailed figures for sewage and industrial waste pollution of the major coastal regions of the Baltic.) The situation has improved insofar as discharge of wood-processing industrial waste is concerned. Here the peak of pollution is believed to have passed. *Id.*, at 20.

¹⁶ For various estimates of phosphorus budget see ICES Report; Dybern, *supra* note 4, at 20; Lundholm, *Problems*, *supra* note 4, at 60-61; *Id.*, *The Oceans*, *supra* note 4, at 55-56. See further S. Gupta, *Nitrogen and Phosphorus Budgets in the Baltic Sea*, 1 MARINE CHEMISTRY 267-80 (1973).

¹⁷ It was not until 1971 that the city of Kiel in Schleswig-Holstein began to plan sewage treatment facilities. Frankfurter Allgemeine Zeitung, March 4, 1971; M. Petersen, *Die Bedeutung der Konvention zum Schutze der Ostsee für Schleswig-Holstein*, DEUTSCHE GEWÄSSERKUNDLICHE MITTEILUNGEN, No. 19 (Special issue) 27-29 (1975).

¹⁸ By 1974 the situation in the Sound had improved so that 25 percent of the Danish and 85 percent of the Swedish waste water received secondary or better treatment. Lundqvist, *supra* note 11, at 48. For the Danish-Swedish program see text at notes 75 and 76 *infra*.

¹⁹ See the general plan "Abwasser und Gewässerschutz in Schleswig-Holstein," issued by the Minister of Food, Agriculture, and Forestry of Schleswig-Holstein, Kiel 1971, cited in J. Koschwitz, *Das Übereinkommen über den Schutz der Meeresumwelt des Ostseegebietes*, in [1975] 18 JAHRBUCH FÜR INTERNATIONALES RECHT 223-40 (1976).

²⁰ In 1975 in Poland out of 98 towns included in the "coastal macroregion" only 42 had sewage treatment plants, most of them mechanical, achieving only 30 percent purification. W. Popiela, *Ochrona polskich wód morskich przed zanieczyszczeniem* [Protection of Polish Sea Waters against Pollution], 30 PAŃSTWO I PRAWO (No. 1) 50, at 51 note 7 (1975).

may change this situation, since nitrogen causes overfertilization and spread of blue-green algae. It is estimated that 50% of nitrogen input into the Baltic is caused by man.²¹

Whereas introduction of organic matter and nutrients by man merely compounds the otherwise precarious ecological balance of the Baltic environment, contamination by harmful and toxic substances, such as chlorinated hydrocarbon pesticides (DDT, dieldrin, endrin), polychlorinated biphenyls (PCB's), and mercury and other heavy metals, seems to be an exclusively human source of threat for the Baltic Sea.²² Pesticides enter the sea in water runoff from agriculture and from the atmosphere; mercury is discharged in industrial waste. It is not entirely clear how PCB's, a component in many paints, enter marine environment.²³ All these substances are toxic to marine environment because, not being readily metabolized, they accumulate in marine food chains and webs, and are most dangerous to marine life and probably also to man.²⁴ Sweden, East Germany, and Poland are mainly responsible for polluting the Baltic with these substances.²⁵ Marine biology research, primarily in Sweden, has found that the levels of these substances in the Baltic Sea are very high. Considerable quantities of DDT and PCB are accumulated in fish (especially fat fish, such as herring and salmon), seals, and fish-eating birds, such as white-tailed eagle and guillemot.²⁶ It is for these reasons that the use of DDT has been banned in Denmark, Sweden, and the Soviet Union. Controls have been introduced in the other Baltic countries.²⁷ Mercury compounds are used in Finland and Sweden as fungicides and slimicides in the paper and pulp industry and high mercury contents have been found in fish off the coast of Denmark, Sweden, and Finland.²⁸

Pollution by waste deliberately dumped from vessels, frequently on the high seas, either dispersed in the form of dredging spoils, garbage, sewage, and the like, or containerized waste with toxic materials, also presents a

²¹ Lundholm, *Problems*, *supra* note 4, at 61-62; Gupta, *supra* note 16.

²² However, the ICES Baltic pollution study investigates the possibility that the presence of heavy metals in fish may be the result of natural contamination by leaching of rock formations around the sea. N.Y. Times, *supra* note 11.

²³ O. Schachter & D. Serwer, *Marine Pollution Problems and Remedies*, 65 AJIL 84, at 95 (1971).

²⁴ *Id.* at 95-96.

²⁵ B. Johnson, *The Baltic Conventions*, 25 INT'L. & COMP. L. Q. 1, at 5 (1976).

²⁶ See Dybern, *supra* note 4, at 21 (Table 7A); Lundholm, *Problems*, *supra* note 4, at 64-66 (Tables 9 and 10). See further C. Osterroht, *Dissolved PCB's and Chlorinated Hydrocarbon Insecticides in the Baltic, Determined by Two Different Sampling Procedures*, 5 MARINE CHEMISTRY 113-21 (1977); D. Stadler, *p,p'-DDT, Dieldrin und polychlorierte Biphenyle (PCB) im Oberflächenwasser der westlichen Ostsee 1974*, 29 DEUTSCHE HYDROGRAPHISCHE ZEITSCHRIFT 25-31 (1976); S. Jensen, *Anthropogenic Substances in Seal from the Baltic: Methyl Sulfone Metabolites of PCB and DDE*, 5 AMBIO [Sweden] 257-60 (1976); M. Olsson & S. Jensen, *PCB Levels Correlated with Pathological Changes in Seal Uteri*, 5 AMBIO 261-63 (1976); B. Jansson *et al.*, *Identification by GC-MS of phenolic Metabolites of PCB and p,p'-DDE Isolated from Baltic Guillemot and Seal*, 4 AMBIO 93-97 (1975).

²⁷ Reintanz, *supra* note 11, at 219.

²⁸ Dybern, *supra* note 4, at 21.

hazard for the marine environment of the Baltic Sea.²⁹ The Baltic has been an important maritime region since the times of the Vikings and the Hansa. Today all the Baltic littoral states are major shipowning nations and, in addition, represent a sizable share of international waterborne traffic, accounting for about 20% of the world trade. A number of major ports are located on the Baltic. Obviously much waste is discharged deliberately on many routes. In 1970 the Baltic ferries alone dumped 50,000 tons of rubbish into the sea.³⁰ It is estimated that between 250 and 400 cubic meters of rubbish are dumped into the Baltic every day, so that trawling has become difficult along the littered ferry routes.³¹

The extent of waste dumped into the Baltic in containers is not entirely known, but the danger from such usually very toxic waste does exist in the Baltic. Thus very high levels of arsenic in the sea led to the discovery that some time in the 1930's 7,000 tons of arsenic had been dumped in concrete containers off the Swedish coast.³² In another case containerized chemical waste has already caused damage. In the Bornholm Deep Danish fishermen were burned and poisoned from fish contaminated with German mustard gas dumped by the Allies after World War II.³³ Dumping of harmful wastes in the national waters of the Baltic countries is banned by domestic regulations.³⁴ In addition, insofar as the territorial waters and the high seas are concerned, most of the Baltic countries apply the London Convention on the Dumping of Wastes at Sea (1972)³⁵ or have issued regulations very similar to it.

The damage that oil pollution can cause to marine life and recreational potential of the coastal areas is well known from the spectacular oil spills from wrecked tankers and offshore drilling. Despite the fact that super-tankers cannot enter the Baltic Sea proper because of the shallow straits, oil pollution has been on the increase in the Baltic because more and more oil is being transported, including crude oil to refineries in Sweden, Denmark, Finland and Poland. A number of oil spill accidents have occurred through either collision or running aground.³⁶ Oil pollution caused by

²⁹ On wastes dumped from ships, see generally Schachter and Serwer, *supra* note 23, at 105-10.

³⁰ Lundqvist, *supra* note 11, at 47.

³¹ Fonselius, *supra* note 9, at 23.

³² Schachter & Serwer, *supra* note 23, at 106; Reintanz, *supra* note 11, at 219. Other toxic substances, once dumped off the Swedish coast, are mercury, chromium, and various acids. See Dybern, *supra* note 4, at 22.

³³ See Schachter & Serwer, *supra* note 23, at 107. During World War II and in the immediate post-War period the Baltic served as the dumping ground for munitions of war. This practice has been given up. See Koschwitz, *supra* note 19, at 234.

³⁴ See, e.g., the Swedish Marine Dumping Prohibition Act, January 1, 1972, reprinted in 11 ILM 1115 (1972).

³⁵ See text at note 71 *infra*. But see further text at notes 72 and 73 *infra*.

³⁶ The oil spill from the tanker *Palva*, which ran aground in the Finnish waters in 1969, provided a good example of the hazards of oil spills in cold waters. 25 to 30 percent (2,400 to 3,000) of the birds in the affected area, mostly eider ducks, died as a result of the accident. E. Leppakoski, *Effects of an Oil Spill in the Northern Baltic*, 4 MARINE POLLUTION BULLETIN (No. 6) 93 (1973). More recently about 1,600 tons of oil leaked from the Soviet tanker *Tsesis* 30 miles south of Stockholm. This was the

"normal" operations, such as pumping out cargo and ballasting tanks with salt water has also been on the increase.³⁷ The Mecklenburger Bight (Federal Republic of Germany and German Democratic Republic), the east coast of Sweden near Norrköping and Stockholm, the Finnish coast off Helsinki and Turku, and the Gulf of Riga (U.S.S.R.) belong to the most exposed areas. It must be stressed that the Baltic Sea is especially sensitive to oil pollution not only because of the unique features of its ecology which have been noted above but also because of its relatively cold water in which bacterial oxidation is slow and oil spilled there remains much longer than in warmer seas.³⁸ It was estimated in 1971 that even if no more oil spills occurred, it might take at least 15 years for the last trace of oil to decompose.³⁹ Unfortunately, more oil spills have since occurred. The Baltic is under special protection of international rules to combat pollution from ships.⁴⁰

Oil pollution from offshore drilling does not pose any immediate danger to the Baltic environment at this time. There is general agreement that, unlike the dramatic case of the North Sea, no substantial reserves of oil exist in the Baltic shelf. However, seismic and geophysical research, carried out by Sweden, the Soviet Union, Poland, and East Germany has confirmed the existence of moderate oil deposits in the southern part of the sea in the offshore area between Gdańsk and Kaliningrad, off the islands of Gotland (Sweden) and Wolin (Poland), and off some Polish coastal areas. Recently a joint agency, with headquarters in Gdańsk and the British Petroleum as its main consultant, has been set up by the Soviet Union, Poland, and East Germany to embark upon a more intensive offshore oil exploitation of the Baltic. However, the project is hampered by lack of adequate equipment; hence the possibility of a joint exploration with a Western country, such as Sweden, has been considered by Poland.⁴¹ Should oil exploitation in the Baltic become a reality, the hazards stemming from offshore wells would be added to others already faced by the vulnerable environment of the Baltic Sea.⁴²

The marine environment of the Baltic Sea can be exposed to some other pollutants which, fortunately, do not yet represent special hazards. Radio-

worst oil spill in the Baltic. N.Y. Times, October 29, 1977, at 5, col. 3; Ch. Science Monitor, October 31, 1977, at 2.

³⁷ Lundholm, *Problems*, *supra* note 4, at 67.

³⁸ According to reports by Soviet scientists at the Soviet-Swedish symposium in 1971, high values of oil exist in the surface waters of the Baltic and its water down to the depth of 100 meters is contaminated. *Id.*, at 66.

³⁹ Reintanz, *supra* note 11, at 220.

⁴⁰ See texts at notes 61 ff. and 140 ff. *infra*.

⁴¹ See N.Y. Times, January 24, 1978, at 49, cols. 1-2. See also V. ŠEBEK, 1 THE EASTERN EUROPEAN STATES AND THE DEVELOPMENT OF THE LAW OF THE SEA: REGIONAL DOCUMENTS—NATIONAL LEGISLATION 189-191 (1977); M. Jaworski, *Podział oraz zasady wykorzystania szelfu Morza Bałtyckiego* [The Division and the Principles of the Utilization of the Baltic Sea Shelf], SPRAWY MIĘDZYNARODOWE (No. 10) 105-106 (1976).

⁴² Article 10 of the Baltic Convention envisages the possibility of pollution resulting from offshore oil exploitation. See text at note 162 *infra*.

active pollution is strictly controlled by all the governments of the region. Thermal or warm water pollution is still limited, but since the construction of a number of nuclear power plants is planned in the area,⁴³ the adverse effects of additional heat upon the Baltic ecosystem cannot be discounted even though the heat surplus can be used in a beneficial way. Among the possible adverse effects would be an increase in eutrophication because of the growth of blue-green algae and oxygen depletion with the occurrence of anoxic release of hydrogen sulfide.⁴⁴

Contamination by viruses and bacteriae, originating from sewage disposal, has been reported in some coastal areas of the Baltic, but, unlike the warm waters of the Mediterranean, the cold Baltic is not a hospitable habitat for pathogenic organisms.⁴⁵

IV.

A REVIEW OF UNILATERAL RULES AND POLICIES

Effective control of marine pollution manifestly requires international co-operation, especially in the case of such a unique sea as the Baltic. International regional approach is the focus of this study. However, a brief review of national regulations and policies in environmental matters as they relate to marine pollution seems appropriate, the more so since in the conditions of the present international system, the implementation of international agreements ultimately depends on national action which therefore must be considered as crucial for marine pollution control.

Like other industrialized nations, all the coastal states of the Baltic region had, by the early 1970's, become aware of the dangers of pollution and the need to develop and strengthen legislative and organizational measures implementing pollution control policies.⁴⁶ This action was complemented by marine science research designed to develop the inadequate knowledge of the Baltic environment and ascertain the degree of pollution in the Baltic and, in particular, the contribution of man to the deterioration of its environment.

⁴³ Sweden, for example, is planning to build about ten nuclear power stations, each emitting about 150 cubic meters of heated water per second, which corresponds to the outflow of ten Swedish rivers. Dybern, *supra* note 4, 22.

⁴⁴ Lundholm, *Problems*, *supra* note 4, at 68.

⁴⁵ *Ibid.* Coliform bacteria has been reported in some areas. Living salmonella virus has been found in the Gulf of Gdańsk and in the Sound. Epidemic has been reported among bathers in Stockholm and some beaches have been closed in Poland. See *ibid.*, Dybern, *supra* note 4, at 21; Popiela, *supra* note 20, at 52.

⁴⁶ For a useful review of pollution control policies see R. L. SIEGEL & L. B. WEINBERG, *COMPARING PUBLIC POLICIES: UNITED STATES, SOVIET UNION, AND EUROPE* (1977). East Germany, West Germany, Sweden, and the Soviet Union are among eight countries discussed in this study. For a comparative review of environmental legislation in 16 countries, including Denmark, Finland, the two Germanys, Sweden, and the Soviet Union, see R. E. Lutz II, *The Laws of Environmental Management: A Comparative Study*, 24 AM. J. COMP. L. 447-520 (1976) (hereinafter Lutz).

Insofar as governmental organization is concerned, a characteristic development has been the establishment in most of the Baltic countries of a central agency overseeing in a comprehensive way the national control of pollution.⁴⁷ All these countries have enacted comprehensive⁴⁸ or sectoral⁴⁹ legislation against pollution, employing both regulatory and preventive approaches. Most common is the issuance of permits and licenses for any alteration of the marine environment, based on the permittee's meeting certain effluent emission standards which are allowed by the current state of technology but are adjusted to what is economically reasonable. The so-called effluent charges are also used as a dissuasive device and incentive to control marine pollution, in Finland and the two Germanys, for example.⁵⁰ Denmark and Sweden are among the countries which, realizing the connection between land use, fresh water pollution, and marine pollution, apply land use planning as their principal strategy in combating pollution of their national waters.⁵¹ Yet despite proliferation of marine pollution legislation, there are still gaps in certain areas of control, especially in combating land-based pollution in some of the Baltic countries.⁵²

Compliance with marine pollution legislation is enforced by surveillance, monitoring, and inspection.⁵³ Criminal sanctions are provided in all the

⁴⁷ In Denmark a Ministry for Environmental Protection was created in 1971; Lutz 453. See also C. H. JENSEN, *THE LAW AND PRACTICE RELATING TO POLLUTION CONTROL IN DENMARK* (1976). In the German Democratic Republic, where antipollution control is among the best on the Baltic, there is a Ministry for Environmental Protection and Water Economy, set up in 1972; See P. H. Sand, *The Socialist Response: Environmental Protection Law in the German Democratic Republic*, 3 *ECOLOGY L. REV.* 451-505 (1973). In Sweden there is a National Environmental Protection Board, forming part of the Ministry of Agriculture and supervising pollution control, and a Franchise Board, an independent body issuing permits and licenses. On the Swedish pollution control system see OECD, *ENVIRONMENTAL POLICY IN SWEDEN* (1977). See also L. J. LUNDQVIST, *ENVIRONMENTAL POLICIES IN CANADA, SWEDEN, AND THE UNITED STATES: A COMPARATIVE OVERVIEW* (1974). In West Germany there is a special Cabinet Committee for Environment coordinating pollution management and an Environment Office directing research and representing the federal government in international environmental matters. See Lutz, 452, 454. See also H. STEIGER & O. KIMMINICH, *THE LAW AND PRACTICE RELATING TO POLLUTION CONTROL IN THE FEDERAL REPUBLIC OF GERMANY* (1976). In the Soviet Union water pollution is under the supervision of the Ministry for Reclamation and Water Management; in Poland, the Ministry of Local Economy and Environmental Protection.

⁴⁸ See, e.g., the Swedish Environmental Protection Act, May 29, 1969; similar Danish Act, June 13, 1973. See Lutz, *passim*. In the German Democratic Republic environmental protection, including water purity, is raised to the status of a constitutional rule. Constitution of the German Democratic Republic, 1968, Art. 15.

⁴⁹ See, e.g., the Finnish Water Act, May 19, 1971, cited in Lutz 499.

⁵⁰ See the discussion in Lutz, 497-500.

⁵¹ *Id.*, at 504-06.

⁵² Thus in Poland marine pollution control is governed by the Water Law of May 30, 1962, which, however, is geared more to protecting inland waters than marine environment; an Order of the Minister of Shipping; by harbor regulations; and by the Penal Code. See Popiela, *supra* note 20, at 50.

⁵³ See Lutz 506-08, discussing the procedures in the two Germanys and the Soviet Union.

seven countries.⁵⁴ Fines are a widely used, but not always effective, method of deterring violations of antipollution laws.⁵⁵ Everywhere laws impose civil liability upon the polluter for damage resulting from his polluting activities.⁵⁶

In general, the antimarine pollution measures and enforcement mechanism appear to be most advanced in the Scandinavian countries, notably Sweden, and also in East Germany. The Federal Republic of Germany, too, has made great progress in controlling the land-based pollution of its marine waters, but, unlike Sweden, which prefers centralized implementation, West Germany relies more on local autonomy. This creates problems of coordination between the federal government and the government of the Land of Schleswig-Holstein, the Baltic province of West Germany. Despite ideological similarities, the organization and enforcement of antipollution laws in the U.S.S.R. compare unfavorably with the situation in East Germany. Although the necessary legislation exists in the U.S.S.R., enforcement is not entirely satisfactory since the attainment of production targets at stake is often given preference over the upholding of antipollution standards. Fines are not always effective since they are mostly paid from the enterprise fund, and antipollution grants to enterprises are sometimes diverted from the construction of antipollution facilities to achieving production goals.⁵⁷ Nonetheless, the Soviet Union as well as Poland has done much in combating marine pollution. They are very active in the Marine Environment Protection Committee⁵⁸ and carry out a considerable amount of research in the area. The Soviet vessels have a good antipollution record and make use of reception facilities in home ports.⁵⁹

V.

INTERNATIONAL GLOBAL AND SUBREGIONAL AGREEMENTS

However much progress had been achieved by unilateral action of the individual littoral states of the Baltic Sea area, it soon became obvious that international cooperation was needed to cope with the ecological crisis at hand. Pollution does not stop at the limits of territorial waters and, further-

⁵⁴ *Id.*, at 513-14, reviewing the laws of the Soviet Union, East Germany, Finland, and Sweden. For Poland see Popiela, *supra* note 20, at 54.

⁵⁵ Lutz at 511-13, discussing Denmark, Sweden, the Soviet Union, and West Germany.

⁵⁶ *Id.*, *passim*, discussing the legislation of Denmark, Sweden, East Germany, and the Soviet Union.

⁵⁷ See generally SIEGEL & WEINBERG, *supra* note 46, at 407-09. See also D. E. Powell, *The Social Costs of Modernization: Ecological Problems in the USSR*, 23 *WORLD POLITICS* 618-34 (1971); C. H. ENLOE, *THE POLITICS OF POLLUTION IN A COMPARATIVE PERSPECTIVE: ECOLOGY AND POWER IN FOUR NATIONS* Ch. 6 (1975).

⁵⁸ The Marine Environment Protection Committee (MEPC) is an IMCO body created in 1973 to coordinate and administer IMCO activities regarding control of marine pollution. See E. V. C. Greenberg, *IMCO: An Environmentalist's Perspective*, 8 *CASE W. RES. J. INT'L. L.* 131, at 144-48 (1976).

⁵⁹ Šebek, *supra* note 41, at 257-58.

more, in the Baltic case, the vulnerability of that sea to pollution made international cooperation the more imperative.

Prior to the adoption of the Baltic Convention in 1974, a number of sectoral international agreements, global and bilateral, applied at least to parts of the Baltic area. Initially, under the impact of accidents in sea transport and increasing oil discharges, international concern focused primarily on combating pollution of the sea by oil. As early as 1954 the Oil Pollution Convention⁶⁰ established certain "prohibited zones" of the seas where discharge of oil by tankers was prohibited. As defined by the Convention,⁶¹ prohibited zones extend to at least 50 miles from the nearest land. Because of its geography the Baltic Sea is included within the concept of the prohibited zone. The 1954 Convention is still in force but it will be superseded by the 1973 Convention for the prevention of pollution from ships not only by oil but also by noxious substances, garbage and sewage.⁶² This Convention, adopted under the auspices of IMCO, establishes more rigorous rules for the so-called "special areas" where "for recognized technical reasons in relation to [their] oceanographical and ecological condition and to the particular character of [their] traffic the adoption of special mandatory methods for the prevention of sea pollution by oil is required."⁶³ The Baltic Sea (along with the Black Sea, the Red Sea, and the Persian Gulf) is considered such an area.⁶⁴ As discussed below,⁶⁵ the Baltic Convention has incorporated many of the IMCO Convention provisions on oil pollution, including the very definition of the Baltic Area.

Other global, albeit very general, international rules, which still continue to be legally binding and apply to the Baltic, are the provisions of the 1958 Geneva Convention on the High Seas, which place upon the signatories the obligation to prevent pollution of the sea by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed or subsoil, and also to prevent pollution from the dumping of radioactive waste.⁶⁶ The 1958 Geneva Convention on the Continental Shelf obliges the parties to protect the living resources of the sea from "harmful agents," in the process of offshore drilling.⁶⁷ Among the more recent pollution-related

⁶⁰ International Convention for the Prevention of Pollution of the Sea by Oil, *done at* London, May 12, 1954 (effective July 26, 1958), amended in 1962 (amendments effective May 18 and June 28, 1967), 1969 (effective January 20, 1978) and 1971 (not yet in force); TIAS Nos. 4900, 6109, 8505; 324 UNTS 3. The 1954 Convention is in force for all the Baltic countries except the German Democratic Republic. B. Johnson, *The Baltic*, in 3 NEW DIRECTIONS IN THE LAW OF THE SEA 209, at 212 (R. Churchill, K. R. Simmonds, & J. Welch, eds. 1974).

⁶¹ Annex A.

⁶² International Convention for the Prevention of Pollution from Ships, *opened for signature* January 15, 1974, *reprinted in* 12 ILM 1319 (1973) (not yet in force) (hereinafter 1973 IMCO Convention).

⁶³ 1973 IMCO Convention, Annex I, Reg. 1 (10).

⁶⁴ *Id.*, Annex I, Res. 10.

⁶⁵ See texts at notes 140 ff. *infra*.

⁶⁶ Convention on the High Seas, *done* April 29, 1958, 13 UST 2312, TIAS No. 5200, 450 UNTS 82; Arts. 24, 25. The Convention is in force for all Baltic countries except Sweden.

⁶⁷ Convention on the Continental Shelf, *done* April 29, 1958, Art. 5(7), 15 UST 471,

global conventions are the 1969 Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties⁶⁸ and the 1969 Convention on Civil Liability for Oil Pollution Damage⁶⁹ with its supplementary Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.⁷⁰ The 1972 London Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter⁷¹ is an important addition to global antipollution agreements from which certain rules were adopted by the Baltic Convention. Of limited geographical scope is the 1972 Oslo Convention against dumping, which applies to the high seas and the territorial waters of the Northeast Atlantic and the Arctic Oceans.⁷² This agreement excludes the Baltic Sea and the Belts, but affects the Baltic insofar as it applies to the Kattegat.⁷³ The 1974 Paris Convention, adopted one month before the Baltic Convention, deals with the problem of land-based pollution for the same geographical area as the 1972 Oslo Convention, but expressly includes the internal waters of the Parties.⁷⁴

International cooperation to combat marine pollution in the Baltic was initiated by the Nordic countries. In 1955, Denmark and Sweden started bilateral cooperation concerning the Sound, which in 1960 resulted in the establishment of a joint Sound Water Committee, engaged in the study of the water quality in the Sound.⁷⁵ This cooperation grew into an agreement on the protection of the Sound from land-based pollution (1974) and a five-year program of cleaning up waste water reaching the Sound. Under this program, by 1979 waste water in the area will have undergone at least secondary treatment and tertiary treatment facilities will be installed for some areas.⁷⁶ In another Baltic area, a joint Finnish-Swedish Gulf of Bothnia Committee was set up in 1972 to coordinate water quality research pro-

TIAS No. 5578, 499 UNTS 311. The Convention is in force for all Baltic countries except the Federal Republic of Germany.

⁶⁸ *Done* at Brussels, Nov. 29, 1969, TIAS No. 8068, *reprinted in* 9 ILM 25 (1970) (effective May 6, 1975). Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances Other than Oil, Nov. 2, 1973, 13 ILM 605 (1974) (not yet in force).

⁶⁹ *Done* at Brussels, Nov. 29, 1969, 9 ILM 45 (1970) (effective June 19, 1975).

⁷⁰ *Done* at Brussels, Dec. 18, 1971, 11 ILM 284 (1972) (not yet in force).

⁷¹ *Done* Nov. 13, 1972, 11 ILM 1294 (1972) (effective Aug. 30, 1975). Among the signatory states are Denmark, West Germany, Finland, and Sweden.

⁷² Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, *Done* at Oslo, Feb. 15, 1972, 11 ILM 262 (1972). Among other signatories of this Convention, which is now in force, are Denmark, West Germany, Finland, and Sweden.

⁷³ *Id.*, Art. 2 (a) (i).

⁷⁴ Convention for the Prevention of Marine Pollution from Land-Based Sources, *adopted* February 21, 1974, *open for signature* June 4, 1974, Art. 3(a). 13 ILM 352 (1974) (not yet in force). Among other signatories were Denmark, West Germany, and Sweden. Finland attended the Conference as observer.

⁷⁵ Dybern, *supra* note 4, at 23; Lundqvist, *supra* note 11, at 47.

⁷⁶ Johnson, *supra* note 25, at 4; Lundqvist, *supra* note 11, at 48.

grams in that part of the sea.⁷⁷ Even earlier, in 1968, cooperation to combat pollution in the Gulf of Finland had started between Finland and the U.S.S.R.⁷⁸

In 1971 the four Nordic countries, Denmark, Finland, Norway, and Sweden, concluded an agreement pledging cooperation in the implementation of the 1954 oil pollution Convention.⁷⁹ The Nordic cooperation in environmental matters culminated in the Convention for the Protection of the Environment in 1974.⁸⁰ This unique document deals only with pollution originating in soil or structures, but not ships or other vehicles. In a way it transcends the national sovereignty of the contracting parties in that it obliges the country which is considering the permissibility of an environmentally harmful activity to take into account any nuisance that such activity may cause in the territory of another party.⁸¹ What is more, any person, affected by pollution originating in another contracting state, has the right to challenge the permissibility of the pollution-causing activity before the court or administrative authority of that state.⁸² The Nordic Convention applies to the Baltic Sea environment since, among environmentally harmful activities, it includes discharges of waste into water courses, lakes, and the sea, and the use of seabed entailing nuisance by water pollution or any other effect on water conditions.⁸³ This provision is significant in view of offshore oil drilling and nuclear power plants located in some coastal areas of the Nordic countries.

This brief review of the international agreements applicable to the Baltic shows that they do not adequately cover all the special requirements of the Baltic marine environment. The existing conventions, even those awaiting entry into force, either deal only with individual sources of pollution, include only the Kattegat, or are concluded only by some, but not all the countries of the Baltic littoral. The major concern, namely pollution of the Baltic from land-based sources, is not dealt with by any of these agreements. That some kind of a comprehensive regionwide arrangement was imperative became obvious at the end of the 1960's and early '70's, the period of growing environmental awareness which found its climax in the Stockholm United Nations Conference on the Human Environment in 1972⁸⁴ and the establishment of a new UN agency, the United Nations Environment Programme (UNEP).

⁷⁷ Lundqvist, *supra* note 11, at 47.

⁷⁸ Dybern, *supra* note 4, at 23.

⁷⁹ Johnson, *supra* note 60, at 212; Lundqvist, *supra* note 11, at 48.

⁸⁰ Denmark-Finland-Norway-Sweden: Convention on the Protection of the Environment, Done at Stockholm, February 19, 1974, 13 ILM 591 (1974), (in force October 5, 1976). On this Convention see A. C. Kiss, *La convention nordique sur l'environnement*, in 20 ANN. FRANÇAIS DE DROIT INT. 808-14 [1974] (1975); C. A. Fleischer, *Nordisk miljøvernkonvensjon*, TIDSSKRIFT FOR RETTSVITENSKAP (No. 1) 83-116 (1976).

⁸¹ Nordic Convention, Art. 2.

⁸² *Id.*, Art. 3.

⁸³ *Id.*, Art. 1.

⁸⁴ U.N. Document A/CONF.48/14, Report of the United Nations Conference on the Human Environment, Stockholm, June 16, 1972. Major portions reprinted in 11 ILM 1416 (1972).

VI.

TOWARD THE REGIONAL MANAGEMENT OF POLLUTION IN THE
BALTIC MARINE REGION

The idea of regional solution to the environmental problems of a sea raises the theoretical question of what a marine region is, an issue similar in its nature to that with which political scientists have been grappling in their attempts to define political regions of the world.⁸⁵ Insofar as marine regions are concerned, a leading student in this area conceptualizes two connotations of the term: one, geographical in the sense of "an expanse of water that is set aside from other parts of the world ocean by some distinctive feature or features,"⁸⁶ and the other, in the sense of a "marine-oriented" region, that is, a group of countries in an area having similar interests in ocean matters.⁸⁷ The Baltic is certainly a physically defined region with major subsidiary bodies of water; it is sufficiently extensive; it is clearly set aside from the ocean by characteristic narrow straits and has a unique hydrography representing a relatively closed marine ecosystem with its own problems of the conservation of the living resources and the protection of the marine environment. As a physical marine region, the Baltic meets the qualifications of a "semi-enclosed sea," one category of physical marine region, the other being a "basin." Four criteria are suggested in differentiating a semienclosed sea from other water bodies:⁸⁸ (1) an area of at least 50,000 square nautical miles (the Baltic has 123,000); (2) the quality of being a primary sea rather than an arm of another semienclosed water body; (3) having at least 50 percent of its periphery occupied by land (the Baltic has 97 percent);⁸⁹ (4) being bordered by at least two states (the Baltic is bordered by seven states).

The Baltic region can be also approached as a group of marine-oriented countries which have common identifiable concerns, namely preservation of the living resources and pollution control. This connotation of the Baltic area as a "management region" overlaps with its definition as a physical marine region.⁹⁰ It must be stressed that the concepts of marine

⁸⁵ See, for example, B. M. RUSSETT, *INTERNATIONAL REGIONS AND THE INTERNATIONAL SYSTEM: A STUDY IN POLITICAL ECOLOGY* (1967); L. J. CANTORI & S. L. SPIEGEL, *THE INTERNATIONAL POLITICS OF REGIONS: A COMPARATIVE APPROACH* (1970).

⁸⁶ Alexander, *supra* note 6, at 88.

⁸⁷ *Ibid.*

⁸⁸ L. M. Alexander, *Regionalism and the Law of the Sea: The Case of Semi-enclosed Seas*, 2 OCEAN DEV. & INT'L L.J. 151, at 155-57 (1974). Alexander lists 24 semi-enclosed seas, among them the Baltic Sea. Cf. also the definition of an "enclosed or semi-enclosed sea" in Article 122 of the Informal Composite Negotiating Text (ICNT) of the UNCLOS III, UN Doc. A/CONF. 62/WP. 10, July 15, 1977, reprinted in 16 ILM 1108 (1977).

⁸⁹ Alexander, *supra*, note 88, at 167-68 (Appendix).

⁹⁰ Alexander, *supra*, note 6, at 88. A marine regional arrangement which is in effect is referred to by Alexander as an "operational region." *Id.*, at 93. Thus the Baltic region is "operational" insofar as the management of the living resources is concerned since the 1973 Gdansk Convention (*see* text at note 97 *infra*) is already in force.

region, marine regionalism, and semienclosed sea, have nothing to do with the politically and strategically motivated doctrine of the so-called "regional sea" (sometimes referred to as "closed sea" or "semi-enclosed sea"). Long sponsored by the Soviet doctrine, this idea essentially proclaims that certain seas, including the Baltic, should be closed to the military units of extralittoral powers. This doctrine is rejected by the Western countries.⁹¹

The origins of the Baltic pollution management region date back to the years 1969 and 1970 when two conferences of the representatives of the Baltic states met at Visby (Gotland) to draft an agreement on the prevention of oil pollution in the Baltic. The conferences were attended by governmental representatives of the German Democratic Republic, Poland, and the U.S.S.R. and delegations of lower governmental units (marine administrations) of the other coastal states. These early attempts to set up a regional system of oil pollution control foundered on the issue of the recognition of the German Democratic Republic by the Federal Republic of Germany, which refused to sign any agreement to which the East German state was a party on grounds that the signature would imply recognition of that state.⁹² The failure of these first attempts shows how political and ideological differences may hold back cooperation among the states of a marine region.⁹³ As is well known, the German issue also led to the absence of the Soviet Union and its allies from the 1972 UN Stockholm Conference.

With the radical change in the West German policy and the recognition of the German Democratic Republic by all the littoral states of the Baltic, the road was open to proceed with formal government-to-government negotiations for the conclusion of necessary agreements. It is worth pointing out, however, that even before the breakthrough in the German question, various groups of marine scientists from all the Baltic countries had been cooperating directly outside of any official framework. Among these transnational groupings, the Baltic Oceanographers and the Baltic Marine Biologists are currently cooperating closely with the Interim Baltic Marine En-

⁹¹ For a discussion of the Soviet doctrine and practice of the closed sea, see W. E. BUTLER, *THE SOVIET UNION AND THE LAW OF THE SEA* Ch. 4 (1971); Sebek, *supra* note 41, at 423-69. Recently the Soviet Union seems to have dropped its insistence on the regional sea doctrine, probably in view of its negative implications for the growing Soviet navy, especially in the Mediterranean Sea and the Indian Ocean. See Sebek, at 465.

⁹² M. Jaworski, *Międzynarodowa ochrona zasobów biologicznych i środowiska morskigo Bałtyku*, [International Protection of the Living Resources and the Marine Environment of the Baltic] *SPRAWY MIĘDZYNARODOWE* (No. 7) 109, at 115-17 (1974); Johnson, *supra* note 25, at 1.

⁹³ In this respect there are analogies with the situation obtaining in the Mediterranean today. It is significant, however, that most of the littoral Arab states on the Mediterranean signed the pollution agreements in 1976. See *Mediterranean Pollution: The Tie That Binds*, 3 *THE INTERDEPENDENT*, Apr. (No. 4) 1976, at 2. More Arab countries were absent from the 1977 Venice conference which drafted an Agreement on protecting the Mediterranean from land-based pollution. *N.Y. Times*, Oct. 22, 1977, at 3, cols. 5-7. The 1976 Mediterranean Pollution Convention and the two Protocols are reprinted in 15 *ILM* 290, 300, 306 (1976).

vironment Protection Commission set up under the Baltic Convention.⁹⁴ The most important marine pollution research in the Baltic had been carried by a special working group on the Study of the pollution of the Baltic, established jointly by ICES⁹⁵ and the Scientific Committee for Oceanographic Research (SCOR), a body created in 1957 by the International Council of Scientific Unions (ICSU), a nongovernmental international organization grouping various national scientific organizations.⁹⁶ The fact that an East German scientific organization was a member of SCOR had made it possible for the ICES-SCOR Working Group to carry out comprehensive marine research even before the recognition of the German Democratic Republic by West Germany.

Following the normalization of political relations, the seven Baltic countries perceived as their most urgent task the management of fisheries in the Baltic, a problem perhaps less challenging than pollution. On September 13, 1973 in Gdańsk, a Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and the Belt was signed and entered into effect on July 28, 1974.⁹⁷ The next task was to set up a system for managing pollution in the region. Following the Finnish initiatory talks with Denmark and Sweden in January 1973, a working group of governmental representatives, technical experts on ship-based pollution, and legal experts from the seven coastal countries met during 1973 and early 1974 to prepare a draft Convention on the Protection of the Marine Environment of the Baltic Sea Area. This Draft was discussed and signed by the Diplomatic Conference of the seven countries in Helsinki on March 22, 1973.⁹⁸ The Convention is not yet in force, however, and will not enter into effect before

⁹⁴ See text at notes 173-75 *infra*.

⁹⁵ On ICES see note 11 *supra*.

⁹⁶ W. S. Wooster, *Interactions between Intergovernmental and Scientific Organizations in Marine Matters*, 21 INT'L. ORG. 102, at 104-05 (1973).

⁹⁷ Reprinted in 12 ILM 1291 (1973). For a discussion of this 1973 Gdańsk Convention see Carroz, *supra* note 8. See also L. Gelberg, *Rechtsprobleme des Schutzes der lebenden Ressourcen in der Ostsee*, [1975] JAHRBUCH FÜR INTERNATIONALES RECHT 204-22 (1976); A. Straburzyński, *Ochrona żywych zasobów Bałtyku na tle postanowień konwencji gdańskiej* [The Protection of the Living Resources of the Baltic against the Background of the Provisions of the Gdańsk Convention] 29 PAŃSTWO I PRAWO (No. 5) 68-75 (1974).

⁹⁸ Final Act of the Diplomatic Conference on the Protection of the Marine Environment of the Baltic Sea Area, Helsinki 18 to 22 March 1974, done March 22, 1974, 13 ILM 544 (1974). The text of the Baltic Convention is reprinted at *id.* 546.

Despite optimistic forecasts (see, for example, W. Popiela, *Konwencja o ochronie środowiska morskiego Bałtyku* [Convention on the Protection of the Marine Environment of the Baltic], 30 PAŃSTWO I PRAWO (No. 7) 96, at 101 (1975); Koschwitz, *supra* note 19, at 239), the Baltic Convention is not yet in force since to become effective it must be ratified by all the seven Baltic states (Art. 27). As of January 1, 1978 it had been ratified by Finland (June 27, 1975), Sweden (July 30, 1976), the German Democratic Republic (January 6, 1977), and Denmark (July 20, 1977). According to the statements of the respective delegations to the 1977 meeting of the Interim Commission, the Federal Republic of Germany expects to ratify the Convention in 1978; Poland after 1978; and the Soviet Union as soon as possible after completion of necessary implementation measures. Poland is carrying out a program of investment projects aiming at full implementation as soon as possible of the requirements of the Convention. The existing

1979 at the earliest. It is to be noted that Czechoslovakia and Norway were represented by observers. These two countries, situated just outside of the Baltic region, may in the future enter into some kind of cooperative agreements with the Baltic pollution management region, in the area of land-based pollution, for example. The UN Environment Programme, the UN Economic Commission for Europe, F.A.O., I.M.C.O., the Inter-Governmental Oceanographic Commission of UNESCO, the W.H.O. Regional Office for Europe, ICES, the Nordic Council, and the Nordic Council of Ministers also sent observers.

VII.

THE BALTIC CONVENTION

A. *Geographical Scope*

The Baltic Convention area includes the Baltic Sea proper with the Gulf of Bothnia, the Gulf of Finland, and the entrance to the Baltic bounded by the parallel of the Skaw in the Skagerrak at 57° 44' 8" N.⁹⁹ This is identical

possibilities do not allow ratification in 1978. See Interim Commission Report 1977, at 3.

Under its Article 29 the Baltic Convention is drawn up in a single copy in English. Official translations into the six languages of the Baltic states were to be prepared and deposited with the signed original.

The Convention consists of 29 articles and annexes which elaborate the concise provisions of the main body of the Convention. The Annexes are as follows: I—hazardous substances; II—noxious substances and materials; III—land-based pollution; IV—pollution from ships (this very long Annex, partially incorporating the provisions of the 1973 IMCO Convention, has eight Regulations and five Appendices); V—exceptions from dumping prohibition (five Regulations); VI—cooperation in combating marine pollution (ten Regulations and an Appendix on incidents involving harmful substances, which includes five Regulations). Finally Annex B includes seven Resolutions (application by other states of special rules for ships; reception facilities; navigation through the entrances to the Baltic; uniform reporting system; safety of navigation; application of Article 21 to future treaties; and Interim Commission). Under Article 20, the Annexes form an integral part of the Convention. Preparing the Convention in two parts is a drafting technique frequently used in conventions of this kind since under Article 24 of the Convention the procedure for amending Annexes and adding new ones is simpler than for amending the Convention's text itself. Generally speaking, the Commission itself adopts annex amendments proposed by a Party, recommending them for acceptance. An amendment is deemed to have been accepted at the end of the period fixed by the Commission unless one of the Parties has objected. Cf. 1973 IMCO Convention, Art. 16 (2)(f). See also T. A. Mensah, *International Conventions Concerning Oil Pollution at Sea*, 8 CASE W. RES. J. INT'L. L. 110, at 122 (1976). Amendments to the articles themselves may be proposed by each Party and are communicated to all through the Depositary Government. Notifications of acceptance by all are necessary for an amendment to become effective (Art. 23). A conference for purposes of a general revision or amending may be convened with the consent of all Parties or at the request of the Commission (Arts. 22 and 23(2)). The Baltic Convention is not subject to any reservations, but a Party may suspend the application of an annex or a part thereof for a period not exceeding one year (Art. 25(1)(2)).

⁹⁹ Baltic Convention, Art. 1.

with the definition of the Baltic Sea as a "Special Area" under the 1973 IMCO Convention,¹⁰⁰ and it means that the Baltic Straits and the Kattegat up to a line connecting Skagen and Göteborg are included in the Baltic Sea area. The Baltic Convention protects the marine environment of the "Baltic Sea Area," that is, not only the water body but also the seabed including the living resources and other forms of marine life.¹⁰¹ The Convention applies both to the high seas and the territorial waters of the Parties. However, whereas the high seas of the Baltic are governed completely by the Convention, with the Baltic Marine Environment Protection Commission authorized to keep implementation of the Convention under continuous observation,¹⁰² the implementation within the territorial waters of each country is, "without prejudice to the sovereign rights in regard to their territorial sea," the responsibility of the national authorities of the Parties.¹⁰³ The territorial sea claims of the Baltic countries are as follows: Denmark and the two Germanys 3 miles; Finland and Sweden 4 miles; and the Soviet Union and Poland 12 miles. In the Final Act of the Baltic Conference the seven participating states "took note" that "at present" none of them claimed more than 12 nautical miles' territorial waters.¹⁰⁴ This is the breadth of the territorial sea acceptable in view of the recent developments in the customary law of the sea as reflected at UNCLOS III.¹⁰⁵ It is then only a matter of time before all the Baltic states claim 12 miles territorial waters.

Unlike the 1974 Paris Convention,¹⁰⁶ the Baltic Convention does not cover internal waters,¹⁰⁷ that is, waters on the landward side of the baseline from which the territorial sea is measured.¹⁰⁸ The low water line along the coast is usually the baseline, but along much of the Baltic coast of Denmark, Sweden, and Finland, where the coastline is indented and cut into or is accompanied by a fringe of islands, the straight baseline method is used by these countries.¹⁰⁹ In addition, the Gulf of Riga is claimed by the Soviet Union as internal waters.¹¹⁰ Poland has a similar claim to much of the Gulf of Gdańsk.¹¹¹ The exclusion of internal waters from the scope of the Baltic Convention means that estuarine waters through which much, if not most, of land-based pollution enters the sea, are not covered by the Convention and their protection will depend entirely upon the readiness to act of the Baltic governments. In order to remedy this situation at least partially the Parties "undertake, without prejudice to their sovereign rights, to ensure that the purposes of [the] Convention will be obtained in these waters."¹¹²

¹⁰⁰ See text at notes 63, 64 *supra* and 140-142 *infra*.

¹⁰¹ Baltic Convention, Art. 4(1).

¹⁰² *Id.*, Art. 13(a).

¹⁰³ *Id.*, Art. 4(2).

¹⁰⁴ Final Act of the Baltic Conference, para. 10. Cf. Final Act of the Conference adopting the 1973 Gdańsk Convention.

¹⁰⁵ ICNT, Art. 3.

¹⁰⁶ See note 74 *supra*.

¹⁰⁷ Baltic Convention, Art. 4(3).

¹⁰⁸ Convention on the Territorial Sea and the Contiguous Zone, Art. 3. 15 UST 1606; TIAS No. 5639; 516 UNTS 205. ICNT, Art. 5.

¹⁰⁹ *Id.*, Art. 4. ICNT, Art. 7.

¹¹⁰ BUTLER, *supra* note 91, at 106.

¹¹¹ Šebek, *supra* note 41, at 173-76.

¹¹² Baltic Convention, Art. 4(3). One small part of the internal waters of the Baltic

One part of the Convention area, the entrance to the Baltic Sea proper, which belongs to the territorial waters of Sweden and Denmark, has received a special protection in view of the potential danger of serious pollution that navigation of large commercial vessels poses in the case of grounding or collision. The Conference members invited IMCO to adopt a recommendation concerning rules for navigation of deep draft ships in the difficult but compulsory route through the Great Belt to be established by Denmark between Skaw at the western entrance to the Kattegat and Gedser at the southern tip of the island of Falster. The Conference Resolution further recommends that these IMCO rules might include compulsory pilot service and special electronic equipment (VHF and DECCA).¹¹³

B. Participation

Only the Baltic states were invited by Finland to the Helsinki Baltic Conference in 1974. The resulting Convention was open for signature to these states alone. However, the Convention is open for accession to any other state interested in fulfilling the aims and purposes of the Baltic Convention, provided that it is invited by all the Parties.¹¹⁴ It would be interesting to see whether such a unanimous invitation would be forthcoming if, for example, Norway or a country whose ships frequently navigated through the Baltic Convention area, should apply for admission to the Baltic regional arrangement.¹¹⁵

Withdrawal from the Convention is possible only after the expiry of five years from the date of entry into force. Since such an action would adversely affect the whole rationale of the regional management of marine pollution, the Depositary Government (Finland) must, upon receiving the notification of withdrawal, convene a meeting of the participants to consider the effects of the withdrawal.¹¹⁶

The Baltic Convention applies only to nongovernmental vessels and aircraft, including pleasure craft.¹¹⁷ It contains the usual exclusion of warships, naval auxiliaries, military aircraft, and any other craft owned or operated by a state and used only on government noncommercial service. The Parties undertake, however, to ensure that such vessels and aircraft observe the rules of the Convention, so far as it is reasonable and practicable, without impairing their operations or operational capabilities.¹¹⁸

Within their internal and territorial waters the parties may enforce the rules of the Baltic Convention against all vessels, but on the high seas such

Convention area, notably the internal waters in the Kattegat, will receive protection from land-based pollution under the 1974 Paris Convention when that Convention becomes effective. See text at note 74 *supra*.

¹¹³ Baltic Convention, Annex B, Res. 3. ¹¹⁴ *Id.*, Art. 26(1).

¹¹⁵ Consent to accession by all the seven Baltic states could at least partially reassure those who believed that absence of extra-Baltic states from the Gdańsk and Helsinki arrangements meant that the Baltic was clearly "juridically becoming a closed sea." See T. Miljan, *Mare Clausum Balticum and the Law of the Sea*, *OSTEUROPA RECHT* (No. 2) 103, at 117 (1972).

¹¹⁶ Baltic Convention, Art. 28.

¹¹⁷ *Id.*, Art. 8.

¹¹⁸ *Id.*, Art. 4(4). Cf. 1973 IMCO Convention, Art. 3(2)(3).

rules may be enforced only against the vessels flying the enforcing state's flag. The right of innocent passage and freedom of navigation are explicitly guaranteed by the Baltic Convention.¹¹⁹

To secure the widest possible compliance with the provisions against vessel-source pollution, Resolution 1 of the Helsinki Conference of the Baltic States requests the participating governments to act to prevail upon other states and extraregional ships "to act in accordance with the provisions for the protection of the Baltic Sea Areas."¹²⁰ Explicitly, the Resolution calls upon the Baltic states to encourage their charterers to insert in charterparties a clause to the effect that ships destined to a Baltic port shall observe the rules followed by the ships of the Baltic countries. It also invites IMCO to recommend that such rules be applied by the ships of all nations.¹²¹

C. Pollution Control

The Baltic Convention is the first international agreement to institute comprehensive measures to combat marine pollution, whether land-based, airborne, from ships, or by dumping. The fundamental obligation of the Parties is to take individually or jointly all appropriate legislative, administrative, or other relevant measures to prevent and abate pollution and protect and enhance the Baltic environment.¹²² Since the implementation of the Baltic Convention might cause increase in the pollution of neighboring marine regions, the Parties are obliged "to use their best endeavors" to ensure that this should not happen.¹²³ Pollution is defined as "introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, resulting in such deleterious effects as hazard to human health, harm to living resources and marine life, hindrance to legitimate uses of the sea including fishing, impairment of the quality for use of sea water, and reduction of amenities."¹²⁴

1. *Land-based Pollution.* Land-based pollution, defined as "pollution of the sea caused by discharges from land reaching the sea waterborne, airborne or directly from the coast, including outfalls from pipelines,"¹²⁵ is a major threat to the Baltic Sea.¹²⁶ In view of the particularly harmful effects of chlorinated hydrocarbons on marine life,¹²⁷ the Convention obliges the Parties to "counteract" the introduction into the Baltic environment of these "hazardous substances."¹²⁸ Only two kinds of such substances are listed:

¹¹⁹ *Id.*, Art. 19.

¹²⁰ *Id.*, Annex B, Res. 1.

¹²¹ *Ibid.*

¹²² Baltic Convention, Art. 3(1). Scientific and technological cooperation is also among the obligations undertaken by the Parties. *Id.*, Art. 16.

¹²³ *Id.*, Art. 3(2). Cf. ICNT, Art. 196. As noted by Johnson (*supra*, note 25, at 7), there are fears in Sweden that all the supertankers which are not allowed into the Baltic will have to be received in the West, the Skagerrak Coast north of Göteborg, with the potential danger to the recreational area of that part of the Swedish coast.

¹²⁴ Baltic Convention, Art. 2(1).

¹²⁵ *Id.*, Art. 2(2).

¹²⁶ See text at notes 11 ff. *supra*.

¹²⁷ See text at notes, 23 ff. *supra*.

¹²⁸ Baltic Convention, Art. 5.

DDT and its derivatives DDE and DDD, and PCB's (polychlorinated biphenyls).¹²⁹ Protection from pollution by these substances can involve the use of appropriate technical means, prohibitions and regulations of the transport, trade, handling, application, and final disposition of products containing them.¹³⁰ In comparison with the less strict terms "control and minimize" used with regard to other harmful ("noxious") substances, the language used here ("counteract") would indicate a strict ban. This was certainly intended by the drafters of the Convention, although such an absolute ban would not be possible to uphold due to persistence of DDT and PCB's in the soil for a long time.¹³¹

Pollution by "noxious" substances must be "controlled" and "strictly limited." They must not be introduced into the marine environment in "significant quantities" without any prior permit by the appropriate national authority which must inform the Commission of any significant discharges. It is important to note that common criteria for issuing permits are to be adopted.¹³² A list of the noxious substances, some of which are industrial waste, is included in Annex II.¹³³

As discussed above,¹³⁴ in the long run the main danger to the Baltic is deoxygenization caused by organic matter entering the sea as municipal sewage and harmful eutrophication due to excess of nutrients. This kind of pollution must—under the Convention—be "controlled and minimized." Since it is unrealistic to ban land-based discharges completely, the Convention only appeals to the Parties to attain certain goals and apply certain criteria and measures.¹³⁵ For municipal sewage the goal is to treat it so that the organic matter and nutrients do not cause deoxygenization and eutrophication of the sea, and also to ensure the hygienic quality and epidemiological and toxicological safety of the sea area. The polluting load of industrial waste is to be minimized through processing techniques and similar methods. The discharge of cooling water from nuclear power plants or other industries using large amounts of water is to be effected in a way

¹²⁹ *Id.*, Annex I.

¹³⁰ *Ibid.*

¹³¹ The Scientific and Technological Working Group set up by the Interim Commission (see note 11 *supra* and text at notes 173–175 *infra*), agreed at its 1977 meeting that the elimination of DDT's and PCB's should be achieved by "all possible means." It called upon the seven governments to present national reports on these hazardous substances before the next meeting of the STWG in 1978. Interim Commission Report 1977, at 9–10.

¹³² Baltic Convention, Art. 6(3)(4)(5).

¹³³ This list is another version of the harmful substances listed in Annexes I and II of the 1972 London Convention on the Dumping of Wastes at Sea (see note 71 *supra*). Mercury, cadmium and their compounds are considered the most dangerous substances "for urgent consideration." The other category includes 16 groups, such as antimony, arsenic, copper, lead, phenols, cyanides, radioactive materials, chemicals used in paper, cellulose and wood pulp industry, oil and wastes from petrochemical industry, pesticides, herbicides, and slimicides other than DDT's and PCB's. Also included are substances having adverse effects on the taste or smell of products for human consumption or on the water itself, reducing the amenity value of the sea or seriously interfering with legitimate uses of the sea.

¹³⁴ See text at note 11 *ff. supra*.

¹³⁵ Baltic Convention, Art. 6(6).

which minimizes pollution.¹³⁶ All these goals and measures are formulated in a very general way.¹³⁷ Hence it will remain the task of the Commission to define all these parameters of action.¹³⁸ The Scientific Technological Working Group (STWG), set up by the Interim Commission in 1974, has already proceeded to elaborate criteria and standards for discharges of harmful substances, considering this matter of the highest priority.¹³⁹

2. *Pollution from Ships.* A disproportionately large part of the Convention's Annexes is concerned with the regulation of pollution from ships. This drafting feature is due to the fact that only a few months prior to the adoption of the Baltic Convention the problem had been regulated at length by the 1973 IMCO Convention.¹⁴⁰ Furthermore, that Convention had established more rigorous rules for ships operating in "special areas" in regard to pollution by oil, by noxious liquid substances, and by garbage.¹⁴¹ Since the Baltic nations had achieved their objective of recognizing the Baltic as one of these special areas, they decided to incorporate the bulk of the IMCO rules on vessel-source pollution into their regional convention.¹⁴² The assumption was that the Baltic Convention would enter into effect sooner than the IMCO Convention.

A high percentage of vessels operating in the Baltic fly the flags of non-littoral nations and to that extent the application of the Baltic Convention rules will be reduced. However, after the entry into force of the IMCO Convention—and this may happen even before the Baltic Convention becomes effective—many more ships will be forced to observe the antipollution rules of the Baltic "special area" which are very much the same as the Baltic rules. These rules are briefly reviewed below.

Generally speaking, appropriate measures must be taken against deliberate, negligent or accidental release of oil, other harmful substances, and discharge of sewage and garbage from ships.¹⁴³ Any discharge of oil from a

¹³⁶ *Id.*, Annex III.

¹³⁷ A proposal by the Federal Republic of Germany to adopt more concrete and binding standards of water quality was not accepted. Koschwitz, *supra* note 19, at 231.

¹³⁸ Baltic Convention, Art. 13(d); Annex III(6).

¹³⁹ At the meeting of the STWG (*see* text at notes 173–175 *infra*) at Turku, Finland in August 1977, attended by delegations of the seven Baltic countries and an observer from ICES, it was recognized that in elaborating common criteria for discharges of harmful substances, both ecological and water use criteria and technological standards must be taken into account. A special Working Group on Criteria and Standards was called upon to investigate whether the establishment of numerical values (water quality criteria) and applying technical criteria and emission and immission norms was possible. As noted by the STWG, useful work on developing criteria and standards for discharges of harmful substances was being conducted within the framework of the European Community in fulfillment of the Community's directive of May 4, 1976, 15 ILM 1113 (1976). Interim Commission Report 1977, at 7–11.

¹⁴⁰ *See* note 62 *supra*.

¹⁴¹ 1973 IMCO Convention, Annexes I, II, V.

¹⁴² Baltic Convention, Art. 7; Annex IV.

¹⁴³ *Id.*, Art. 7(1). All these measures are set out at length in Annex IV along the lines of the IMCO "special area" rules.

ship of 400 gross tons and above is prohibited, except in emergency.¹⁴⁴ Any such discharge from a ship of less than 400 tons, other than an oil tanker, is prohibited except when the oil content of the effluent without dilution does not exceed 15 parts per million¹⁴⁵ or if the ship is proceeding en route and the oil content is less than 100 parts per million, and the discharge is made at least 12 nautical miles from the nearest land.¹⁴⁶ All these provisions are to become operative on the date of the entry into force of the Convention.¹⁴⁷

Exhaustive provisions govern the discharge of noxious liquid substances in bulk, carried by chemical tankers.¹⁴⁸ Within one year following the entry into force of the Convention the Parties will decide on a date when these rules become operative.¹⁴⁹ Several hundred noxious substances are listed in four categories of descending degree of hazard.¹⁵⁰

The discharge of sewage is prohibited except when the ship is at a distance of more than twelve miles from land, proceeds at not less than four knots and discharges at a moderate rate. For disinfected sewage the distance is reduced to four miles. In addition, discharge is possible in internal or territorial waters of a state if less stringent national requirements apply there.¹⁵¹ Disposal of plastic and other garbage is banned. Only food waste may be discharged at a distance of at least 12 miles from land.¹⁵²

The existence of adequate harbor facilities for reception of waste is the key to the prevention of vessel-source pollution. The Convention recognizes, therefore, that the basic objective is to develop and apply uniform requirements for the capacity and location of such facilities.¹⁵³ The date of January 1, 1977 was set as the time limit for completing the facilities at oil terminals and repair ports.¹⁵⁴ It appears that the date was too optimistic. Although a number of tanker facilities have been built, not all the investment projects have as yet been completed. This may be one reason why the Baltic Convention has not yet been ratified by three countries.¹⁵⁵ The port states must also build facilities for reception of noxious substances, harmful substances in packed form or in freight containers, sewage, and garbage. No time limit is set, however.¹⁵⁶ Special surveyors will be ap-

¹⁴⁴ Baltic Convention, Annex IV, Reg. 4(B)(1). Oils are listed in Appendix I to Annex IV.

¹⁴⁵ This criterion may be changed by amendment, as discussed by the Maritime Working Group (*see* note 153 *infra*) in 1977. *See* Interim Commission Report 1977, at 23.

¹⁴⁶ Baltic Convention, Annex IV, Reg. 4(B)(2).

¹⁴⁷ *Id.*, Annex IV, Regs. 4 and 5. The alternative date of January 1, 1977 has now passed.

¹⁴⁸ *Id.*, Annex IV, Reg. 5.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Id.*, Annex IV, Appendix III.

¹⁵¹ *Id.*, Annex IV, Reg. 7.

¹⁵² *Id.*, Annex IV, Reg. 8.

¹⁵³ *Id.*, Art. 7(2). The Interim Commission established a Maritime Working Group which has started work on measures relating to all aspects of reception facilities, and marine pollution in general. *See* Interim Commission Report 1977, at 20-26.

¹⁵⁴ Baltic Convention, Annex IV, Reg. 4(E).

¹⁵⁵ *See* note 98 *supra*.

¹⁵⁶ Baltic Convention, Annex IV, Regs. 5(H), 7(E), 8(E). Annex B, Res. 2(2)(3)(4)(5).

pointed or authorized by each country in the ports where chemical tankers are loading or unloading.¹⁵⁷

3. *Dumping.* The Convention defines dumping as "(i) any deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea; (ii) any deliberate disposal at sea of vessels, aircraft, platforms or other man-made structures at sea."¹⁵⁸ The regulation of dumping basically incorporates the rules of the 1972 London Convention,¹⁵⁹ but is more stringent in that dumping of dredged spoils is subject to a prior special permit by the appropriate national authority, which must take into consideration the technical criteria set by the Convention. The permit is to be valid only within the territorial waters of the state concerned. Prior consultation with the Commission is needed for dumping on the high seas.¹⁶⁰

4. *Exploitation of the Seabed and Subsoil.* Although not a pressing matter at the present time,¹⁶¹ pollution from exploration and exploitation of the seabed and subsoil is included in the comprehensive Baltic Convention. The Parties must take all appropriate measures to prevent pollution resulting from such activities in their respective parts of the seabed and subsoil and ensure that adequate equipment is at hand in the case of a spill.¹⁶²

5. *Cooperation in Combating Marine Pollution.* The Baltic Convention sets out detailed obligations of the Parties to cooperate in combating marine pollution. They oblige the participating states to maintain measures for combating spillages and render assistance in such action; to develop and apply, individually and in cooperation, surveillance and monitoring activities and a system of receiving and dispatching reports on significant spillages; to provide information on national pollution agencies and legislation; and to establish direct contact and cooperate in operational matters.¹⁶³

D. Institutional Framework

At the institutional level, one innovation of the Baltic Convention is the establishment of a permanent organ with a Secretariat, led by an Executive Secretary, headquartered in Helsinki, and with English as its working language.¹⁶⁴ The chairmanship of this Baltic Marine Environment Commission will rotate biannually among the members. Meetings are to be held at least once a year, the first to be convened within 90 days following the

¹⁵⁷ *Id.*, Annex IV, Reg. 5(F).

¹⁵⁸ *Id.*, Art. 2(3).

¹⁵⁹ See note 71 *supra*.

¹⁶⁰ Baltic Convention, Art. 9; Annex V, Regs. 1, 2, 3.

¹⁶¹ See text at note 41 *supra*.

¹⁶² Baltic Convention, Art. 10; Annex IV, Reg. 4(D). Several treaties for the delimitation of national sectors of the continental shelf have already been concluded. Others are being negotiated. Among the treaties are: Agreement between Denmark and the Federal Republic of Germany, June 9, 1965, 570 UNTS 91; Finland and the U.S.S.R., May 20, 1965, 6 ILM 727 (1967) and May 5, 1967, 7 ILM 560 (1968); Finland and Sweden, September 29, 1972; see Johnson, *supra* note 60, at 213-14; Poland and the German Democratic Republic, October 29, 1968; Poland and the U.S.S.R., August 28, 1969; see Jaworski, *supra* note 41, at 110-12.

¹⁶³ Baltic Convention, Art. 11, Annex VI.

¹⁶⁴ *Id.*, Arts. 12(1), 14.

entry into force of the Convention. Extraordinary meetings are possible at the request of at least two Parties.¹⁶⁵ The budget is contributed in equal parts.¹⁶⁶ Each Party has one vote and decisions are taken unanimously "unless otherwise provided under the . . . Convention."¹⁶⁷ Since nothing is provided at this time, unanimity in the Commission is the absolute rule, which means that no "supranational" decisionmaking elements exist in this body.¹⁶⁸

The Baltic Commission is a complement to the other regional Baltic body, the International Baltic Sea Fisheries Commission set up under the Gdańsk Convention in 1973.¹⁶⁹

The powers of the Commission are limited. Defining pollution criteria, objectives for pollution reduction, and objectives concerning measures, particularly in preventing the land-based pollution, are the only regulatory powers of the Convention.¹⁷⁰ Otherwise, it has purely recommendatory competences, of which the competence to keep the contents of the Convention under review and to recommend amendments are the most important.¹⁷¹ Among other duties of the Commission are: to keep the implementation of the Convention under continuous observation; to promote additional measures to protect the Baltic, and, for this purpose, serve as a center for exchange of scientific, technological, and statistical information and to promote scientific and technological research. In promoting additional protective measures, the Commission is to cooperate closely with governmental bodies and seek services of international organizations.¹⁷²

Despite the fact that no major regulatory powers have been granted to the Commission, its role as a permanently available center providing various services to the participating governments and coordinating the antipollution campaign cannot be underestimated. The participants of the Helsinki Baltic Conference were aware of the difficulties that the signatory states would have to overcome in order to meet the requirements whose fulfillment was preliminary to ratification. They considered it an urgent matter to have, before the Convention's entry into effect, some kind of an institution which would prepare the way for the subsequent activities of the future Commission. For this purpose an Interim Baltic Marine Environment Commission was set up by the resolution of the Conference. It was given the task to prepare drafts for the rules of procedure and the financial rules of the future Commission, to examine relevant scientific problems, and to consider any other issues presented to it by the member governments.¹⁷³ The Interim Commission was duly constituted of the delegates of the signatory states and in the period between 1974 and 1977 held four annual meetings, most recently in November 1977.¹⁷⁴ It appointed a Scientific

¹⁶⁵ *Id.*, Art. 12(2)(3).

¹⁶⁶ *Id.*, Art. 15.

¹⁶⁷ *Id.*, Art. 12(5).

¹⁶⁸ Proposals for majority vote met with resistance by some participants at the Helsinki Baltic Conference, (the U.S.S.R., for example). Koschwitz, *supra* note 19, at 236.

¹⁶⁹ See note 97 *supra*.

¹⁷⁰ Baltic Convention, Art. 13(d).

¹⁷¹ *Id.*, Art. 13(b)(c).

¹⁷² *Id.*, Art. 13(a)(e)(f).

¹⁷³ *Id.*, Annex B, Res. 7.

¹⁷⁴ See Interim Commission Report 1977.

Expert and a Secretary, and set up two major subsidiary bodies: the Scientific Technological Working Group (STWG) and the Maritime Working Group (MWG). Through these groups and other ad hoc working groups the Interim Commission has been promoting workshops, seminars, and scientific research relating to pollution in the Baltic Sea, all of these activities being conducted in cooperation with national and international organizations (ICES, for example). Work has also begun on developing criteria and standards for discharges of harmful substances and recommendations to members have also been made. In general, the Interim Commission has been performing the tasks that the Baltic Convention assigns to its permanent organ.¹⁷⁵

E. Responsibility for Damage and Settlement of Disputes

The Baltic Convention expressly introduces the principle of responsibility for damage resulting from acts or omissions in contravention of the Convention. However, it does not lay down any specific rules on such responsibility. It only appeals to the signatory states to undertake "as soon as possible" to develop and accept rules concerning responsibility for damage resulting from acts or omissions in contravention of the Convention. Such rules would include, *inter alia*, limits of responsibility, criteria and procedures for the determination of liability and available remedies.¹⁷⁶

The provision on settlement of disputes is also a compromise. There is the usual clause about seeking solution by negotiation, good offices or mediation, but if no agreement is reached, the dispute shall be "upon common agreement" submitted to arbitration or to the International Court of Justice.¹⁷⁷ This formulation means that if no agreement could be reached, arbitration or adjudication by the I.C.J. would not be possible. This is a disappointing solution, comparing unfavorably with the compulsory arbitration procedure adopted by the 1973 IMCO Convention and the 1974 Paris Convention on land-based pollution.¹⁷⁸

F. Review of Enforcement Rules

Enforcement of antipollution conventions raises difficult problems since most of these conventions lack an effective international enforcement and

¹⁷⁵ *Ibid.* The 1978 meeting of the Interim Commission is scheduled for November 14-17, 1978.

¹⁷⁶ Baltic Convention, Art. 17. Cf. ICNT, Art. 236(3). It has been noted by a commentator that the text is not clear on whether these rules should regulate the international responsibility of states acting in contravention of the Baltic Convention or civil-law liability of individuals, or perhaps both. See J. Łopuski, *Prawne problemy współpracy w zakresie korzystania z Bałtyku*, [Legal Problems of Cooperation in the Utilization of the Baltic] SPRAWY MIĘDZYNARODOWE (No. 6) 110, at 117 (1975). The Interim Commission construes the Article as referring to states. See Interim Commission Report 1977, at 30.

¹⁷⁷ Baltic Convention, Art. 18.

¹⁷⁸ 1973 IMCO Convention, Art. 10; Protocol 2. 1974 Paris Convention, Art. 21; Annex B.

sanctions mechanism. This is also the case of the Baltic Convention. The Commission has the duty to observe the implementation of the Convention by the Parties, but cannot enforce its rules. In general, enforcement of the rules against land-based pollution is strictly within the jurisdiction of each government within its national territory. Cooperation in enforcement is possible in the case of an international river carrying discharge polluting marine environment.¹⁷⁹ As far as the enforcement of the rules against vessel-source pollution is concerned, the jurisdiction of the flag state is the rule. Compliance with the antidumping provisions can be enforced against a foreign vessel loading, within a Party's territory or territorial waters, matter which is to be dumped, or believed to be engaged in dumping within that Party's waters.¹⁸⁰ The Parties have the duty to assist each other in investigating violations in the Baltic area against rules relating to discharges. This assistance may include inspection of cargo record books and similar documents, taking oil samples, and tagging oil residues.¹⁸¹ Special surveyors may inspect cargo record books of foreign chemical tankers in a Party's port.¹⁸² However, unlike the IMCO Convention,¹⁸³ the Baltic Convention does not include any references to proceedings or penalties, or informing the flag state of a violation. The latter duty may, however, be inferred from the general obligation of the seven nations to assist each other in investigating violations of antipollution measures.¹⁸⁴ Under the Convention, the port state's enforcement powers do not reach discharges on the high seas of the Baltic, made by a foreign vessel. It is, however, only a question of time before seven national exclusive economic zones completely close off the Baltic and the seven coastal states will begin to enforce their respective antipollution laws within their respective zones even if no treaty results from UNCLOS III.¹⁸⁵

VIII.

EVALUATION AND CONCLUSIONS

As is likely to be the case with respect to any international agreement relating to pollution control, the document formalizing the Baltic pollution management region is not without its deficiencies and gaps. However, some of them, such as lack of an effective enforcement mechanism and sanctions, exclusion of internal waters, unanimity rule in the Commission, and lack of compulsory judicial settlement of disputes, reflect and share in the fundamental defects of the international law of the sea and the international system in general. In the case of the Baltic area, they are compounded by the political heterogeneity of the participants, some of whom are members of opposing political and military blocs.

¹⁷⁹ Baltic Convention, Art. 6(7).

¹⁸⁰ *Id.*, Art. 9(3).

¹⁸¹ *Id.*, Annex IV, Reg. 2.

¹⁸² *Id.*, Annex IV, Reg. 5(F)(G).

¹⁸³ 1973 IMCO Convention, Arts. 4, 6.

¹⁸⁴ Baltic Convention, Annex IV, Reg. 2.

¹⁸⁵ See ICNT, Arts. 56(1)(b)(iii); 221(1). And see further L. M. Alexander & J. Hodgson, *The Impact of the 200-Mile Economic Zone on the Law of the Sea*, 12 SAN DIEGO L. REV. 569 (1975).

Marine pollution, and especially land-based pollution, is not easy to manage. Hence only a rather general framework of action is laid down in the Convention, leaving the elaboration of standards and criteria to the Commission. The fact remains, however, that there is a disproportion between the impact that the land-based pollution has upon the Baltic environment and the extent to which the Convention deals with this problem. On the other hand, relatively much space is devoted to the regulation of pollution from ships, a drafting feature which results from the fact that many of the relevant regulations have been conveniently taken over from the 1973 IMCO Convention.

Despite the Convention's deficiencies, the Baltic countries have made substantial progress in laying the foundations for a viable system of pollution control in the Baltic Sea area. The Baltic Convention is the first regional arrangement to regulate marine pollution in a comprehensive way, dealing as it does, with all sources of pollution, in particular the land-based pollution which represents the major hazard for the sensitive environment of the Baltic Sea. Another new element is the establishment of a permanent organ, the Commission, charged with supervising the implementation of the Convention. Although without any powers of enforcement, the Commission will be an important center for coordinating and guiding the anti-pollution campaign in the Baltic Sea area.

The Baltic arrangement is a remarkable example of international cooperation among states professing different political ideologies and following different foreign policy orientations: two belong to NATO, three to the Warsaw Pact, and two are included among the European "neutralist" countries.¹⁸⁶ Commitment to cooperate closely, first in the area of the conservation of the living resources, and then in marine pollution control, may lead to further reinforcement of regional consciousness and a spillover into other areas of common interest, such as sea rescue, safety of navigation, and meteorology. In fact, negotiations on some of these are already in progress. Developing ever closer cooperation within the area of a semienclosed sea need not necessarily imply the danger of that area's degenerating into a "limited use" arrangement¹⁸⁷ excluding other nations from some legitimate uses of the sea.

Baltic marine regionalism has stimulated similar approaches in other marine regions facing analogous, though not entirely the same, challenges. It has served, at least partially, as a model for the UNEP-sponsored program for the protection of the Mediterranean from pollution, which resulted in the adoption of a Convention and two Protocols, all of them already in effect. Similar arrangements for the Caribbean, the Persian Gulf, and the Red Sea are under consideration.¹⁸⁸

¹⁸⁶ General agreement on environmental cooperation, including protection of marine environment, was subsequently included in the Final Act of the Conference on Security and Cooperation in Europe at Helsinki, August 1, 1975, 14 ILM 1292, at 1308 (1975).

¹⁸⁷ Alexander, *supra* note 6, at 97-98.

¹⁸⁸ *Mediterranean Pollution: The Tie That Binds*, *supra* note 93; *Trashing the Persian Gulf*, 4 THE INTERDEPENDENT, October (No. 9) 1977, at 7. *Two Anti-Pollution*

The countries of the Baltic marine region initiated a trend which has been recognized and encouraged by the Third UN Law of the Sea Conference, whose draft treaty refers to regions in its provisions on the enclosed sea and at numerous other places.¹⁸⁹ Should a global law of the sea treaty emerge from UNCLOS III, many of its antipollution provisions could be made workable and effectively implemented only at regional level. Conversely, gaps that exist in the Baltic Convention could be filled in by the UNCLOS III treaty.¹⁹⁰

In conclusion, one final question must be asked: Will Baltic regionalism live up to its goal of protecting and enhancing the marine environment of the Baltic Sea area?¹⁹¹ In general, barring the possibility of an irreversible process of decay,¹⁹² the chances are good. The case for the regional approach as the most suitable one for the Baltic conditions is strong. The geographical framework chosen for implementing the regional action, the seven littoral states of the semienclosed Baltic Sea, is appropriate from the point of view of the objectives sought. These objectives are couched in general terms, but basically respond to the issue. Whether the regional system of the Baltic states will be able to carry out its objectives in the immediate future is doubtful, however. One discouraging factor must be noted here, namely the fact that, despite initial optimism on this score, the Convention has not yet entered into effect, and will not do so at least before 1979.¹⁹³ Economic and technological problems as well as the need to adjust the existing national legislation to the language of the Convention have delayed ratification by three countries. It is to be hoped that ratification will be forthcoming as soon as possible. It is encouraging that even now, before the entry into effect of the Convention, the Interim Commission has successfully begun the work which the Convention entrusts to the permanent organ of the system. Still, even with the Convention in force, the road toward enhancing the marine environment of the Baltic will be long, mainly because of the lengthy period of time needed to abate land-based pollution,

Treaties Adopted at Kuwait Conference, 15 UN MONTHLY CHRONICLE (No. 5) 32-33 (1978). The three Mediterranean agreements entered into effect on February 12, 1978. 15 UN MONTHLY CHRONICLE (No. 3) 33 (1978).

¹⁸⁹ See, e.g., ICNT, Art. 123 (Cooperation of States bordering enclosed or semi-enclosed sea); Art. 198 (Cooperation on a global or regional basis).

¹⁹⁰ The provisions of the Baltic Convention are without prejudice to the rights and obligations of the signatories under treaties concluded previously as well as under treaties which may be concluded in the future, furthering and developing the general principles of the Law of the Sea. Baltic Convention, Art. 21; Annex B, Res. 6. On the relationship between the global and regional approaches see W. M. Janis, *The Roles of Regional Law of the Sea*, 12 SAN DIEGO L. REV. 553-568 (1975); Ch. O. Okidi, *Toward Regional Arrangements for Regulation of Marine Pollution: An Appraisal of Options*, 4 OCEAN DEV. & INT'L. L. J. 1-25 (1977). See also Alexander, *supra* note 6, at 105-06, ŠEBEK, *supra* note 41, at 468.

¹⁹¹ The framework for assessing the soundness of marine regional planning, suggested by Alexander (*supra* note 6, at 86-87, 109), provides good guidelines for venturing an answer to this question. This framework is partially adopted here to assess the Baltic marine regionalism in managing pollution.

¹⁹² See text at notes 7-10 *supra*.

¹⁹³ See note 98 *supra*.

a complex task intimately related to the prevention of the fresh water pollution. One positive feature is that all the participating states are industrialized countries, concerned about pollution in the Baltic area and aware of the benefits that will accrue to them from their cooperation. The Nordic countries have traditionally given high priority to maritime matters; the other members of the arrangement are rapidly developing their interests and stakes in ocean-related issues. The growing participation of scientists and experts in the area of marine environment is also a positive indicator.

Political differences have not prevented the Baltic countries from embarking upon a common program of marine pollution control. Habits of cooperation have been growing in several marine-related areas. Yet, political differences still remain and represent a potential disintegrative element which could adversely affect cooperation in a changed international political climate. It is to be hoped, however, that the littoral nations of the Baltic marine region will successfully cope with their vital environmental task.

THE FUNCTION OF THE OATH IN THE ANCIENT NEAR EASTERN INTERNATIONAL TREATY

*By Donald L. Magnetti **

INTRODUCTION

Few areas of the world have had such a profound effect upon history as that of the Near East. Egypt, Babylonia, Assyria, the Hittite Empire, Phoenicia, Syria, ancient Israel and Judah, and the smaller kingdoms and states of the area interacted through three thousand years until Rome occupied almost the entire area.¹ The Fertile Crescent is not a vast area, so the various civilizations and cultures were in frequent contact.

The law codes of the ancient Near East have been available to scholars for many years,² and the civil and criminal law of the area over the centuries has been studied in depth.³ To speak of a developed international law is not realistic, but the right ordering and security of international relations demanded that parties involved in an agreement speak the truth and that they remain true to their word. International relations required that certain promises be followed by actual realization of what was promised, and methods and forms were perfected by which that realization could be guaranteed. At the basis of any treaty or covenant on the international level must be a form or institution that will ensure that what was agreed will be respected and observed.

An instance of nonobservance of a binding contract under civil law can result in an appeal to a court of law or to the ruler, and such was the case in the ancient Near East. But in an agreement between states, the agreed points can only be enforced peacefully by an appeal to an international legal structure. In the absence of such an established structure, as was the case in the ancient Near East, only an appeal to the gods could be an effective means to guarantee observance of the treaty—other than a resort to military force. The solemn appeal to the gods to bear witness to the promises made and to punish nonrealization of those promises was subscribed under oath. As such, the oath by the gods was the constitutive element—that which provided the sanction—in the ancient Near Eastern international treaty.

Although the treaty texts have been available for study for many years, it was not until 1931 that Viktor Korošec published his analytic study

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¹ Some familiarity with ancient Near Eastern history must be presumed. Efforts will be made in the text to relate civilizations to each other.

² For English translations of the various law codes, *see* ANCIENT NEAR EASTERN TEXTS RELATING TO THE OLD TESTAMENT (2d ed. J. B. Pritchard 1955).

³ The bibliographical material is so vast that it is impossible to cite here even a representative selection.

of the Hittite suzerainty and parity treaties.⁴ Following Korošec's work, various studies have appeared which have stressed a connection between the international legal structure of the treaty form and the form of the Old Testament covenants.⁵ However, the function of the oath as the means of providing sanction in the treaty form and its place within the structure of the ancient Israelite covenants have not been thoroughly examined. Even though this step in concluding a treaty is not always mentioned in the actual treaty text, the swearing of an oath in support of an agreement and the consequential sanction of the gods were an essential part of treaty-making. A chronological examination of extant ancient Near Eastern international treaties will illustrate this fact.

EXTRA-BIBLICAL EXAMPLES OF ANCIENT NEAR EASTERN TREATIES

Although there is not an abundance of materials from early Mesopotamia, there are some early Sumerian examples of treaty texts which resemble in many ways the later Hittite and Assyrian examples. The Vulture Stele, discovered at Lagash, dates from c. 2500 B.C. and relates the victory of Eannatum, the ruler (*ensi*) of Lagash, over the city of Umma.⁶ After the attack and subsequent defeat of Umma, Eannatum imposed a treaty upon the defeated city. The beginning of the stele is destroyed, and unfortunately it is impossible to reconstruct the text, which most probably was an historical introduction. After the divine favors bestowed on Eannatum are recounted, we read:

... Eannatum laid the *šušgal*-net of [the god] Enlil upon the Ummaite, [and] he [the Ummaite] swore to him [Eannatum]: "By the life of Enlil, the king of heaven and earth! The fields of Ningirsu I will eat [only] up to one *karu*, [and only] up to the old dike will I claim; but never unto wide eternity will I violate the boundaries of Ningirsu, nor will I infringe upon their dikes [and] canals; nor will I rip out their stelae. If I violate [this treaty], then may the *šušgal*-net of Enlil, by which I have sworn, be hurled down on Umma from heaven."⁷

The same oath is repeated six or seven times, but with the substitution of different gods, *viz.* Ninhursag, Enki, Sin, Utu, and Ninkī. The oath in

⁴ See V. KOROŠEC, *HETHITISCHE STAATSVERTRÄGE: EIN BEITRAG ZU IHRER JURISTISCHEN WERTUNG*, LEIPZIGER RECHTSWISSENSCHAFTLICHE STUDIEN No. 60 (1931).

⁵ See G. E. MENDENHALL, *LAW AND COVENANT IN ISRAEL AND THE ANCIENT NEAR EAST* (1955), originally published in 17 *THE BIBLICAL ARCHAEOLOGIST* 26 (1954). A development of Mendenhall's comparison of the treaties and the Old Testament covenants can be found in his article *Covenant*, *THE INTERPRETER'S DICTIONARY OF THE BIBLE*, s. v. (1962). See also K. BALTZER, *DAS BUNDESFORMULAR* (1960), where the author arrived at conclusions much the same as Mendenhall's; D. J. MCCARTHY, *TREATY AND COVENANT* (1963); D. R. HILLERS, *TREATY-CURSES AND THE OLD TESTAMENT PROPHETS* (1964).

⁶ See F. THUREAU-DANGIN, *DIE SUMERISCHEN UND AKKADISCHEN KÖNIGSINSCHRIFTEN*, No. 4a, at 10 (1907).

⁷ Translation is basically that of S. N. KRAMER. See S. N. KRAMER, *THE SUMERIANS* 310 (1963).

each instance is followed by a curse. In so far as the matter under consideration in the Vulture Stele is limited to adjustment of a territorial boundary, it is not an example of the fully developed treaty form, although of course the delineation of boundaries is a typical treaty feature.

The Naram-Sin treaty,⁸ discovered at Susa, commemorates the covenant between Naram-Sin of Akkad and the king of Elam, perhaps Hita.⁹ Dating from between 2275 and 2250 B.C., the text does not mention the situation which led to the alliance. The Elamites may have been conquered by Naram-Sin, for they are in an inferior position in the treaty. In the text the gods of both parties are invoked, the Elamites swear an oath of vassalage, and it is said that "the enemies of Naram-Sin are the enemies of Elam; the friends of Naram-Sin are the friends of Elam." (III, 10-16). The oath of fidelity is sworn several times, and various curses and blessings are mentioned.

The letters from Mari in northern Syria make direct references to treaties sworn between early Mesopotamian kings. Išme-Dagan of Assyria wrote to his brother Yasmaḥ-Addu of Mari about 1718 B.C. and proposed: "Let us swear a great oath by the gods."¹⁰ Some years later, Zimrilim of Mari received a letter concerning Yarimlim's relations with Amut-pî-ila of Qatanum, in which Yarimlim said that Amut-pî-ila would come to him at Ḥalab and that "we will establish good relations between me and him, an oath by the gods and a firm treaty."¹¹

Despite limited evidence, it appears that the form of treaty in use in Mesopotamia in the third millennium and the first half of the second millennium B.C. involved an appeal to the gods, the swearing of an oath as the support of the stipulations, and various curses and blessings. This procedure is consistent with the established form of the treaty used by the Hittites, as will be seen below.

The oldest extant treaty from Syria records the bestowal of Alalakh on Yarimlim by Abba-AN.¹² An earlier vassal treaty must be presupposed, for total control over Yarimlim had already existed. The agreement should be considered as a treaty, however, for it is a solemn sworn agreement between two rulers.¹³ Yarimlim is ordered to remain faithful to Abba-AN under pain of forfeiture of territory. It is also stated that: "Abba-AN placed himself under oath to Yarimlim and cut the neck of

⁸ See V. SCHEIL, *TEXTES ÉLAMITES-ANZANITES, MÉMOIRES DE LA DÉLÉGATION EN PERSE*, No. 11, 1 (1911). See also Hinz, *Elams Vertrag mit Narām-Sin von Akkade*, 58 *ZEITSCHRIFT FÜR ASSYRIOLOGIE* 66 (1967).

⁹ See W. HINZ, *DAS REICH ELAM* 63-64 (1964).

¹⁰ See G. DOSSIN, *CORRESPONDANCE DE ŠAMŠI-ADDU*, 4 *ARCHIVES ROYALES DE MARI*, No. 20 (1951). It should be noted that the text was written after the death of Shamshi-Adad, so a new relationship had to be established (see line 5).

¹¹ See Dossin, *Iamḥad et Qatanum*, 36 *REVUE D'ASSYRIOLOGIE* 51 (1939).

¹² For a comprehensive study of treatymaking at Mari, see Korošec, *Les relations internationales d'après les lettres de Mari*, in *LA CIVILISATION DE MARI, XVE RENCONTRE ASSYRIOLOGIQUE INTERNATIONALE*, 1967, at 139 (1967).

¹³ For a denial of the appellation of this text as "treaty," see Huffmon, *The Exodus, Sinai, and the Credo*, 27 *CATHOLIC BIBLICAL Q.* 105 n. 18 (1965).

a lamb."¹⁴ Abba-AN binds himself under oath to his vassal, over whom control must have been total, and promises protection for Yarimlim who must be unswerving in his loyalty. At the end of the text it is mentioned that Yarimlim swore allegiance and cooperation with other vassals of Abba-AN.

The earliest of the Hittite treaties, discovered in the royal archives of Boghazköy, date from c. 1500 B.C. The archives have yielded about fifty treaty texts, some of which are complete.¹⁵ In his study of the treaty form, Korošec distinguished six elements in the typical Hittite treaty: (1) Preamble; (2) Historical prologue; (3) Stipulations; (4) Provision for deposit in the temple and for periodic public reading; (5) List of gods as witnesses; and (6) Formula of curses and blessings.¹⁶ Composed over a more than two hundred year period from Zitantas I to Tudhaliyas IV, the great majority are "vassal treaties," imposed by the Hittite king on an inferior. Thus, the obligations are upon the vassal. The one complete extant parity treaty involved Hattusilis III and Ramesses II of Egypt—a treaty preserved on temple walls at Karnak in upper Egypt as well as in the Akkadian version from Boghazköy. Though slightly different, both versions state that there shall be brotherhood and peace between Egypt and Hatti. The more concrete stipulations concern peace, mutual defense, legitimate succession to both thrones, and extradition of fugitives. The obligations to observe the various stipulations lay on both parties.

The Hittite vassal treaty was formally the same as the parity treaty, with the exception that the obligation to observe the stipulations lay only upon the vassal. Of course, the political situations from which the vassal and parity relationships arose were radically different.

The constitutive element of the Hittite treaties is not always specifically mentioned, but there must have been a form by which the terms of the treaty were ratified. The formal oath, by which the parties involved swore fidelity to one another in a parity treaty and by which the vassal promised obedience to his suzerain in a vassal treaty, would seem to have been that constitutive element. Mendenhall mentions three additional parts to the typical treaty, *viz.* the formal oath of ratification, some solemn ceremony which accompanied the oath, and perhaps some form for initiating action against a rebellious vassal.¹⁷ The frequency with which the expressions "break the oath"¹⁸ or "the oath and the treaty"¹⁹ occur prove

¹⁴ See Wiseman, *Abban and Alalah*, 12 J. OF CUNEIFORM STUDIES 126 (1958).

¹⁵ For the most important collection of texts, see E. WEIDNER, *POLITISCHE DOKUMENTE AUS KLEINASIEN: DIE STAATSVERTRÄGE IN AKKADISCHER SPRACHE AUS DEM ARCHIV VON BOGAZKÖI*, BOGAZKÖI STUDIEN Nos. 8-9 (1923); J. FRIEDRICH, *STAATSVERTRÄGE DES HATTI-REICHES IN HETHITISCHER SPRACHE*, Pt. 1 (1926), Pt. 2 (1930).

¹⁶ See KOROŠEC, *supra* note 4, at 12-14.

¹⁷ See MENDENHALL, *supra* note 5, at 34-35.

¹⁸ See, e.g., the treaty between Mursilis II and Duppi-Teshub, in FRIEDRICH, *supra* note 15, at 1, D, col. ii, line 12, or the treaty between Zidantas and Pilliya of Kizzuwatna, in H. OTTEN, *Ein althethitischer Vertrag mit Kizzuwatna*, 5 J. OF CUNEIFORM STUDIES 129, line 10 (1951).

that ratification of the treaty required a solemn oath to observe the stipulations. The elaborate oath by which a soldier swore allegiance to the Hittite king²⁰ and the various rituals before battle²¹ also suggest that an oath ceremony accompanied ratification.

Evidence of Syrian-Palestinian treaties from the same centuries is somewhat sparse. The statue of Idrimi refers to a treaty with the Hurrians, with whose aid Idrimi secured the throne of Alalakh.²² The inscription dates from the first half of the fifteenth century B.C.²³ and relates how "the mighty oath" was made. Although parts of the text are broken, it would seem that Idrimi reminded the Hurrian king of the loyalty of his forefathers and promised his own loyalty. After reciting "the terms of the oath," Idrimi states: "Then I became king." The entire agreement is called in Akkadian *māmitu*, "oath."

The text of another treaty involving Idrimi was discovered by Sir Leonard Woolley.²⁴ The treaty was sworn with Pilliya, the king of Kiz-zuwatna.²⁵ Lines 3-5 read: "they took an oath by the gods and made this treaty between them."²⁶ Both Idrimi and Pilliya appear to have been vassals of the Hittite king Baratarra, for lines 40-43 require that Baratarra approve the treaty before it could become effective. Fugitives would be exchanged only after the Hurrian king approved the agreement.

Another treaty text from Alalakh involved Niqmepa, Idrimi's son and successor, and Ir-Teshub, king of Tunip.²⁷ The text is entitled "tablet of the oath by the gods" and enumerates stipulations to be observed by both parties concerning fugitive slaves, interterritorial theft, and marauders. There are provisions for the abrogation of the treaty should either party rebel against their common Hurrian suzerain.

Of the various treaty texts discovered at Ugarit,²⁸ the treaty between

¹⁹ See, e.g., the treaty between Mursilis II and Duppi-Teshub, in FRIEDRICH, *supra* note 15, at 1, D, col. iv, line 23.

²⁰ See "The Soldier's Oath," in Friedrich, *Der hethitische Soldateneid*, 35 ZEITSCHRIFT FÜR ASSYRIOLOGIE 161 (1924).

²¹ See 4 KEILSCHRIFTURKUNDEN AUS BOGHAZKÖI 1 (1924). See also M. WITZEL, HETHITISCHE KEILSCHRIFT-URKUNDEN, KEIL-INSCHRIFTLICHE STUDIEN, No. 4, at 60 (1924), and the translation by Goetze, in Pritchard, *supra* note 2, at 354.

²² See S. SMITH, THE STATUE OF IDRIMI (1949). For the reference to the treaty with the Hurrians, see *id.* 16-19, lines 43-58. See also Landsberger, *Assyrische Königsliste und "Dunkles Zeitalter"* (cont.), 8 J. OF CUNEIFORM STUDIES 55 (1954).

²³ See Albright, *Some Important Recent Discoveries: Alphabetic Origins and the Idrimi Statue*, 118 BULL. OF THE AMERICAN SCHOOLS OF ORIENTAL RESEARCH 14 (1950).

²⁴ See D. J. WISEMAN, THE ALALAKH TABLETS no. 3 (1953).

²⁵ See discussion by WISEMAN, *id.* 32n, and the discussion by Korošec, *Quelques remarques juridiques sur deux traités internationaux, d'Alalah*, in 17 DROITS DE L'ANTIQUITÉ ET SOCIOLOGIE JURIDIQUE, MÉLANGES HENRI LÉVY-BRUHL 171 (1959).

²⁶ Note the parallelism between "oath" and "treaty."

²⁷ See Wiseman, *supra* note 24, no. 2 (1953), and H. KLENGEL, GESCHICHTE SYRIENS IM 2. JAHRTAUSEND V.U.Z., Pt. 1, NORDSYRIEN 221, 232-33 (1965).

²⁸ The archives of the royal palace of this city-state on the Mediterranean coast near the modern Syrian port of Latakia yielded hundreds of important texts which shed light upon the culture of Syria-Palestine during the middle of the second millennium

Niqmadu II of Ugarit and Aziru of Amurru should be mentioned.²⁹ The political situation in the area in the middle of the fourteenth century B.C. is unclear, but it would seem that Amurru held a position of superiority.³⁰ Lines 4-5 of the treaty state that Niqmadu and Aziru "make between themselves this oath." Niqmadu was to pay Aziru five thousand shekels of silver, and mutual defense was guaranteed. The end of the tablet is badly broken, but the word *māmītu*, "oath," appears several times.

Another reference to a sworn treaty dating from about the same period, but from Mesopotamia, is found in the Synchronistic History of Babylon and Assyria.³¹ The fifteenth century B.C. kings Karaindash of Babylon and Ashurbelnisheshu of Assyria made a treaty concerning the establishment of settled frontiers by swearing an oath (*māmītu*).

Although the Egyptian evidence is very sparse, some texts are illustrative of treaty practice. The oath of allegiance sworn by the people of Megiddo in Palestine to Thutmose III shows the importance of the oath in guaranteeing stability and fidelity.³² After the siege and surrender of Megiddo, it is written: "Then My Majesty caused them to swear an oath, saying: 'We will never again act evilly against Menkheperā, may he live forever, our Lord, in our lifetime, for we have seen his glory.'" ³³ While it is true that this is more an example of an oath of fealty, it is still significant to note that the solemn oath was the effective element which brought peace to the area through subjection to Egypt and the subsequent vassalage.

Not many examples of Assyrian treaties exist, for the Assyrians completely subjugated neighboring states and brought them under the direct rule of their god, Ashur.³⁴ Thus, it is not surprising that the first extant Assyrian treaty text should date from a time when the power of Assyria was dramatically curtailed. Shamshi-adad V. of Assyria and Marduk-zakir-shum I of Babylon were the parties involved.³⁵ No mention is made

B.C. The Old Testament Psalms are now understood in a new light as a result of analysis of the Ugaritic hymns and epics.

²⁹ 4 LE PALAIS ROYAL D'UGARIT, 284-86 (published by J. Nougayrol, 1956).

³⁰ The lands from Byblos to Ugarit, virtually all of the Lebanon, were hostile because they were following Amurru. For a discussion of the political situation, see M. LIVERANI, *STORIA DI UGARIT NELL'ETÀ DEGLI ARCHIVI POLITICI*, STUDI SEMITICI No. 6, 32 (1962). Dussaud thought that Ugarit was in the superior position. See R. Dussaud in a communication to the *ACADÉMIE DES INSCRIPTIONS ET BELLES-LETTRES*, *COMPTES RENDUS* 130 (1956).

³¹ See 34 CUNEIFORM TEXTS FROM BABYLONIAN TABLETS &C. IN THE BRITISH MUSEUM, pl. 38, i, 1-4 (1914).

³² See G.A. & M.B. REISNER, *Inscribed Monuments from Gebel Barkal: Part 2. The Granite Stela of Thutmose III*, 69 *ZEITSCHRIFT FÜR ÄGYPTISCHE SPRACHE UND ALTERTUMSKUNDE* 24 (1933).

³³ *Id.* at 32, line 24.

³⁴ "Hier glaubten sich die Könige . . . vor allem dazu berufen, die ganze Welt der Herrschaft ihres Gottes Assur zu unterwerfen." Von Soden, *Religion und Sittlichkeit nach den Anschauungen der Babylonier*, 89 *ZEITSCHRIFT DER DEUTSCHEN MORGENLÄNDISCHEN GESELLSCHAFT* 143, 152 (1935).

of an oath sworn to ratify the treaty, but this is probably due to the poor state of preservation of the text.

Ashurnirari V of Assyria, although very weak in power when compared to his successor Tiglathpileser III, nevertheless was able to make one campaign to the west in 754 B.C. To consolidate his position in Syria, he endeavored to make the Syrian ruler, Mati'ilu of Arpad, his vassal.³⁶ After the stipulations are listed, the text ends with the words: "You have sworn by Ashur, king of heaven and earth." The same phrase is repeated several times but with the substitution of the names of other gods. Thus, the ceremony during which an oath was sworn by Mati'ilu was integral to the ratification of the treaty.

A few years later, the same Mati'ilu made a treaty with Bir-Ga'yah of Katak.³⁷ Evidently Arpad's allegiance to Assyria had ended. Three Aramaic texts were discovered, and it is uncertain whether the stelae are three distinct agreements or three variations of the same treaty to be deposited in different sanctuaries. The exact date of the stelae is disputed.³⁸ The most complete text is that of Sefire I, where the structure is: (1) title and names of the parties involved; (2) gods who are witnesses; (3) curses upon Mati'el should he violate the treaty; (4) ceremony accompanying the treaty; (5) sacredness of the treaty; (6) stipulations of the treaty; (7) reminder for the future observance of the agreement; (8) blessings; and (9) curses upon anyone who disturbs the stele. There is no explicit indication that the treaties are anything but vassal treaties.

There is no express provision for swearing an oath to ratify the agreement, yet Sefire I is entitled in Aramaic "dy'." It is related to the Akkadian "adē," likewise always plural in form. The word in Aramaic may be a loan word from Akkadian, while there is also the possibility that the Akkadian "adē" is a loan word from Aramaic. The word in Akkadian only appears at a relatively late date. Wiseman defines Akkadian "adē" as "a solemn charge or undertaking on an oath."³⁹ That an *adē*-agreement was sealed with a solemn oath is evident from many sources, e.g., "the kings broke the *adē*-agreement with me; they did not heed the oath by the great

³⁶ Weidner, *Der Staatsvertrag Aššurniraris VI. von Assyrien mit Mati'ilu von Bit-Agusi*, (A. "Der Vertrag Šamši-Adads V. mit Marduk-zākir-sumi I."), 8 ARCHIV FÜR ORIENTFORSCHUNG 27 (1932).

³⁷ *Id.* at 17-27.

³⁸ See Dupont-Sommer, *Les inscriptions araméennes de Sfiré (stèles I et II)*, in 15 EXTRAITS DES MÉMOIRES PRÉSENTÉS PAR DIVERS SAVANTS À L'ACADÉMIE DES INSCRIPTIONS ET BELLES-LETTRES 197 (1958); Dupont-Sommer, *Une inscription araméenne inédite de Sfiré*, 13 BULL. DE MUSÉE DE BEYROUTH 23 (1956); J. A. FITZMYER, *THE ARAMAIC INSCRIPTIONS OF SEFIRE* (1967).

³⁹ For a discussion of the date of the Sefire materials, see FITZMYER, *supra* note 37, at 2-3; MCCARTHY, *supra* note 5, at 62; Noth, *Der historische Hintergrund der Inschriften von Sefire*, 77 ZEITSCHRIFT DES DEUTSCHEN PALÄSTINA-VEREINS 122-23, 128-38 (1961).

⁴⁰ D. J. WISEMAN, *THE VASSAL-TREATIES OF ESARHADDON* 81 (1958); reprinted from 20 IRAQ, Pt. 1 (1958).

gods" ⁴⁰; "I made him enter an *adē*-agreement with an oath by the great gods." ⁴¹ Thus, it would seem that Wiseman's definition of "*adē*" in Akkadian should likewise be applied to the cognate in Aramaic.

There is no evidence of Egyptian treaties during the late eighth century B.C. However, the oath of allegiance was still used to guarantee the loyalty of vassals. Within a generation after the Assyrian and Syrian treaties involving Mati'el, Piankhy invaded Lower Egypt and subdued the princes of the Delta. On the Piankhy Stele it is written that the prince Tefnakhte proclaimed his allegiance to Piankhy by giving gifts and by going to the temple, where "he cleansed himself with a divine oath, saying: 'I will not transgress the command of the king . . . I will do according to that which the king says.'" ⁴² The swearing of the oath ratified the act of allegiance.

The treaty which Esarhaddon of Assyria contracted with Baal of Tyre in 677 B.C. is badly preserved and offers no mention of an oath, although curses are included. At the end of the fourth column, however, the treaty is called the *tuppi adē*, so it would seem that the stipulations imposed upon Baal were acknowledged and ratified by an oath sworn by the vassal to the suzerain, Esarhaddon. ⁴³

The vassal treaties of Esarhaddon, as the texts discovered at Nimrud in 1955 are commonly called, consist of one fairly well preserved tablet and fragments of at least eight copies of the stipulations imposed by Esarhaddon on rulers of small areas to the east of Assyria in order to ensure the succession of Ashurbanipal to the throne. ⁴⁴ The best preserved text is the agreement between Esarhaddon and Ramataya of Urakazabanu. While the structure of the agreement is much like that of the regular vassal treaty (*i.e.*, title of the agreement and naming of the parties involved, gods as witnesses, stipulations imposed, mention of preservation of the text, and curses), there are several obvious differences. Every paragraph is in the form of an oath, which is not the case with the earlier treaty form. Also, the parties with whom the treaty was made were already Assyrian vassals, and their unswerving loyalty in the matter of orderly succession to the throne, while only an incidental stipulation in other treaties, *e.g.*, Ramesses II-Hattusilis III treaty, is the main, indeed the only, object

⁴⁰ See M. STRECK, ASSURBANIPAL UND DIE LETZTEN ASSYRISCHEN KÖNIGE BIS ZUM UNTERGANG NINIVEH'S, Pt. 2, TEXTE 12 (1916) (ANNALEN, i, 118).

⁴¹ *Id.* at 68 (ANNALEN, viii, 45). See also other examples in CHICAGO AKKADIAN DICTIONARY, A, Pt. I, at 131b. See also San Nicolò, *Materialen zur Viehwirtschaft in den neubabylonischen Tempeln*, V, 25 ORIENTALIA 25 (1956); Dellar, *Zur Terminologie neuassyrischer Urkunden*, 57 WIENER ZEITSCHRIFT FÜR DIE KUNDE DES MORGENLANDES 31-33 (1961).

⁴² See 4 J. BREASTED, ANCIENT RECORDS OF EGYPT 881. For the text, see H. SCHÄFER, URKUNDEN DER ÄLTEREN ÄTHIOPIENKÖNIGE, URKUNDEN DES ÄGYPTISCHEN ALTERTUMS, Hft. 1, No. 3 at 51-53 (1905).

⁴³ For the text of the treaty, see R. BORGER, DIE INSCRIFTEN ASARHADDONS KÖNIGS VON ASSYRIEN, ARCHIV FÜR ORIENTFORSCHUNG BEIHEFTE, no. 9, 107-09 (1956); see also Weidner, *Staatsvertrag Aššurnirari's*, *supra* note 35, at 29-34.

⁴⁴ See WISEMAN, VASSAL-TREATIES, *supra* note 39.

of the entire text. But, the Esarhaddon vassal treaties must be considered a variation of the usual treaty type, in so far as they are solemn agreements, entitled *adē*, between the Assyrian monarch and foreign princes, and imposed by the Assyrian suzerain on his vassals in the form of an oath and under threat of curses and divine retribution should the vassals act contrary to the stipulations. The fact that each stipulation is in the form of an oath and that the gods are invoked under oath leads to the view that the solemn affirmation by the gods was the constitutive element in the vassal treaties.

The various states and civilizations of the ancient Near East engaged in the practice of making treaties and forming alliances throughout the three millennia under review. Beginning with the first extant text, the Vulture Stele of c. 2500 B.C., up to and including the treaty of Hannibal of Carthage with Philip V of Macedonia,⁴⁵ the general structure of the treaties is the same. In the absence of any international legal authority and frequently despite genuine cultural and religious discrepancies, e.g., Mesopotamia-Egypt-Anatolia, a common structure nevertheless appears by means of which promises made between different states were realized. The promises made had to be sanctioned by, and thus derive their validity from, a power above the parties involved. Since the supernatural or theological dimension thoroughly permeated life and activity in all of the ancient Near Eastern civilizations, that power was the gods.

But what was the relationship between the gods and order? Why should there be such a connection? Mesopotamia believed man and the world in which he lived were governed by an order and law which was supra- and extra-human. Protected by the gods, this law was even above the king. Indeed, final authority was found only in the community of gods as a whole and not with any individual god.⁴⁶ Egypt believed law and order were inherent in the divine. *Maat*, the daughter of Re, was that order in a universe that was essentially static. It was man's duty to bring mortal activity into consonance with the divine order—to bring the physical into line with the metaphysical.⁴⁷ The Hittites, though, thought of law and order as protected by the gods, but essentially it was a physical, historical entity. There was no law among foreigners, and other states participated in law and order only in so far as they were partners in the legal

⁴⁵ For a fine example of traditional Near Eastern practice not considered in this study, see Bickerman, *Hannibal's Covenant*, 73 AMERICAN J. OF PHILOLOGY 1 (1952); Manni, *L'Alleanza Punico-macedone del 215 A. C.*, MEMORIE DELLA REALE ACCADEMIA DI BOLOGNA; CLASSE DI SCIENZE MORALI, Ser. IV, No. 3 at 5 (1941); David, *The Treaties between Rome and Carthage and Their Significance for Our Knowledge of Roman International Law*, in SYMBOLAE AD IUS ET HISTORIAM ANTIQUITATIS PERTINENTIS JULIO CHRISTIANO VAN OVEN DEDICATAE 231 (1946).

⁴⁶ For a discussion on these points, see von Soden, *supra* note 34, at 150-51; Boyer, *De la science juridique et de sa méthode dans l'ancienne Mésopotamie*, 4 SEMITICA 6 (1951-1952); Speiser, *The Biblical Idea of History in Its Common Near Eastern Setting*, 7 ISRAEL EXPLORATION J. 203 (1957); Lambert, *Nebuchadnezzar King of Justice*, 27 IRAQ 1 (1965).

⁴⁷ See, e.g., H. FRANKFORT, ANCIENT EGYPTIAN RELIGION 49 (1948).

structure of a treaty with the Hittites. Then, both parties were bound by that law which was protected by the Hittite gods.⁴⁸

Although the concept of law and order differed from area to area, there was in each civilization a connection between the supernatural and law. Thus it would be expected that an agreement made between states would involve an appeal to the supernatural to witness and to enforce the promises made by one or both parties. Once the oath had been sworn, the treaty received, as it were, an existence of its own. This reality, backed by the gods, had influence over him who swore it. As long as the oath was not violated, the party who swore remained free from the evil which would follow from a violation. If it were broken, then the curses inherent in every oath and spelled out in colorful detail in many treaties would naturally follow and come to rest upon the violator.

As such, the oath was the effective means employed to insure that promises made in treaties would be kept.⁴⁹ In the absence of an international authority, the sanction of the gods was the effective guarantee and constitutive element of the ancient Near Eastern treaty.

BIBLICAL EVIDENCE OF TREATIES

The Old Testament comprises a wide variety of literature, developed over almost a millennium. Thus, one cannot speak of one Old Testament theology or one Old Testament viewpoint. Central to the relationship between the community of ancient Israel and Israel's God was the covenant. In order to make the relationship real, ancient Israel employed the legal form of the international treaty.⁵⁰ In this article it is impossible to study the covenant as a variation of the treaty form, confirmed by the solemn oath of the nation of ancient Israel. Rather, only actual evidence of international treaties will be considered.

Because of the nature of the Old Testament, it would be surprising if there were preserved an actual text of a treaty made between ancient Israel and another state. But, that the technique and form of contracting a treaty were well known in ancient Israel is an established fact. The prohibitions against making treaties with the Canaanites and Philistines (Ex. 23: 32, Dt. 7: 2, Jgs. 2: 2) lead one to believe that there was a definite fear of the establishment of parity treaties with the inhabitants of the

⁴⁸ See, e.g., Güterbock, *Authority and Law in the Hittite Kingdom*, in J. A. Wilson et al., *AUTHORITY AND LAW IN THE ANCIENT ORIENT* 16 (1954); Güterbock, *Die historische Tradition und ihre literarische Gestaltung bei Babyloniern und Hethitern bis 1200*, 44 *ZEITSCHRIFT FÜR ASSYRIOLOGIE* 94 (1938).

⁴⁹ Some scholars maintain that the oath was the principal feature in the treaties from the first millennium B.C., but not in those from the second millennium where the elaborate ceremony and ritual was of primary importance. This writer cannot agree in such a conclusion, for there is ample evidence that the oath and the ritual were integrally connected in the earlier treaties and that the ritual accompanied the oath in the later treaties, even though it may have been less elaborate. For the view that there was a definite development from ritual to oath, see Gelb, *BOOK REVIEW* of Wiseman, *supra* note 39, in 19 *BIBLIOTHECA ORIENTALIS* 161 (1962).

⁵⁰ See, e.g., Mendenhall, *supra* note 5.

land. The consequential closer ties with the religions of other peoples following treaties sworn by their gods would have been incompatible with the religion of ancient Israel, which categorically forbade such activity.

Despite the lack of primary sources, such as stelae, and of direct quotation in the Old Testament, there are certain references to treaties contracted. Beginning in Gen. 20, the narrative of Abraham's sojourn in Gerar of the Negev tells of the covenant made between Abraham and Abimelech (Gen. 21: 22-32, 34). Stemming from a possible combination of sources,⁵¹ the account is much the same as that of Isaac's covenant with Abimelech in Gen. 26: 1-33: (a) the wife-sister motif of Abraham and Sarah and of Isaac and Rebecca and (b) the treaty with Abimelech of Gerar at Beersheba. The answer to the problem must lie in the fact that traditionally one of the patriarchs settled near Beersheba and made a treaty with a local ruler, Abimelech. According to the first account, the patriarch was Abraham; according to the second, Isaac. In the first account, Abimelech, accompanied by his general Phicol, came to Abraham and said:

"God is with you in all that you do; swear to me by God here, then, that you will never be false to me, nor to my children, nor to my descendants, but that you will treat me and the land in which you are settled as an immigrant as kindly as I have treated you." "I swear it," said Abraham. So Abraham took some sheep and oxen, which he gave to Abimelech, and the two of them made a covenant.

There follows another narrative concerning a dispute over a well in the vicinity, and a covenant between Abraham and Abimelech resolved the dispute (vv. 25-26, 28-30, 32). The aetiology of the name Beersheba is given as "well of the oath" in this account (v. 31).

In the account of the treaty between Isaac and Abimelech, it is likewise a water dispute that forms the background against which the treaty was concluded. Abimelech came to Isaac (again accompanied by his general Phicol) and made the following proposal (Gen. 26: 27-31):

"Let there be an oath between us, between ourselves and you; let us reach an agreement with you that you will do us no harm, since we did not hurt you, but only did you good, and let you go amicably." . . . Rising early next morning, they took oath with each other . . . and they departed from him [Isaac] on friendly terms.

In Gen. 31, after the confrontation between Jacob and Laban, Laban spoke to Jacob (v. 44): "Come then, let us make a covenant, you and I, and let X be a witness between you and me."⁵² A commemorative pile of rocks was erected and a meal was eaten next to it. Laban invoked a blessing (v. 49): "May Yahweh keep watch between you and me when we are out of one another's sight," and bade Jacob remain faithful to his daughters, Jacob's wives, and remember that (v. 50): "God is a witness

⁵¹ Virtually all scholars accept the fact that the Pentateuch (or Torah) is a combination of at least four different sources over a four or five hundred year period.

⁵² The Massoretic Text is not correct. The translation adopted here is neutral, for it seems impossible to construct a conclusive text.

between you and me." Finally (v. 54), "so Jacob took the oath by the Kinsman⁵³ of his father, Isaac." A sacrifice was offered, and the relatives were invited to the sacred meal.

Although undoubtedly the narrative has been corrupted, as is evident from the two different meals (vv. 46 and 54) *inter alia*, what remains is a reference to a treaty concluded in the time of the patriarchs between one of the patriarchs and a local ruler. Notable is the integral part of the oath in the ceremony of making the treaty.

Jos. 9 tells of the covenant sworn between Joshua and the Gibeonites.⁵⁴ Pretending to be newly arrived immigrants, the Gibeonites approached Joshua and requested that they be permitted to settle among the Israelites. Actually the Gibeonites perpetrated a ruse, for they were among the inhabitants of the land to be killed by the Israelites. Tricking Joshua, they concluded a treaty with him: "Then the men partook of their provisions, without asking the advice of Yahweh; and Joshua came to terms with them, and made a covenant with them to let them live, and the leaders of the community swore an oath to them" (vv. 14-15). After finding out that the Gibeonites were not in fact newly arrived immigrants, the Israelites could not kill them,

for the leaders of the community had sworn an oath to them by Yahweh, the God of Israel. The whole community grumbled at the leaders, but the leaders all said to the whole community: "We have sworn an oath to them by Yahweh, the God of Israel, so now we cannot touch them" (vv. 18-19).

The Gibeonites were allowed to live so that evil would not come to the Israelites "because of the oath" (v. 20) which was sworn to them.

In addition to the historical prologue, partaking of the food in a ceremonial meal, and the possible imposition of stipulations, the agreement, so similar to the classical vassal treaty form, was sealed with an oath. Once sworn, the oath could not be broken, even though the Gibeonites had misrepresented themselves through deception. Years later when Saul tried to slay the descendants of the Gibeonites, David made amends because "the Israelites had sworn to them" (2 Sam. 21: 2).

Other references to treaties concluded by the Israelites are not so specific.⁵⁵ An internal Israelite affair which, although not involving a treaty illustrates in a way the importance of the oath in an agreement which was not a civil contract, is related in Jgs. 21. After the crime of Gibeah

⁵³ The usual translation is "Awesome One"; see, e.g., Alt, *Der Gott der Väter*, in 1 KLEINE SCHRIFTEN ZUR GESCHICHTE DES VOLKES ISRAEL, 24-26 (1959). The translation should most likely be "Kinsman" on the basis of Palmyrene Aramaic and Arabic cognates. See W. F. ALBRIGHT, *STONE AGE TO CHRISTIANITY* 188-89, 327 n.71 (2d ed. 1957).

⁵⁴ See Fensham, *The Treaty between Israel and the Gibeonites*, 27 BIBLICAL ARCHAEOLOGIST 96 (1964); see also Grintz, *The Treaty of Joshua with the Gibeonites*, 86 J. OF THE AMER. ORIENTAL SOC. 113 (1966).

⁵⁵ Other treaties undoubtedly did exist, but the references are usually vague. See, e.g., Fensham, *Did a Treaty between the Israelites and the Kenites Exist?* 175 BULL. OF THE AMER. SCHOOLS OF ORIENTAL RESEARCH 51 (1964).

had been avenged, the people gathered together at the sanctuary of Bethel to offer sacrifice, but the Benjaminites were not present following the defeat at Gibeah. It is related that when the Israelites had assembled at Mizpah, before the attack on Gibeah, "a solemn oath had been taken concerning him who did not come up to Yahweh at Mizpah, as follows: 'He shall be put to death'" (v. 5). After a change of heart came over the Israelites concerning the tribe of Benjamin, they set about getting wives for the survivors, which was a problem, "for the Israelites had sworn, saying: 'Cursed be he who gives a wife to Benjamin'" (v. 18). Reference is being made here to some sort of parity agreement sworn by the amphictyony concerning the tribe of Benjamin, since we are told that the tribes had gathered together before Yahweh, that stipulations had been imposed on the parties involved (the tribes), that a curse had been invoked on anyone who did not obey the terms of the agreement, and that a "solemn oath" had been sworn. Although this agreement cannot be called an international treaty, the method of contracting it closely resembles that of the treaty. The importance of the sworn oath reflects the place the oath had in the treaty form.

A treaty contracted between Ahab and Ben-Hadad of Aram towards the middle of the ninth century B.C. is mentioned in 1 Kgs. 20: 34 following the account of the war with Syria. Shortly before 875 B.C., Ben-Hadad had invaded Israel during Baasha's reign at the behest of Asa of Judah, and he probably had occupied certain border towns. Following his defeat by Ahab of Israel, Ben-Hadad had agreed to return the border towns and to allow the Israelites to have extraterritorial commercial rights in Damascus. The agreement, despite the stipulations imposed on Ben-Hadad, seems to have been more along the lines of a parity treaty than along those of a vassal treaty.⁵⁶ Unfortunately, we know practically nothing of the ratification of the treaty.

Another reference to a treaty is 2 Chr. 36: 13, where it is written that Zedekiah "rebelled against Nebuchadnezzar, who had made him swear by God." In all probability, Nebuchadnezzar of Babylon had imposed a vassal treaty upon Zedekiah when he was installed as ruler of Judah in the place of the young Jehoiachin, who was deported to Babylon in 597 B.C. following the death of his father, Jehoiachin, who had rebelled against the Babylonian hegemony about 600 B.C. This treaty is said to have been "sworn."

In Neh. 6, the futile efforts to frustrate Nehemiah are recounted. One of the enemies was Tobiah, the Jewish governor of Ammon, and when the plotting of Tobiah is mentioned we read (vv. 17-18): "Moreover in those days, the nobles of Judah sent letters to Tobiah, and those of Tobiah came to them, for many in Judah were under oath to him . . ." Although the "oath" in question is clearly not sworn in a treaty context and is rather an oath of allegiance, the *swearing* of fidelity in such a situation shows that

⁵⁶ In 853 B.C., both Ben-Hadad of Aram and Ahab of Israel joined in the coalition which met and successfully stopped the Assyrian advance of Shalmaneser III at Qarqar on the Orontes River.

the bond of allegiance became effective when an oath was sworn. Therefore, the incident is illustrative of treaty practice.

Under the same category of Biblical evidence of treaties, those few personal relationships which are referred to as "covenants" should be considered. In 1 Sam. 18: 3, it is written that "Jonathan made a covenant with David, because he loved him as himself." Later we read (1 Sam. 20: 17): "So Jonathan again took oath to David, because of his love for him, for he loved him as himself." This covenant must have been a pledge of undying friendship between David and Jonathan. Similar to the classical parity treaty in so far as both parties were obliged to remain true to one another, two private individuals nevertheless cannot be said to have contracted a "treaty." That the oaths sworn by both men constituted the "covenant" and made the "covenant relationship" a real entity in itself is shown from 1 Sam. 20: 42: "[W]e have both sworn in the name of Yahweh," and from v. 23, where Jonathan says to David: "As for the word which we have spoken, you and I, behold, Yahweh is between you and me forever." The fact that Jonathan is said to have initiated this relationship would not imply that the obligations to remain true to it lay only upon Jonathan and not upon David as well. Besides, David may well have already sworn allegiance to King Saul and his family. Later David as king spared the life of Meribaal, Jonathan's son, "because of the oath of Yahweh which was between them, between David and Jonathan, the son of Saul" (2 Sam. 21: 7).

There is evidence of such a pledge of friendship, described with actual treaty terminology from the epic literature of Mesopotamia in the story of Etana and the Eagle.⁵⁷ In the Middle Assyrian version, it is written that "in the shade of that poplar, the eagle and the serpent formed a friendship, taking an oath to remain companions."⁵⁸ The serpent appealed to the god Shamash after the betrayal by the eagle and said: "To the eagle I extended goodwill; I revered and honored your oath . . ."⁵⁹ The mutual oaths between the eagle and the serpent closely resemble those sworn by David and Jonathan—"covenants" between private individuals very similar to international treaties in form.⁶⁰

Although the evidence is not abundant, the treaties concluded by ancient Israel were made along the lines of the customary treaty form used throughout the ancient Near East. Furthermore, it is evident that the swearing of an oath—in the case of Israel, an oath by Yahweh, although treaties with the Assyrians undoubtedly contained oaths sworn by the Assyrian gods also—was the constitutive element which ratified the covenant

⁵⁷ Old Babylonian version published by S. Langdon, *The Legend of Etana and The Eagle, or the Epical Poem "The city they hated,"* 12 BABYLONIACA 1, plates i-xiv (1931); for the Middle Assyrian and Neo-Assyrian versions, see Ebeling, *Ein mittelassyrisches Bruchstück des Etana-Mythus*, 14 ARCHIV FÜR ORIENTFORSCHUNG 298 (1944).

⁵⁸ *Id.* at 14, pl. 9, i, 10-11.

⁵⁹ See Langdon, *supra* note 57, at 23, r. 12-13.

⁶⁰ See also the covenant between David and Abner in 2 Sam. 3.

and made it, for all practical purposes, inviolable. (*See, e.g.*, the treaty of Joshua with the men of Gibeon.) Through the oath something outside of and higher than the parties involved was created. The relationship was essentially changed and raised to a higher level. The presence of Yahweh was between the parties to the treaty, as it were, and this separate entity was holy and sacrosanct. As Jonathan said to David: "Behold, Yahweh is between you and me forever." Violation of the sworn bond would be punished by Yahweh, whose sanction had been obtained, for such an act would let loose the curses embodied in the oath. The terms of the treaty were guaranteed through the oath, and one could be confident that the promises made would be respected and brought to fulfilment.

In the absence of international sanctions by which the terms of the treaty could be enforced, ancient Israel had recourse to the use of the oath in the same way as the other ancient Near Eastern peoples had. Even if effective military means were at hand, the gods provided the only written sanction. A treaty was not actually in effect unless it involved the solemn affirmation by the divine that one would be faithful to the details of the agreement.

DECLARATIONS BY JUDGES OF THE INTERNATIONAL COURT OF JUSTICE

*Farrokh Jhabvala **

I. INTRODUCTION

Judges of the International Court of Justice have a variety of vehicles through which they may express their judicial opinions. There are, in the first place, the judgments and opinions of the Court—results of the collegial deliberations—to which every judge may contribute.¹ If, however, the judgment or opinion of the Court does not represent “in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.”² And, despite misgivings on the part of some scholars early in the experience of the Permanent Court of International Justice, this right conferred by Article 57 of the Statute of the Court has been consistently interpreted as allowing individual and joint separate and dissenting opinions.³ Finally, Article 95 of the Rules of Court, adopted on April 14, 1978, provides, *inter alia*, that “[a]ny judge may, if he so desires, attach his individual opinion to the judgment, whether he dissents from the majority or not; a judge who wishes to record his concurrence or dissent without stating his reasons may do so in the form of a declaration.”⁴

Thus, we see that individual judges may participate in the formulation of, and consequently contribute to, the judgments and opinions of the Court; they may write individual or joint dissenting or separate concurring opinions; and they may make bare, *i.e.* unreasoned, “declarations” of concurrence or dissent. The new Rules of Court institute novel constraints upon the declarations of individual judges by expressly restricting them to statements

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¹ Individual judges have several opportunities of presenting their viewpoints to the Court at different stages of the internal proceedings; see “Resolution Concerning the Internal Judicial Practice of the Court,” adopted on April 12, 1976, in 70 AJIL 905-08 (1976).

² Art. 57 of the Statute of the International Court of Justice. By Article 68 the Statute extends this provision, among others, to the advisory proceedings.

³ See ALEXANDER P. FACHIRI, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE* 315 (1932). Fachiri was of the view that the “spirit” of the Statute and Rules of the PCIJ allowed only individual dissenting opinions and not joint opinions, even if the texts of these instruments could be interpreted to include joint opinions.

⁴ *Rules of Court*, adopted on Apr. 14, 1978, at 153. Article 107 makes an identical provision for the advisory procedure; *ibid.*, at 161. These provisions are among the rules which were amended through the promulgation of the new Rules of Court.

TABLE I.
AVERAGES OF DECLARATIONS AND OPINIONS IN THE PCIJ AND THE ICJ

	No. of Judgments and Advisory Opinions	No. of Individual and Joint Opinions	No. of Decla- rations	Average No. of Opinions per case	Average No. of Decla- rations per case
PCIJ (1922-1946)	58	103	36	1.78	0.62
ICJ (1946-1977)	54	250	71	4.63	1.31

of concurrence or dissent *without* giving the reasons for adopting their positions. A perusal of the Court's Reports of its judgments and opinions will quickly reveal that the past practice of the judges does not conform to the new rule on declarations and that this vehicle of individual judicial expression has had a different meaning and scope during the first thirty-odd years of the International Court's existence.

The fifty-four judgments and advisory opinions of the International Court since 1946 have produced seventy-one declarations—an average of more than one per judgment and opinion. The Permanent Court of International Justice had its share of declarations, too, there having been thirty-six in the fifty-eight judgments and opinions it handed down, yielding an average of roughly two declarations in every three cases.⁵ Declarations thus have been common in the experiences of the two courts. They have, however, not been as popular with judges as the individual and joint opinions, of which the International Court has produced two hundred and fifty to date and the Permanent Court one hundred and three in its time. The respective averages in terms of minority opinions per case for the two courts are 4.63 and 1.78 respectively. These statistics are summarized in Table I.

A breakdown of the numbers by triennial periods, however, indicates a generally upward trend in the number of declarations per case for the International Court of Justice, as evidenced in Table II. A similar breakdown for the Permanent Court does not yield any such clear trend as may be seen in Table III.

It is thus apparent that while declarations have not been resorted to as often by judges as individual and joint opinions, they have nonetheless been resorted to more often in recent years than in the earlier years of the ICJ or during the time of the PCIJ. This increasing use of the declaration for the expression of judicial opinions was a consequence, it is submitted, of the increasing diversity of ends to which the declaration was turned in recent years and the attendant expansion in scope of that vehicle. The changes introduced into this area of judicial activity by the new Rules of Court apparently seek to reverse this trend of expanding scope and use of declarations, ostensibly requiring that individual judges either reason out their

⁵ The statistics given here refer exclusively to the judgments and advisory opinions of the two Courts and do not include opinions and declarations made in connection with the Orders of the Courts.

TABLE II.

TRIENNIAL DISTRIBUTION OF DECLARATIONS IN THE INTERNATIONAL COURT OF JUSTICE

Period	No. of Cont. Cases	No. of Adv. Ops.	No. of Decls in Cont. Cases	No. of Decls in Adv. Ops.	Total No. of Cases	Total No. of Decls	Decls per Case
1946-51	7	7	4	3	14	7	0.5
52-54	7	1	4	0	8	4	0.5
55-57	3	3	2	5	6	7	1.2
58-60	6	1	16	0	7	16	2.3
61-63	4	1	8	1	5	9	1.8
64-66	2	0	5	0	2	5	2.5
67-69	2	0	2	0	2	2	1.0
70-72	1	1	4	1	2	5	2.5
73-75	6	2	11	5	8	16	2.0
Totals	38	16	56	15	54	71	1.31

opinions in the form of full-fledged separate or dissenting opinions or reconcile themselves to bare statements of their votes without benefit of any explanatory reasoning whatsoever. It is our object in this study to examine through the experiences of the two World Courts the development of the scope of declarations as vehicles of judicial expression.

II. THE CONSTITUTIONAL BASIS FOR DECLARATIONS: THE PCIJ

The constitutional basis for declarations would logically appear to be the Statute of the Court, but as we shall see, the Statute is ambiguous in this regard and open to mutually exclusive interpretations.⁶ The Rules of Court are clearer in this regard and do provide expressly for declarations. In addition, there have been some internal decisions of the Permanent Court which have explicitly allowed judges to attach declarations to the decisions of the Court. It is to an examination of these institutional foundations that we now turn.

It is common knowledge that the Permanent Court had struck out into a new and uncharted area when its 1922 Statute had provided in Article 57 that,

If the judgment [did] not represent in whole or in part the unanimous opinion of the judges, dissenting judges [were] entitled to deliver a separate opinion.⁷

⁶ The author entreats the indulgence of the reader for the lack of a definition of "Declaration." As will become clear, however, practice on the Courts has been too diverse, and at times declarations have been indistinguishable from individual opinions, so that a succinct definition is all but impossible.

⁷ ACTS AND DOCUMENTS CONCERNING THE ORGANIZATION OF THE COURT, PCIJ, ser. D, No. 1, at 25. This article was not altered by the 1936 revision of the Statute. As is well known, the 1922 Statute had not made any provision for the Court's advisory juris-

TABLE III.
 TRIENNIAL DISTRIBUTION OF DECLARATIONS IN THE PERMANENT
 COURT OF INTERNATIONAL JUSTICE

Period	No. of Cont. Cases	No. of Adv. Ops.	No. of Decls in Cont. Cases	No. of Decls in Adv. Ops.	Total No. of Cases	Total No. of Decls	Decls per Case
1922-24	3	9	0	5	12	5	0.42
25-27	8	5	4	0	13	4	0.31
28-30	5	4	4	1	9	5	0.55
31-33	5	7	6	8	12	14	1.17
34-36	3	2	3	1	5	4	0.80
37-39	7	0	4	0	7	4	0.57
Totals	31	27	21	15	58	36	0.62

This provision had been introduced into international judicial procedure only after much deliberation and had not received the universal support of the judicial community. The 1920 Advisory Committee of Jurists, which had been entrusted with the task of drafting the PCIJ Statute, had rejected the idea that dissenting judges be allowed to reason out their negative votes in individual opinions.⁸ But, the committee had provided for dissenters "to have the fact of their dissent or reservations" mentioned with the Court's decision.⁹ The League Council had amended this provision to allow for *reasoned* dissenting opinions, and the League Assembly had accepted the Council's position on this question.¹⁰ The question in 1920 had been whether to allow *reasoned* dissenting opinions or merely *bare* and *un-reasoned* statements of dissent from the Court's decisions; and, the two positions had been viewed as being mutually exclusive.

There had been a precedent for such an approach to the issue of individual opinions in the Hague arbitration system. The 1899 Convention on the Pacific Settlement of International Disputes had allowed minority arbitrators

diction and the Court had rectified this omission partially through Article 71 of the 1922 Rules of Court; *ibid.*, at 81. This gap in the Statute was finally closed through Articles 65-68 of the revised Statute, which came into force on February 1, 1936; ACTS AND DOCUMENTS CONCERNING THE ORGANIZATION OF THE COURT, PCIJ, ser. D, No. 1, at 27-28 (4th ed. 1940). See also, SIXTEENTH REPORT OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1935-1965, PCIJ, ser. E, No. 16, at 198.

⁸ Art. 56 of the Advisory Committee's draft, Procès-Verbaux of the Proceedings of the Advisory Committee 683-84 (The Hague: Advisory Committee of Jurists, 1920); See also 570, 591 and 669.

⁹ *Ibid.*, 683-84.

¹⁰ PROCÈS-VERBAL OF THE 10TH SESSION OF THE COUNCIL, (Geneva: League of Nations, 1920), Official Journal No. 8 (Nov.-Dec. at 18, 21, 1920); and DOCUMENTS CONCERNING THE ACTION TAKEN BY THE COUNCIL OF THE LEAGUE OF NATIONS UNDER ARTICLE 14 OF THE COVENANT AND THE ADOPTION BY THE ASSEMBLY OF THE STATUTE OF THE PERMANENT COURT 24, 60, 69, 138, 213, 256-57 (Geneva: League of Nations 1921).

to "record their dissent when signing" the award.¹¹ But that Conference had rejected a proposal made by Edouard Rolin which would have required reasoned opinions from dissenters.¹² It was said at the time that reasoned dissents would create the impression that the tribunal had produced two awards in a given case.¹³ Thus, the Hague arbitration experiment had first dealt with the notion that reasoned dissents were a different sort of individual expression from unreasoned statements—the earliest form of declarations—and this had been the historical experience with which the jurists and delegates of 1920 were familiar.¹⁴

This perceived antithetical nature of dissenting opinions and dissenting statements was not restricted to pre-PCIJ times but persisted in the thinking of some eminent jurists and was carried over into the practice of the PCIJ, a fact which appears from the Court's deliberations in 1926 on the revision of its Rules. The first Rules of Court, which had been adopted March 24, 1922, had provided that "the opinions of judges who dissent[ed] from the judgment, [would] be attached thereto" if they expressed a desire to that effect.¹⁵ In the early years of the Court, however, this rule had led to the less than candid practice of writing secret dissenting opinions—dissenting opinions which formed part of the minutes of the Court's internal deliberations, and which were consequently kept secret and not published along with the Court's decisions.¹⁶ Judges Moore, Anzilotti and Lord Finlay had been strongly opposed to this practice and had proposed that the Court's Rules be amended so that the only form of expression available to individual judges would be a reasoned and public opinion.¹⁷ The Court refused to go as far as these judges had hoped, but instead adopted the lesser position of publishing the votes by which each of its judgments and opinions were adopted.¹⁸

¹¹ THE REPORTS TO THE HAGUE CONFERENCES OF 1899 AND 1907, (J. Scott ed. 1917). This right was withdrawn in 1907 when the Second Hague Conference revised the arbitration provisions of the 1899 Convention; 1 THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES 436 (trans. J. Scott 1920).

¹² Proceedings, The Conference of 1899, at 149, n. 11.

¹³ *Ibid.*, 149, 616.

¹⁴ Four cases were arbitrated under the 1899 rules: the *Pious Fund* case, the *Venezuelan Preferential* case, the *Muscat Dhows* case and the *Japanese House Tax* case. Only the last mentioned of these produced a dissenting statement; the rest, presumably, were unanimous decisions. THE HAGUE COURT REPORTS, (J. Scott ed. 1916); the unreasoned dissenting statement of the Japanese arbitrator, I. Motono, is on pp. 84-85. For the practice of earlier tribunals see MANLEY O. HUDSON, INTERNATIONAL TRIBUNALS: PAST AND FUTURE (1944).

¹⁵ Art. 62, ACTS AND DOCUMENTS, n. 7, at 79.

¹⁶ ACTS AND DOCUMENTS CONCERNING THE ORGANIZATION OF THE COURT, PCIJ, ser. D, Addendum to No. 2, at 5, 272 (1926). See also, THIRD ANNUAL REPORT OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1926-1927, PCIJ, ser. E, No. 3, 217; and, S. Rosenne, *The Composition of the Court*, in THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE, 377 at 425. (Leo Gross ed. 1976).

¹⁷ ACTS AND DOCUMENTS, n. 16, at 272.

¹⁸ *Ibid.*, 202-21. See also the explanation given by the Registrar of the Court in ACTS AND DOCUMENTS CONCERNING THE ORGANIZATION OF THE COURT, PCIJ, ser. D, Third Addendum to No. 2, at 325 (1936).

At the same time it adopted, at the suggestion of the Registrar, a provision by which judges would be allowed to write bare statements of dissent.¹⁹ As Registrar Hammarskjöld explained, this amendment formalized the practice initiated by the Court in the *Eastern Carelia* case when it allowed Judges Weiss, Nyholm, de Bustamante and Altamira to express their dissent without giving their reasons.²⁰ The Court had expressly based its decision there on the Rules of Court and not upon the Statute.²¹

Subsequently, the Court took an internal decision on July 24, 1923, in which it "agreed that it was for each dissenting judge to decide what attitude to adopt, . . . it being understood, having regard to the precedent established in the case of the Advisory Opinion regarding the question of Eastern Carelia, that he might confine himself to an expression of his dissent."²²

Reflecting on these amendments to the Rules, the *Third Report of the Permanent Court* declared that among the new principles which had been introduced in 1926 was that of allowing mere statements of dissent.²³

The amendment of the Rules of Court did not, however, put an end to the debate on this question in the Permanent Court. Sir Cecil Hurst proposed in 1930 that only "the *opinions* of judges who dissent shall be attached to the judgment," adding that in his view Article 57 of the Statute demanded that dissenting judges express themselves in reasoned statements.²⁴ Similarly, Judge Anzilotti is on record for having reiterated that he was opposed to bare statements of dissent, a mode of expression for which, in his view, "no provision was made in the Statute."²⁵

In addition to the above, it seems clear in retrospect, that Statute Article 57 had been introduced to provide solely for dissenting judges—judges who disagreed with the conclusions of the Court and not merely with its reasoning.²⁶ Thus, on December 1, 1927, the Court stated that the object of dissenting opinions "was to show the *reasons* for which a judge *could not agree* with the majority. . . ." ²⁷ This statement was later strengthened by

¹⁹ ACTS AND DOCUMENTS, n. 16, at 172, 313; ACTS AND DOCUMENTS CONCERNING THE ORGANIZATION OF THE COURT, PCIJ ser. D, No. 1, at 59 (1926).

²⁰ ACTS AND DOCUMENTS, n. 16, at 172; ANNUAL REPORT OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1922-1925, PCIJ ser. E, No. 1, at 203.

²¹ ANNUAL REPORT, n. 20, at 256. Similarly, in the *Mavrommatis* case Judge Altamira had been allowed by special decision of the Court to mention his dissent; *ibid.*, 257.

²² *Ibid.*, 257.

²³ THIRD REPORT, n. 16, at 36-37.

²⁴ ACTS AND DOCUMENTS CONCERNING THE ORGANIZATION OF THE COURT, PCIJ, ser. D, (Second Addendum to No. 2) 294 (1931). Translation mine; emphasis added. The Court did not discuss Sir Cecil's proposal during the discussions over its 1931 modification of the Rules of Court; *ibid.*, 178-79, 315.

²⁵ ACTS AND DOCUMENTS, n. 18, at 325.

²⁶ On this, see declaration of Judge Sir Percy Spender in the *South West Africa Cases (Second Phase)*, ICJ REPORTS 1966, at 51 ff.; and R. P. Anand, *The Role of Individual and Dissenting Opinions in International Adjudication*, 15 INTL AND COMP. L. Q., 788 ff. (1965), especially 795.

²⁷ FOURTH ANNUAL REPORT OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1927-1928, PCIJ ser. E, No. 4, at 291. (Emphasis added.)

an internal resolution of the Court, adopted on February 17, 1928, according to which "dissenting opinions [were] designed solely to set forth the reasons for which judges *do not feel able to accept the opinion of the Court*. . . ." ²⁸ This preoccupation with dissenting judges can also be traced back to the Hague Peace Conferences. ²⁹

Furthermore, the Court felt obliged to undertake special decisions which allowed the separate concurring opinion. In the advisory opinion on the question of the *Acquisition of Polish Nationality*, the PCIJ decided that "Lord Finlay, while concurring in the opinion of the Court, was permitted to add observations in regard to the reasoning adopted by the Court." ³⁰ A similar decision was taken by the Court in the *Case Concerning Certain German Interests in Polish Upper Silesia* when Lord Finlay, who again "agreed with the conclusions of the judgment, but not with all the reasons given for one of these conclusions, was permitted to explain his views by means of observations which were attached to the printed text of the judgment. . . ." ³¹

It thus seems very likely on the basis of the above evidence that the Statute of the PCIJ initially provided only for reasoned dissenting opinions and that the Court interpreted the Statute in this manner, thus feeling constrained to take internal decisions "permitting" declarations—simple statements—of dissent, and separate concurring opinions. The historical evidence establishes clearly that declarations were instituted through *ad hoc* internal decisions of the Permanent Court and later through its Rules. ³² It was only when the Rules of Court were revised in 1926 that they expressly allowed judges, for the first time, the choice between "an exposition of their individual opinion [and a simple] statement of their dissent." ³³

The above view receives additional support from the practice of the

²⁸ *Ibid.* Emphasis added.

²⁹ F. Jhabvala, *The Development and Scope of Individual Opinions in the International Court of Justice*, (1977) (unpublished dissertation, Fletcher School of Law and Diplomacy). The Permanent Court's "Resolution Regarding the Court's Judicial Practice" made no mention of declarations; TWELFTH REPORT OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, PCIJ ser. E, No. 12, at 196-97; neither does the "Resolution Concerning the Internal Judicial Practice" of the International Court, 70 AJIL 905-08 (1976).

³⁰ ANNUAL REPORT, n. 20, at 257.

³¹ SECOND REPORT OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1925-1926, PCIJ ser. E, No. 2, 173-74.

³² In 1926, Judge Huber had remarked that while he had started from the above position, he had come to conclude that the greater right (reasoned dissenting opinions) might include the lesser (simple statements of dissent); ACTS AND DOCUMENTS, n. 16, at 215.

³³ Art. 62, ACTS AND DOCUMENTS, n. 19, at 59; see also *supra*, n. 19 and associated text. The ICJ Rules of Court provide a similar choice; *infra*, at 13-14. Some evidence that declarations were considered as being distinct from individual opinions is also available in the ICJ YEARBOOKS. An early volume reported that "[i]n the Corfu Channel case (Merits), a Judge attached to the Judgment a reasoned declaration of his dissent, instead of filing a complete dissenting opinion." ICJ YEARBOOK 1948-1949, at 80. The same YEARBOOK reported that in the *Reparation* case "a Judge attached a simple declaration of dissent from the Court's opinion and did not file a dissenting opinion." *Ibid.*

judges. The judgment on the *Territorial Jurisdiction of the International Commission of the River Oder*, for instance, had the following declaration attached to it:

MM. De Bustamante and Pessôa, judges, and Count Rostworowski, judge *ad hoc*, declaring that they were unable to concur in the judgment delivered by the Court, and availing themselves of the right conferred on them by *Article 62 of the Rules of Court*, attached to the judgment this statement of their dissent.³⁴

The above approach was also used in the Court's second advisory opinion, which dealt with the *ILO and the Conditions of Agricultural Labour*. There, Judge Weiss and Deputy-Judge Negulesco, "availing themselves of the right accorded them *under Article 71 of the Rules of Court*, declare[d] that they [were] unable to concur in the opinion given by the Court."³⁵

III. THE CONSTITUTIONAL BASIS FOR DECLARATIONS: THE ICJ

The preceding section has made the point that declarations had no specific basis in the PCIJ Statute and were developed through the practice of judges, internal decisions of the Court and provisions in the Rules of Court. It is, in consequence, a matter of no little surprise to find judges of the International Court basing their right to make declarations upon the Statute of the ICJ. In the *Right of Passage (Merits)* case, we find Judge Basdevant basing his declaration on Article 57 of the Statute.³⁶ Similarly, Judge Lachs based his declaration in the *ICAO* case on "the right conferred [on him] by Article 57 of the Statute. . . ."³⁷

This point of view has even been expressed in a recent internal document of the Court, which states, *inter alia*, that "[t]he right of a judge to express his own views separately from the judgment or opinion of the Court is derived from Article 57 of the Statute . . ." and that declarations, being "merely a particular form of separate opinion, . . . ought to be treated in the same way."³⁸

In principle, it is undeniably correct that the right of individual judges to write declarations must be traced to Statute Article 57 because neither the Rules nor the practice of the Court may properly exceed the bounds set by the Statute. The Statute is primarily the constituent instrument of the

³⁴ PCIJ ser. A, No. 23, at 32. Emphasis added.

³⁵ PCIJ ser. B, Nos. 2 and 3, at 43. Emphasis added. Similar references will be noted by the declaration by Judge Loder in the *Danzig and the ILO* opinion, PCIJ ser. B, No. 18, at 17; and the joint declaration by Judges Adatci, Rostworowski, Altamira, Schücking, van Eysinga and Rapazoff in the *Greco-Bulgarian Agreement of December 9th 1927*, PCIJ ser. A/B, No. 45, at 88.

³⁶ ICJ REPORTS 1960, at 48-49. For the text of ICJ Article 57, see *infra*, at 12.

³⁷ ICJ REPORTS 1972, at 72. In the advisory opinion on the *Review of Judgment No. 158*, Judges Forster and Nagendra Singh, perhaps more aware of the constitutional situation, based their declaration upon "Article 57 of the Statute read with Article 84 of the Rules of Court . . .," ICJ REPORTS 1973, at 214.

³⁸ "Recommendation of the Committee for the Revision of the Rules concerning Declarations adopted by the Court on 12 April 1976," ICJ Doc. RR 76/12 of Apr. 15, 1976, para. 3.

Court, but it also forms a part of the UN Charter, a treaty between states, and it is very doubtful that it can be modified through the practice of the judges,³⁹ or through changes in the Rules of Court. Consequently, our first task here must be to examine the ICJ Statute provisions in its Article 57 to see whether it differs from that of the PCIJ in terms of providing for declarations.

The first point to be made is one of a general import. The Permanent Court had been one of the few successful experiments of the League era, as a result of which there had been a "widespread agreement that the new [ICJ] Statute should depart very little from the old [PCIJ Statute]."⁴⁰ And, while important changes were introduced in 1945, continuity between the two Courts was preserved.⁴¹ We shall call this consideration our "informing principle," one upon which we will rely in case the other traditional tools of interpretation leave any ambiguity.

A glance at Article 57 of the ICJ Statute shows that it differs from that of the PCIJ. According to the "new" Statute,

If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.⁴²

The above text replaced the words "dissenting judges are" of the PCIJ text with "any judge shall be," thus clearly establishing the right of judges who concur in the Court's decision to write individual opinions. This change had been proposed by the Washington Committee of Jurists, the body which did most of the spadework on the revision of the Statute before the convening of the San Francisco Conference of April 1945.⁴³ There were no other changes in Article 57. Thus, while the new Statute deliberately incorporated the PCIJ practice of allowing separate concurring opinions it did not do the same for declarations.⁴⁴ It could perhaps be argued that there was no im-

³⁹ In this connection, the remarks of Judge Spender in the *Expenses* advisory opinion are pertinent; ICJ REPORTS 1962, at 184-97.

⁴⁰ R. B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER 864 (1958). The report to the President by the U.S. delegation to the San Francisco Conference stated that there had been "unanimous agreement" that the PCIJ had rendered effective service and had set up an excellent record; HEARINGS ON THE CHARTER OF THE UNITED NATIONS (before the Committee on Foreign Relations) 80th Cong., 1st Sess. 123 (1945). See also, *Report of the Rapporteur on the Draft of the Statute of the International Court of Justice*, Doc. Jur. 61, G/49 of Apr. 20, 1945, in 14 UNCIO 649.

⁴¹ The outstanding work in this regard remains SHABTAI ROSENNE'S *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE* (1965), in 2 volumes. In this connection, see also G. I. TUNKIN, *THEORY OF INTERNATIONAL LAW* 190 ff. (trans. W. E. Butler 1974).

⁴² Art. 57, ICJ ACTS AND DOCUMENTS CONCERNING THE ORGANIZATION OF THE COURT, No. 1 (May 1947). The PCIJ text is given above.

⁴³ The Drafting Committee expressly stated that this change was recommended to make the new provision "conform to the Court's practice of rendering concurring as well as dissenting opinions." Doc. Jur. 58, G/46 of Apr. 16, 1945, in 14 UNCIO 211.

⁴⁴ This partial blindness also affected an earlier panel of jurists which had been convened by the British Government in 1943—the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice. This Committee was much

mediate need to provide for declarations in the ICJ Statute; that the incorporation of PCIJ Statute Article 57 into the new Statute without substantial alteration implied tacit approval for the practices connected with it which were, *mutatis mutandis*, incorporated into the interstices of the ICJ Statute. On the other hand (and this is an approach favored in this study), it could be argued that the fact that the practice of writing declarations was not expressly incorporated into Article 57 in 1945 even as other practices were, clearly indicates that declarations were not to be given express recognition in the new Statute.⁴⁵ Such an interpretation need not necessarily mean a rejection of the practice, but it could mean a decision to leave it at the level at which it existed in the PCIJ days—a practice based on internal decisions of the Court which could easily be changed without going through the difficult process of amending the Statute.⁴⁶

The “gap” in the Statute regarding declarations—if it may be so characterized—was bridged by the Rules of Court adopted on May 6, 1946, according to Article 74(2) of which,

Any judge may, if he so desires, attach his individual opinion to the judgment, whether he dissents from the majority or not, or a bare statement of his *dissent*.⁴⁷

The Rules of the International Court, patterned on those of the PCIJ, thus provided for separate and dissenting opinions and also for declarations by judges who dissented. It is worth noting here, first, that the *express* basis for declarations continued, as it had been since 1926, to be the Rules of Court and not the Statute of the ICJ. Second, even as recently as May 1946, the declaration was considered as a form of expression for judges who *dissented*. Subsequent practice of judges, as we shall see below, went far beyond this conception of declarations.

heartened by the experience with the dissenting opinions, Report of the Committee, BRITISH PAPERS BY COMMAND, No. 6531 (1944), paras. 81–82 and 150 at 23–24 and 37. However, it said nothing about declarations, and this omission may well have influenced the Washington Committee of Jurists.

⁴⁵ A comparable question arose in connection with the mandatory aspects of Articles 24 and 25 of the UN Charter, when the Security Council practice regarding abstentions combined with the increased membership of that body after the 1965 amendments created the possibility of Council resolutions and decisions being adopted without the affirmative vote of any permanent member. There has not been, to the knowledge of this writer, a satisfactory solution of this question. On this point, see Leo Gross, *Voting in the Security Council: Effect on Article 25 of Abstention under Amendments to U.N. Charter*, 62 AJIL 315–34 (1968).

⁴⁶ The very ease with which the Court adopted the “Recommendation for the Revision of the Rules concerning Declarations,” n. 38, is testimony to the soundness of the above approach. Correspondingly, it also weakens the argument that declarations have their constitutional roots in the Statute. Our “informing principle” of continuity, mentioned above, supplies the element of continuity here.

⁴⁷ ICJ YEARBOOK, 1950–1951, at 259. Emphasis added. The partial amendments to the Rules carried out in 1972 did not affect this article except that its number was changed to 79(2). An identical provision applied to advisory opinions; Art. 84(2) of the 1946 Rules or Art. 90(2) of the 1972 version. See also, *supra*, n. 29; *infra*, n. 50 and associated text.

The latest Rules of Court provide more explicitly for declarations than any other previous set of Court Rules. In paragraph 2 of Article 95, the Rules of April 14, 1978, state that

Any judge may, if he so desires, attach his individual opinion to the judgment, whether he dissents from the majority or not; a judge who wishes to record his *concurrence or dissent without stating his reasons* may do so in the form of a declaration. The same shall also apply to orders made by the Court.⁴⁸

It is clear that the above text differs from that adopted in 1946 in two significant ways: first, declarations are now expressly required to refrain from stating any reasons; second, declarations have been included within the repertoire of concurring judges. Both of these departures from the earlier Rules have been instituted, as we shall describe below, to take into account the evolving practice of the judges of the International Court.

Finally, the "Resolution Concerning the Internal Judicial Practice of the Court," makes no express reference to declarations by name.⁴⁹ The "Recommendation of the Committee for the Revision of the Rules concerning Declarations," adopted by the Court on April 12, 1976, explains that it was not thought necessary to make express mention of declarations in the Resolution on internal practice because it was believed that declarations were "subject to the provisions of Article 7, paragraphs (ii) and (iv), . . . which relate to the circulation and amendment of the texts of separate or dissenting opinions."⁵⁰

IV. THE DECLARATION IN THE PRACTICE OF THE PCIJ

As we have noted above, declarations in the Permanent Court were initiated as, and at first restricted to, being nonreasoned statements of dissent. In the *Mavrommatis Jerusalem Concessions* case, for instance, the Court reported that "M. Altamira declare[d] that he [was] unable to concur in the judgment delivered by the Court, as regards paragraphs 3 and 4 of the operative part."⁵¹ The statement said nothing more and it is only by referring to the operative paragraphs of the judgment that we learn of Judge Altamira's dissent, first, from the conclusion denying that the temporary invalidity imposed by the mandatory in Palestine on the Mavrommatis concessions caused Mavrommatis any loss, and, second, from that dismissing the Greek government's claim for indemnity.

Similarly, in the case of the *Factory at Chorzów (Merits)* two of the four judges who appended statements to the judgment wrote declarations of dissent: Judges de Bustamante and Altamira both "declared" that they dissented from one point of the *dispositif*.⁵² On the other hand, the other two

⁴⁸ Rules of Court, n. 4. Emphasis added.

⁴⁹ *Supra*, n. 29.

⁵⁰ *Supra*, n. 38, para. 6.

⁵¹ PCIJ ser. A, No. 5, at 51. Emphasis added.

⁵² PCIJ ser. A, No. 17, at 65.

judges, Rabel and Nyholm, desired "to add remarks which follow . . .," and wrote what we might now call individual opinions.⁵³

In the advisory opinion on *Eastern Carelia*, "M. M. Weiss, Vice-President, Nyholm, de Bustamante and Altamira, judges, *declare[d]* that they [were] unable to share the views of the majority of the Court as to the impossibility of giving an advisory opinion on the . . . question."⁵⁴ Nothing more follows.

Such declarations of dissent, originally confined to dissents from the *dispositif*, were gradually expanded in practice to cover dissents from the reasoning of the Court too. Thus, in the advisory opinion on the *Treatment of Polish Nationals in Danzig*, we find the statement that "Baron Rolin-Jaequemyns, Judge, whilst in agreement with the replies given by the Court to the questions submitted to it by the Council, *declare[d]* that he [was] unable entirely to accept some of the arguments on which these replies [were] based; in this connection he refer[red] to the reservations set out in the note of Sir Cecil Hurst . . . in which he concur[red]."⁵⁵ This form of the declaration was later to become quite common in the Reports of the International Court of Justice.⁵⁶

An important expansion in scope occurred when judges began briefly to indicate their reasoning as, for instance, in the declaration of Judge Urrutia attached to the Judgment on the *Interpretation of the Statute of Memel Territory*. Judge Urrutia "declare[d] that he [could not] concur" in two clauses of the *dispositif* or in the grounds on which they were based and then went on to give a one-paragraph outline of the reasoning which he thought was decisive.⁵⁷ In the same case Judge *ad hoc* Römer's also wrote a similar declaration explaining briefly the reasons for his partial dissent with the Court's judgment.⁵⁸ Another partially reasoned declaration was that of Judge Rostworowski in the advisory opinion on the *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*.⁵⁹ Judge Rostworowski dissented from the Court's opinion because, in his view, the decrees in question were not "*in substance*, inconsistent with the Constitution of the Free City," but that having been issued by the Senate alone, were *in form* contrary to the Constitution, which required that all legislation receive the concurrent assent of the *Volkstag* and the Senate.⁶⁰

The declarations we have just considered included some reasoning of the judges' positions, albeit in a fragmentary form. Yet, such declarations included more than simple statements of dissent and were a broadening of the scope of declarations, a broadening which tended to reduce the distinc-

⁵³ *Ibid.*

⁵⁴ PCIJ ser. B, No. 5, at 29. Emphasis added.

⁵⁵ PCIJ ser. A/B, No. 44, at 44. Emphasis added. The same kind of declaration was made by Judge Schücking in the case concerning the *Rights of Minorities in Upper Silesia*, PCIJ ser. A, No. 15, at 74.

⁵⁶ See, among others, declaration of Judge Winiarski in the *Reparation* case, ICJ REPORTS 1949, 174 at 188; and declarations of Judges Guerrero, Zoričić and Badawi in the opinion upon the *International Status of South West Africa*, ICJ REPORTS 1950, at 144-45.

⁵⁷ PCIJ ser. A/B, No. 49, at 338-39.

⁵⁸ *Ibid.*, at 339.

⁵⁹ PCIJ ser. A/B, No. 65, at 59.

⁶⁰ *Ibid.*

tion between declarations and opinions, the latter having been the traditional avenue for reasoned statements by individual judges. This effect can readily be seen by comparing Rostworowski's declaration mentioned above with the "Separate Opinion" of Judge *ad hoc* de Tomcsanyi in the *Pajzs, Csáky, Esterházy* case.⁶¹ The lengths of the two individual statements are virtually identical and the reasoning of each is equally sketchy. Yet one was called a declaration, while the other was called a separate opinion. The distinction between opinions and declarations was totally obliterated here and it appears that the labels attached by each judge to his statement were all that placed the two individual statements in separate categories—one a declaration and the other an individual opinion.

The expansion of the scope of declarations was taken a step further yet when the declaration began to be used by *concurring* judges who wished to add something to the opinion of the Court. In the matter of the proposed *Customs Union* between Germany and Austria, we find the following statement attached to the Court's advisory opinion:

M. Guerrero, Count Rostworowski, MM. Fromageot, Altamira, Urrutia and Negulesco, whilst concurring in the . . . Opinion, declare that, in their opinion, the regime of customs union projected by the Austro-German Protocol of March 19th, 1931; since it would be calculated to threaten the independence of Austria in the economic sphere, would constitute an act capable of endangering the independence of that country and would, accordingly, be not only incompatible with Protocol No. I of Geneva of October 4th, 1922, but also and in itself incompatible with Article 88 of the Treaty of Saint-Germain of September 10th, 1919.⁶²

The Court, it will be recalled, had based its opinion on the incompatibility of the projected customs union with the Protocol of March 19, 1931—the narrower ground—and had refrained from pronouncing upon the compatibility of the proposed merger with the Treaty of Saint-Germain—the broader ground. The six declaring judges, who concurred in the conclusions and the reasoning of the Court, nevertheless sought to place the opinion on broader footing by making it known that, in their opinion, the proposed union also violated the Treaty of Saint-Germain.

The above description of the development of the scope of declarations must be completed by reference to an unusual practice of the Permanent Court. The practice in question concerned declarations by judges who had participated in the major portion of the proceedings and deliberations but had not voted in the final decision. Thus, in the *Case of Readaptation of the Mavrommatis Jerusalem Concessions*, the judgment carried the attached statement that Judge Pessôa, who had to leave The Hague before the Court had voted on the final draft of the Judgment, "declared he was unable to agree to the conclusions of the judgment, the Court having, in his opinion, jurisdiction."⁶³ It is not known whether Judge Pessôa had seen a draft of the judgment before his departure from The Hague; but it certainly was

⁶¹ PCIJ ser. A/B, No. 68, at 90.

⁶² PCIJ ser. A/B, No. 41, at 53.

⁶³ PCIJ ser. A, No. 11, at 24.

unusual for the judgment in any case to carry a declaration by a judge who had not participated in the final vote. In fact, Judge Pessôa's name did not even appear in the list of judges who constituted the Court—undoubtedly because he was not present at the final vote!⁶⁴ Eleven judges other than Pessôa are named there and the decision was taken by a vote of 7 to 4.

An identical situation occurred in the advisory opinion on the *Acquisition of Polish Nationality*, when Judge Moore, whose name did not appear in the list of judges constituting the Court, attached the statement that he had to leave The Hague before the final terms of the advisory opinion had been set but that he "declared that he concurred in the conclusions of [the] Opinion."⁶⁵

Another situation of this kind occurred in the Court's decision on the *Interpretation of Judgments Nos. 7 and 8 (Chorzów Factory)*, where we find the following declaration:

Mr. Moore, Judge, took part in the discussion *and voted for* the adoption of the present Judgment, but had to leave The Hague before judgment was delivered.⁶⁶

Despite the express statement that Judge Moore voted for the decision and that he was absent only at the time the judgment was delivered, his name is not even listed among the judges constituting the Court. There are eleven judges listed there and the decision was taken by a vote of 8:3.⁶⁷ Either Judge Moore's vote was not counted—but one is at a loss to explain this—or his vote was counted and another judge who was among the eleven listed in the judgment abstained from voting—which is even harder to explain in view of the implicit injunction against abstentions by judges!

We thus see that declarations which had been initiated by the Permanent Court to express nonreasoned statements of dissent from the findings of the Court, were gradually expanded in scope to express dissents from the Court's reasoning, brief remarks on reasoning by concurring judges, additional remarks by judges who did not dissent in any way with the Court's decision and, finally, even statements of acquiescence or dissent by judges who apparently had not participated in the final decisions of the Court.

V. THE DECLARATION IN THE PRACTICE OF THE ICJ

The practice of the judges on the Permanent Court apparently was assumed as valid precedent by the ICJ judges, who not only adopted that practice but further expanded the scope of declarations by breaking out in new directions. The declarations in the PCIJ had all been directed to the Court's judgments and opinions; in contrast, some declarations in the new Court have, as will be seen presently, attacked the opinions of other judges

⁶⁴ *Ibid.*, at 4.

⁶⁵ PCIJ ser. B, No. 7, at 6 and 21. A similar declaration by Judge Kellogg appeared in the *Peter Pázmány University* case; PCIJ ser. A/B, No. 61, at 250.

⁶⁶ PCIJ ser. A, No. 13, at 22. Emphasis added.

⁶⁷ *Ibid.*, at 21.

or dealt with procedural questions not directly related to the Court's decisions.⁶⁸

The adoption of the practice of the PCIJ by ICJ judges was apparent in the very first case which came before the new Court, the *Corfu Channel* case. There, Judge Zoričić, following the most advanced development in the Permanent Court, "attached to the judgment a reasoned declaration of his dissent, instead of filing a complete dissenting opinion."⁶⁹ Judge Zoričić's declaration was barely a page long and the reasoning it contained was quite sketchy. But that was only the beginning; for, the ICJ judges soon began supporting their declarations with increasingly detailed reasoning so that these began to be scarcely distinguishable from individual opinions.⁷⁰

The declarations by Judges Lachs⁷¹ and Sir Muhammad Zafrulla Khan⁷² in the ICAO case are instances of such declarations which go far beyond the simple nonreasoned declaration. Lachs dealt in his declaration with the interpretation of the jurisdictional clauses of the agreements covering air services between India and Pakistan to support his position that "appealable" decisions of the ICAO under these agreements were not solely those dealing with substantial issues but that some procedural decisions could also be brought before the ICJ on appeal.⁷³

Zafrulla Khan's declaration was similar to that of Lachs' but took the opposite position, arguing that preliminary decisions of the ICAO Council could not be reviewed by the ICJ, functioning as a court of appeal. Both Lachs and Zafrulla Khan also reviewed briefly the procedural rules of the ICAO Council.

There have been several other instances of reasoned declarations in the

⁶⁸ The individual opinion was introduced into international adjudication procedure to enable judges who dissented from the majority position to make known their disagreement and the reasons therefor. See, Spender, n. 26, at 49-57. This point is substantiated through historical evidence in Jhabvala, n. 29, Part I. In recent years, however, this position has been disputed; see, for instance, opinions of Judge Tanaka in the *South West Africa Cases (Second Phase)*, 6 ICJ REPORTS 1966, at 262 ff.; and in *Barcelona Traction (Second Phase)*, ICJ REPORTS 1970, at 114-15.

⁶⁹ ICJ YEARBOOK, 1948-1949, at 80. See also, ICJ REPORTS 1949, at 37-38. The *Yearbook* apparently sought to draw a distinction between declarations and dissenting opinions, as may be deduced from the above quotation. This effort, however, was abandoned with the *Yearbook* for 1966-1967 and no sign whatsoever of this earlier effort appears in recent *Yearbooks*.

⁷⁰ Whereas in the PCIJ the individual opinions at times were so briefly reasoned as to approach partially reasoned declarations (*supra*, at 16), in the ICJ the movement has been in the opposite direction, with the reasoning behind a declaration being expanded so as to approach the length and comprehensiveness of individual opinions. This development was noted by the Court's Committee for the Revision of the Rules concerning Declarations, which reported that "many 'declarations' were in fact indistinguishable from separate or dissenting opinions. . . ." "Recommendation for the Revision of Rules concerning Declarations," n. 38, para. 5.

⁷¹ ICJ REPORTS 1972, at 72-75.

⁷² *Ibid.*, at 71-72.

⁷³ Judge Lachs's argument was directed to Pakistan's objection that the preliminary decision of the ICAO Council to accept Pakistan's Application and Complaint was not one which could be brought before the ICJ on appeal.

practice of the International Court. In the *Fisheries Jurisdiction (Merits)* case, Judge Ignacio-Pinto's declaration argued that "the Court [had] deliberately evaded the question which was placed squarely before it . . . namely, whether Iceland's claims are in accordance with the rules of international law."⁷⁴ That declaration also criticized the Court's decision because questions of preferential and historic rights which had been "dealt with at length in the Judgment, [were] not subject to any dispute between the Parties."⁷⁵

Similarly, the joint declaration of Judges Petrán and Onyeama in *Barcelona Traction (Second Phase)* pointed out that, since both Parties had recognized Canada's right of protection, the only question the Court had to answer within the framework of the objection on *jus standi* was whether, alongside the right of protection pertaining to the national State of a company, another State could have the right of protection of shareholders who happened to be its nationals.⁷⁶ In such a case, the two judges asserted, the Court had no business to consider whether the "genuine connection" principle was applicable to diplomatic protection of juristic persons.⁷⁷

The tendency of judges to reason out their declarations had apparently become irresistible in recent years and we have some instances where declarations have been as long, and as comprehensive and specific in their reasoning, as many individual opinions. A good example of such a declaration is the one written by Judge Gros in the *Western Sahara* case, in which he dealt with issues relating to the Court's composition, the nonexistence of a legal "dispute" over the territory in question and the reasons for his votes. His declaration also took issue with the Court's views on the relationship between the Emperor of Morocco and certain nomadic tribes, rejecting the "idyllic vision" of Saharan conditions projected by the Court.⁷⁸ In the same case Judge Nagendra Singh also wrote a declaration "to throw more light on the nature and character of the legal ties" between the territory of Spanish Sahara and Morocco/Mauritania.⁷⁹

In addition, judges on the ICJ have also used declarations for other purposes: for instance, to qualify their support for the Court's decision in a given case or to exclude certain implications from such support. The occasion for such declarations was provided by the question of the preservation under the ICJ Statute of jurisdiction clauses which had conferred competence on the Permanent Court, a question which was central to the *Aerial Incident* (Israel v. Bulgaria), the *Temple (Preliminary Objections)* and the *Barcelona Traction (Preliminary Objections)* cases. In the *Aerial Incident*

⁷⁴ ICJ REPORTS 1974, at 36.

⁷⁵ *Ibid.*

⁷⁶ ICJ REPORTS 1970, at 52.

⁷⁷ *Ibid.*

⁷⁸ ICJ REPORTS 1975, at 69-77.

⁷⁹ *Ibid.*, at 78-82. The tendency to reason out declarations is obviously reflected in the increasing lengths of declarations: in the PCIJ most declarations were barely longer than a sentence or two, a few being as long as a paragraph and none exceeding a page of the Reports in length; while this situation obtained at the start of the ICJ, recent declarations have run from four to nine pages. The declaration by Judge Gros mentioned above was nine pages long.

case, the Court had concluded that the Bulgarian declaration of July 29, 1921, accepting the compulsory jurisdiction of the PCIJ under its Statute Article 36 *had not survived the dissolution of the PCIJ* and had not been effectively transferred to the ICJ under the new Statute's Article 36(5) since this article exclusively provided for the "immediate preservation" of declarations by states which were represented at the San Francisco conference and which were the original signatories to the UN Charter. In the Court's judgment, Article 36(5) did not preserve the declarations of States such as Bulgaria which joined the UN later and the conferrals of jurisdiction by such States thus lapsed with the PCIJ. Consequently, the Court found that it did not have jurisdiction in the case.⁸⁰

In the *Temple* (Cambodia v. Thailand) case, Thailand argued, in part and by analogy with the *Aerial Incident* judgment, that the renewal in 1950 of its declaration of 1929 was ineffective *ab initio* because Thailand was not an original member of the UN.⁸¹ The Court refused to accept this line of reasoning and despite the express language of the Thai declaration of 1950 concerning renewal, it decided that this declaration was a new and independent instrument expressing the consent of Thailand to the jurisdiction of the Court.⁸² Being acutely aware of the apparent contradiction between this judgment and that in the *Aerial Incident* case, the Court went to some lengths to substantiate its position that Thailand's situation was different from that of Bulgaria and that the *Temple* judgment did not reverse the Court's judgment in the *Aerial Incident* case.⁸³ The reliance that the Court had placed on the "intention" of Thailand regardless of the express text of the 1950 declaration exposed the dilemma it faced: on the one hand it could not bring itself to repudiate the *Aerial Incident* judgment by stating that Article 36(5) preserved all declarations made to the PCIJ, and on the other it did not want further application of the principle of nonpreservation on which it had based that judgment.

This situation obviously posed a problem for those judges who had consistently argued in favor of the preservation of all declarations made to the PCIJ regardless of original membership in the UN. They found themselves to have been in opposition to the *Aerial Incident* judgment but in concurrence with the *Temple* decision, a situation where the doctrinal inconsistencies of the two judgments were compounded by the Court's assertion of consistency between these judgments. For them, an unqualified concurrence in the *Temple* judgment would necessarily have meant a rejection of their dissenting positions in the *Aerial Incident* case. The declaration thus became an important vehicle for these judges, and it was used to explain that their concurrence in the *Temple* judgment was not to be construed as belated acquiescence in the majority principles and judgment in the *Aerial Incident* case.⁸⁴

The reverberations of the *Aerial Incident* judgment were also felt in the

⁸⁰ ICJ REPORTS 1959, at 136-38 and 144.

⁸¹ ICJ REPORTS 1961, at 20-22.

⁸² *Ibid.*, at 29-30 and 33-34.

⁸³ *Ibid.*, at 25-29.

⁸⁴ See, declaration of Judge Wellington Koo, ICJ REPORTS 1961, at 36; joint declaration of Judges Fitzmaurice and Tanaka, *ibid.*, at 36-38. Judges Spender and Morelli

Barcelona Traction (Preliminary Objections) case, where Spain's second objection contended that the jurisdictional clause of the 1927 treaty conferring competence on the PCIJ had, in accordance with the *Aerial Incident* judgment, lapsed with the dissolution of the Permanent Court.⁸⁵ Despite the fact that the preservation of such jurisdictional clauses was provided for by Statute Article 37 and not Article 36(5), the objection rekindled the old controversy on whether jurisdictional conferrals on the PCIJ survived the dissolution of that Court and became transformed into conferrals on the ICJ regardless of original membership in the UN. The Court decided by a split vote of 10 to 6 to reject Spain's second objection on the ground that the "governing concept" of Article 37 was to preserve as many jurisdictional clauses as possible from becoming inoperative by reason of the dissolution of the PCIJ.⁸⁶ Spain's argument had been based on the *Aerial Incident* judgment, and the Court was again faced with the dilemma it had unsatisfactorily dealt with in the *Temple* case. Again refusing to reverse expressly its judgment in the *Aerial Incident* case, the Court sought to distinguish between the preservative purposes and effects of Articles 36(5) and 37. This position consequently drew forth a declaration by Judge Spender, who found it "difficult to discern any decisive distinction in principle between Article 36(5) and Article 37 in relation to the cardinal questions raised by the second Preliminary Objection," and who reiterated his continued adherence to the joint dissenting opinion in the *Aerial Incident* case.⁸⁷

Going beyond such uses of the declarations, all of which have focused on the Court's judgments and opinions, seeking to buttress or qualify these or expose their flaws, ICJ judges have also used the declaration to express their opinions on matters of procedure and propriety which have no relation to the *dispositif*, the *ratio decidendi* or the *obiter dicta* of the Court's pronouncements. This use of the declaration is peculiar to the International Court, such practice having been unknown on the PCIJ.⁸⁸ Among the first declarations of this kind was that written by Judge Jessup in the *Barcelona Traction (Preliminary Objections)* case. That judgment had disposed of two of the four objections to the Court's jurisdiction raised by Spain and had postponed decision on the other two objections—those dealing with the *jus standi* of Belgium and the nonexhaustion of local remedies—to the second phase of the case since these were "too intimately related and too closely interconnected" with questions of the merits.⁸⁹ This caution on the

wrote separate opinions upon this point and Judge Alfaro wrote a declaration supporting the Court's position on consistency.

⁸⁵ ICJ REPORTS 1964, at 28-29.

⁸⁶ *Ibid.*, at 29, 31 and 47.

⁸⁷ *Ibid.*, at 47. Judge Wellington Koo wrote a separate opinion in this case to the same point, rejecting the alleged distinction between Articles 36(5) and 37 and denying that the *Aerial Incident* judgment was "equally justifiable" in law; *ibid.*, at 51-53. Judge Tanaka, who also wrote a separate opinion in the case, demonstrated very effectively that while "the Court [was] careful not to deal directly with the [*Aerial Incident*] Judgment, . . . the viewpoint adopted . . . [there was] substantially overruled" by the judgment in *Barcelona Traction (Preliminary Objections)*; *ibid.*, at 66-77.

⁸⁸ *Supra*, n. 68 and associated text.

⁸⁹ ICJ REPORTS 1964, at 46.

part of the majority, however, did not restrain Judge Wellington Koo, who went on in his separate opinion to discuss Spain's objection to the *jus standi* of Belgium and to conclude that the Spanish objection ought to have been rejected.⁹⁰ It is presumably to point out the error of Wellington Koo's method that Judge Jessup wrote his declaration.⁹¹ The sole point of the declaration was that even though "conclusions of law applicable to arguments involved in [the latter two] objections" of Spain were capable of being formulated at the time, it would be appropriate to defer them to the subsequent stage in keeping with the majority's rationale.⁹²

Judge Jessup's declaration, it bears reemphasizing, was not written to express his reservations on some conclusions or some aspects of the Court's reasoning, nor even to add some remarks to that reasoning, nor to state the approach he would have preferred, nor indeed to refer to any question at issue in the case. It was directed solely to the impropriety of pronouncing upon preliminary objections which were closely connected with the merits of the dispute and which would best have been left for decision at a later stage in the Court's proceedings—an impropriety which had clearly been committed by Judge Wellington Koo and not by the Court.

By far, the most well-known declaration of this kind is that of Judge Spender in the *South West Africa Cases (Second Phase)*.⁹³ That judgment, which caused a storm of controversy because it defeated, on "grounds of high technicality and abstraction," the hopes of obtaining a judicial settlement of the Namibian situation, drew forth long and vituperative opinions by some judges on the Court.⁹⁴ Furthermore, two judges, Judge Tanaka and Judge *ad hoc* van Wyk, completely ignored the fact that the Court, which had disposed of the case on a point that "appertained to the merits of the case but which had an antecedent character,"⁹⁵ had not pronounced upon the merits of the Ethiopian and Liberian Applications.⁹⁶ Paying no regard whatsoever to the principle that statements by individual judges must pertain to questions dealt with in the Court's decision, these judges discussed at great length the merits of the substantive issues which had been before the

⁹⁰ *Ibid.*, at 51.

⁹¹ Shabtai Rosenne has made this connection; see Rosenne, n. 16, at 400.

⁹² ICJ REPORTS 1964, at 49-50.

⁹³ ICJ REPORTS 1966, at 51-57.

⁹⁴ The words within the quotation marks are attributed to Shabtai Rosenne in UN Doc. A/PV. 1439, at 47 and quoted by Leo Gross in "The International Court of Justice and the United Nations," 120 RECUEIL DES COURS, 325 (1967-I). See also, Rosenne, n. 16, at 395-96; and FRIEDMANN, LISSITZYN, PUGH, CASES AND MATERIALS ON INTERNATIONAL LAW 83 (1969) and references cited there.

⁹⁵ ICJ REPORTS 1966, at 18.

⁹⁶ Some passages in that judgment argued that the mandate agreement was in fact a resolution of the League Council and consequently could not be treated as an international agreement. While not going as far as expressly declaring the Mandate to have lapsed with the League, the judgment carried suggestions to this effect. It was this aspect which apparently promoted the spirited defense of the existence of the Mandate and its international supervisory provisions evidenced in Judge Jessup's dissenting opinion. See also, Jessup, THE PRICE OF INTERNATIONAL JUSTICE 46 (1971). Judge Jessup's dissenting opinion in the *South West Africa Cases (Second Phase)* may also be characterized as going beyond the traditional scope of individual opinions.

Court but which the Court had set aside when it decided the second phase of the case on a point of standing.

This disregard for the Court's procedural principles provoked a seven-page declaration from President Spender in which he analyzed "not merely the text of Article 57 [of the Statute] but the general purpose it was intended to serve, and its intended application. . . ." ⁹⁷ His study led him to conclude that the main purpose of the right of judges to make individual statements was to avoid the impression of an illusory unanimity on the Court and "to enable the view of the dissenting judge or judges on particular questions of law *dealt with in the Court's judgment* to be seen side by side with the views of the Court on those questions." ⁹⁸ Judge Spender's declaration itself was devoted not to the "questions of law dealt with in the Court's judgment," but to the general doctrinal issue of defining the "limits to the scope and extent of the exercise of [the right guaranteed under Article 57] by any individual judge." ⁹⁹ To the issues of law dealt with by the judgment, Spender devoted just one sentence, declaring that he associated himself "unreservedly with the . . . Judgment, and . . . [had] nothing to add thereto." ¹⁰⁰

The same purpose of speaking out in defense of the Court's integrity and against the impropriety of dealing with certain issues at a premature stage of the proceedings or in a certain manner motivated two other declarations in recent years. Both of these "defensive" declarations were made in the *Fisheries Jurisdiction* cases, one in each phase. In the jurisdiction phase, Judge Zafrulla Khan considered it necessary to emphasize that the only question at that stage was the competence of the Court to rule upon the validity of Iceland's unilateral extension of its fisheries jurisdiction. "All considerations tending to support or to discount the validity of Iceland's action are, at this stage, utterly irrelevant," he wrote. ¹⁰¹ His declaration, which "strongly deprecated" such attempts, was directed at Judge Padilla Nervo, who wrote a dissenting opinion at the jurisdiction stage justifying Iceland's action and arguing that Iceland's claim to a fifty-mile zone had "not been proved to be contrary to international law." ¹⁰²

In the second phase of the same cases, Judge Ignacio-Pinto wrote a reasoned declaration, in part because he was deeply concerned that the judgment in that phase seemed to have been adopted with the intention of "pointing the way for the participants in the Conference on the Law of the Sea" then meeting in Caracas. ¹⁰³ The Court's support for the idea of "preferential" rights and the balance it sought between these coastal-state rights and the "historic" rights of distant-fishing states seemed to deal with issues *de lege ferenda* and disturbed Ignacio-Pinto as it did other judges. Consequently, Ignacio-Pinto declared that in the circumstances it would

⁹⁷ ICJ REPORTS 1966, at 52.

⁹⁸ *Ibid.*, at 53. Emphasis added.

⁹⁹ *Ibid.*, at 52.

¹⁰⁰ *Ibid.*, at 57.

¹⁰¹ ICJ REPORTS 1973, at 23 and 67.

¹⁰² *Ibid.*, at 36 ff. and 81 ff.

¹⁰³ ICJ REPORTS 1974, at 37. The questions at issue were those relating to the 200-mile economic zone proposal and the potential conflicts between "historical" and "preferential" rights within that zone.

have been better for the Court to have confined itself strictly within the limits of its jurisdiction instead of arrogating to itself "a creative power which [did] not pertain to it under either the United Nations Charter or its Statute."¹⁰⁴

Another question concerning the good administration of justice arose in connection with the Court's Orders of June 22, 1973, pronouncing provisional measures in the *Nuclear Tests* cases. A day before the Orders were read out in Court, the Australian Prime Minister, Mr. Gough Whitlam, revealed to some journalists that the Orders of the next day would go in favor of the Applicant States, Australia and New Zealand, by a margin of 8 to 6, which happened to be the exact vote on the Orders.¹⁰⁵ This announcement indicated a breach of the Court's secrecy, and the Court conducted an inquiry to trace the source of the leak.

Judge Lachs, who was the President of the Court at the time, wrote a short declaration on this matter when the judgment was handed down. He found it regrettable that the statement had been made and that reports had appeared in the press which exceeded what was admissible in a matter *sub judice*. The Court's inquiry, he stated, had not identified any specific source of the statements and the published reports; and he certified that the Court had done everything possible in the matter and had dealt with it with all the seriousness it warranted.¹⁰⁶ It can readily be seen that some statement on a matter as grave as the breach of the Court's secrecy was called for, as well as a statement on the action, if any, that the Court had taken in responding to the situation. Further, the most logical spokesman for the Court on such matters would undoubtedly be the presiding judge. The possible vehicles for such a statement were a declaration or a communiqué of the Court; and of the two, the declaration would certainly carry greater weight and indicate the importance which the Court attached to the question. The declaration by the President thus was the uniquely apt method of expression in this situation.

Before concluding we must mention the declaration by Judge Lachs in the *Fisheries Jurisdiction (Merits)* cases, which must be placed in a category of its own. The declaration follows and had best be left to explain itself:

I [*i.e.* Judge Lachs] am in agreement with the reasoning and conclusions of the Court, and since the Judgment speaks for and stands by itself, I would not feel it appropriate to make any gloss upon it.¹⁰⁷

VI. CONCLUDING REMARKS

The above discussion has sought to establish the following points regarding declarations as a mode of individual judicial expression on the Inter-

¹⁰⁴ *Ibid.*

¹⁰⁵ ICJ REPORTS 1973, at 106 and 142.

¹⁰⁶ ICJ REPORTS 1974, at 273. Judges Bengzon, Onyeama, Dillard, Jiménez de Aréchaga and Waldock wrote a joint declaration in that case, stating that they did not consider any of the criticisms of the Court's handling of the matter to be "in any way justified"; *ibid.*, at 273.

¹⁰⁷ *Ibid.*, at 35 and 206.

national Court of Justice: First, the Statute does not contain any express provision for such statements by judges and that the best that can be said under the circumstances is that it is silent on the issue. This silence could be interpreted as the lack of any express prohibition against the use of declarations and permit the inference that they are not contrary to the Statute. The historical background to the PCIJ Statute provides much evidence that the right of judges to make individual statements was introduced into international adjudication to provide dissenters with the opportunity to take a public position on the case before the Court and to offer their reasons for so doing and that this right did not include the right to make declarations. On the other hand, the Rules of Court, some internal decisions of the Court and, above all, judicial practice over five decades provide a veritably irrefutable wealth of evidence that, regardless of the prior intentions of the framers of the Statute, declarations came to constitute a legitimate form of judicial expression. And the above set of considerations, it is submitted, is perhaps the proper constitutional basis for declarations, notwithstanding the reference to Article 57 of the Statute relied upon by the Court's committee, which recommended a revision of the rules concerning declarations.¹⁰⁸ Put in another way, the legal basis for declarations consists of the silence of the Statute combined with express approval in the resolutions and Rules of Court, and the practice of the judges.

Second, all individual statements by judges were originally conceived of as deriving their *raison d'être* from the decisions of the Court, which consequently were to form the focus of the opinions and comments of the individual judges. This conception of the role of individual—and joint—statements finds sufficient corroboration in the Statute, the Rules and the practice of the Court. Recent practice, however, had departed considerably from this founding concept, and the declarations of judges had frequently dealt with matters of Court procedure, the opinions of other judges and even issues totally extraneous to the questions before the Court.¹⁰⁹ In other words, the content of individual opinions, and declarations in particular, was no longer considered as being restricted to the questions of law and/or fact which were before the Court and which had been treated by the Court's decision.

This expansion in the scope of declarations had important implications for the prestige and the good functioning of the Court. It was understandable, for instance, that a Zafrulla Khan or a Spender felt compelled to express public disapproval when a Padilla Nervo or a van Wyk flagrantly transgressed the bounds of sound administration of justice by pronouncing upon the merits of a dispute when the Court had expressly declared that the

¹⁰⁸ *Supra*, n. 38 and associated text.

¹⁰⁹ A recent study claims on the basis of private interviews that, "several judges criticized the [separate] opinions as exercises in academic irrelevancy"; Lillich and White, *The Deliberative Process of the International Court of Justice: A Preliminary Critique and some Possible Reforms*, 70 AJIL 36 (1976). See also, Report by T. O. Elias in JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES 30-31 (Mosler & Bernhardt eds. 1976).

Application was inadmissible or when it had reserved consideration of the merits to a future phase of the case. For, not only could such premature pronouncements prejudice the positions of the States parties to the dispute, but they could also implicate the impartiality of the Court if it were to deal with the merits of the dispute at some later time. Further, in situations where the Court had decided not to deal with the merits of the case, pronouncements on such matters could nonetheless impede progress towards a settlement of the dispute through other procedures. The cavalier attitudes of some judges in this regard may have contributed to the erosion of the prestige of the entire Court and may have brought the procedure of dispute settlement through adjudication into disrepute.

The adoption by the Court, first, of the "Recommendation of the Committee for the Revision of the Rules concerning Declarations," and, second, of its new Rules of Court presumably will lay this issue to rest once and for all. By paragraph 8 of the Recommendation, "only a brief statement by a judge, limited to making known which way he casts his vote but without stating his reasons, should be labelled a 'declaration'. . . ." ¹¹⁰ In the same vein, the second paragraph of Article 95 of the Rules of Court allows that "a judge who wishes to record his concurrence or dissent without stating his reasons may do so in the form of a declaration." ¹¹¹ It seems apparent, then, that henceforth declarations will consist of mere statements of vote. Indeed, it is even possible that we may not see many declarations in the future because the new Rules make it redundant to express merely one's concurrence or dissent. The first paragraph of Article 95 also has an innovation, and it now provides, *inter alia*, that the judgment "shall contain . . . the number *and names* of the judges constituting the majority." ¹¹² The second paragraph of Article 107 introduces the same innovation into advisory procedure. As the names of the majority judges will henceforth be carried by all judgments and opinions, the identities of the dissenting judges will be known through reduction; it makes little sense under such

¹¹⁰ *Supra*, n. 38. Paragraph 9 of the Recommendation adds that "Any other statement of opinion which a judge wishes to attach to the decision of the Court should be treated as a separate or dissenting opinion." Emphasis added. It may be pointed out that while this document claims only to "revise" the rules concerning declarations, it is in fact *establishing* such rules in a clear and express manner for the very first time; see, *supra*, Parts II and III.

¹¹¹ *Rules of Court*, n. 4, at 153. It ought to be added here that while the Rules use peremptory language to define the "declaration," the "Recommendation . . . for the Revision of the Rules concerning Declarations" uses more flexible language and provides for "declarations" other than mere statements of concurrence or dissent. Paragraph 12 of the "Recommendation" finds that "[o]ne form of declaration constitutes a special case falling outside" its terms, such a declaration being one "made by the President, in his capacity as such, and in the discharge of his functions under Article 10 of the [old] Rules. Should the President, however, wish to express his views on the merits of the case, these should be made known only within the framework of his right to append a separate or dissenting opinion." *Supra*, n. 38. This exception would clearly provide for declarations by the President of the sort made by Spender in 1966 and Lachs in 1974; *supra*, notes 93 and 106 and associated texts.

¹¹² *Rules of Court*, n. 4, at 153.

circumstances for a dissenting judge to make a further statement of dissent. Concurring judges, on the other hand, may nonetheless feel compelled to write declarations either to indicate that their concurrence does not extend to the reasoning employed by the Court, or to state that while concurring with the Court's decision, they do so for reasons elaborated in the opinion of another judge.¹¹³

It is also worth mentioning that by restricting declarations to mere statements of concurrence with, or dissent from, the opinion or judgment of the Court, the Court has also restored its pronouncements to a position of central focus, at least as far as declarations are concerned.

The above-mentioned innovations have also addressed another problem, that concerning the priority traditionally accorded to declarations and the consequent inflation of the importance of the views expressed therein. When the Permanent Court first allowed declarations to be attached to its judgments and opinions, it tacked these, written in the third person, to the end of the majority opinion. For instance, the declaration attached to the *Eastern Carelia* opinion appeared directly after the Court's opinion and stated that, "MM. Weiss . . . declare that they are unable to share the views of the majority of the Court. . . ." ¹¹⁴ The attaching of such a declaration to the end of the Court's decision and preceding the reasoned opinions of other judges did not carry any significance other than the publicizing of the votes of judges making the declarations. However, when this practice was, perhaps inadvertently, modified to the one in which judges wrote their declarations in the first person and added their reasoning, the position in the Reports of such declarations took on a totally different significance. These declarations, which increasingly tended to take on the appearance of individual opinions, seemed to be accorded the position of *primus inter pares*, an importance they would certainly not have received had they been correctly labelled as separate or dissenting opinions. It was possible, therefore, for a judge to call his personal statement a declaration, include anything he chose to in that statement and have it printed ahead of all other opinions by the mere expedient of its label! The individual opinions of the judges are generally presented in decreasing order of seniority with the separate concurring opinions following immediately upon the Court's judgment and the dissenting opinions coming later. Through the previous practice of the Court it had been very easy for a less senior judge to have his opinion printed ahead of that of a more senior judge through the mere ploy of calling his opinion a declaration. This practice accorded to declarations an emphasis out of all proportion to their significance, particularly where they contained fragmentary or inadequate reasoning.¹¹⁵ The new

¹¹³ But see below, n. 121 and associated text.

¹¹⁴ PCIJ ser. B, No. 5, at 29. For the full text of this declaration, see *supra*, n. 54 and associated text.

¹¹⁵ This could perhaps be said of the declarations of the Soviet judge, Kojevnikov, who sat on the Court in the mid-fifties and whose declarations received precedence over the opinions of more senior judges such as Basdevant, Klaestad, Badawi and Hackworth. See, *inter alia*, the *Voting Procedure* case, ICJ REPORTS 1955, at 67; and the *ILO Tri-*

Rules of Court and the "Recommendation for the Revision of the Rules concerning Declarations" completely obviate this problem by ensuring that declarations will be bare and unreasoned statements of concurrence or dissent.¹¹⁶

Third, at the time that declarations were first hesitantly introduced into the armory of judicial means of expression, it was believed that they would serve well the purpose of lifting the veil of mystery which shrouded the Court's voting and that this sort of exposure of the Court's decisions to the public would lend to the Court that prestige which normally attaches to open procedures.¹¹⁷ Without doubt this goal is very laudable and, indeed, whenever declarations were made, they did serve to identify the votes and views of the declaring judges and, by reduction, perhaps also those of judges who had remained silent in public. But declarations became longer and increasingly to contain reasoning, so that we ended up with a spectrum that covered the entire range from bare statements to fully reasoned opinions.

The International Court attempted, in its infant years, to give some guidance on this matter by adopting the view that "the opinion of a judge who disagreed with a judgment or advisory opinion should be called a 'dissenting' opinion; and that . . . by a judge who supported the view of the majority should be called an 'individual' opinion."¹¹⁸ These definitions and the labels they proposed have been ignored by most judges in their opinions. Further, the Court had never, until the 1976 "Recommendation for the Revision of the Rules concerning Declarations" and the 1978 Rules of Court, expressly defined what a "declaration" was meant to be. The practice of the Court had been to let each judge decide for himself what he would call his personal statement—individual, separate or dissenting opinion or a declaration.¹¹⁹ And this random assignment of labels had inevitably led to a confusion of the purpose and scope of the various instruments.¹²⁰

The declaration had been developed through the practice of the judges of

bunal case, ICJ REPORTS 1956 at 77. Judge Kojevnikov was elevated to the bench of the ICJ in 1953 whereas all the others had served on the Court since 1946.

¹¹⁶ There is one exception to the new rule in the "Recommendation," which states in Paragraph 10 that "[i]f a judge expresses his separate or dissenting opinion only by concurring in the views of other judges, such a statement . . . [will] follow the opinion to which it refers." *Supra*, n. 38. This certainly is a rational order. Paragraph 7 of the "Recommendation" recognized the "priority problem" and "considers that [the past] . . . practice should be changed. . . ."

¹¹⁷ See, for instance, the statement by Judge Moore, made during the 1926 PCIJ deliberations on the revision of the Rules of Court; ACTS AND DOCUMENTS CONCERNING THE ORGANIZATION OF THE COURT, PCIJ ser. D, Addendum to No. 2, at 200 and 296 (1926). Then, as now, "the breath of [the Court's] life is the public confidence," in the words of Judge Moore.

¹¹⁸ ICJ YEARBOOK, 1947-1948, at 68. The practice of the court has been different, and concurring opinions are usually labeled as "Separate Opinion" when in English and "Opinion Individuelle" when in French.

¹¹⁹ This procedure was confirmed in a letter dated July 12, 1977, to the author from Mr. A. Pillepich, Deputy-Registrar of the International Court.

¹²⁰ In this confused practice, the ICJ apparently has carried on the tradition of the Permanent Court with perhaps somewhat less of the earlier contradictions of the PCIJ. For instance, Judge *ad hoc* Eugène Dreyfus wrote a "Dissenting Separate Opinion" in the *Free Zones* case, PCIJ ser. A/B No. 46 at 200.

the Courts into a versatile vehicle which offered much flexibility to the judges—a flexibility, it may be added, which went much beyond that offered by individual opinions. And, while such flexibility was perhaps desirable on a Court which comprises jurists from disparate legal systems and which often deals with issues of considerable complexity, it also was desirable that possible confusion be reduced or eliminated from the already intricate procedures of the Court. The Court can only gain in prestige and public support through the rational ordering of its procedures so that they are consistent and predictable. It is heartening to note that the 1976 “Recommendation” and the new Rules of Court achieve this end so far as declarations are concerned, although the final word on this matter may not be written until the empirical evidence of the Court’s practice under the new system is available.

The above judgment must be tempered by the sober realization that the changes with regard to declarations may not be anything more than cosmetic in effect. For, it is still possible for judges to continue all their previous practices so long as they refrain from using the label of “declaration” for their personal statements. Their previous practices can now be continued under the titles of “individual,” “separate” or “dissenting” opinions.¹²¹ Therefore, with due deference to the wisdom of the judges on the Court, it is suggested that the Court undertake the attempt to define more clearly the purpose and scope of individual opinions. Without such a further step, the recent changes could well prove to be futile. The new Rules of Court have at long last made a clear distinction between individual opinions and declarations, and that effort merits the recognition of the international judicial community. However, that effort may be brought to naught unless it is followed up by a similar refining of the scope and purpose of individual opinions. Such a redefinition could be most conveniently undertaken through an internal resolution of the Court if it does not want to revise rules it has only just recently adopted. Sufficient precedent for such an approach exists in the practice of the two Courts. While such a step certainly would not lift the value of the Court’s stock with States to breathtaking heights, it would provide some assurance to States that the Court intends to reassert a firm control over its procedures; that it will not let individual judges determine unilaterally the scopes of their opinions, and in consequence also erode the prestige of the Court. Such an indication would certainly hearten those States which used to look upon the Court as the highest judicial body in the world and used to respect it but of late have come to regard it as a body of argumentative jurists with differing conceptions of the proper role of the Court and of their own roles within it. Evidence of greater cohesion and compatibility amongst the judges along with greater restraint in the writing of individual opinions may recapture for the Court some of the confidence of States it enjoyed in its earlier years.

¹²¹ Paragraph 9 of the Recommendation, quoted above in n. 110, would seem to encourage judges in such a course of action. If this potential loophole were to be exploited by the judges, it would erase any progress that may have been made through the 1976 “Recommendation” and the 1978 Rules and would effectively set the Court’s procedure back into its pre-1976 mould.

NOTES AND COMMENTS

TRUST FUNDS IN INTERNATIONAL LAW: THE CONTRIBUTION OF THE INTERNATIONAL MONETARY FUND TO A CODE OF PRINCIPLES

The arrangements that bear the name of the Trust Fund of the International Monetary Fund (IMF), of which the IMF is Trustee, were adopted as recently as May 5, 1976.¹ Problems of the law of trusts have been raised in the establishment and administration of the Trust Fund. The principles that have been applied by the IMF are the main topic of this note. In view of the many trust funds that are administered by international organizations, the question is raised whether these principles have a broader relevance in international law.

I.

The word "trust" is frequently applied without precise definition or connotation to certain arrangements that are governed by international law. Sometimes the word is used in a broad sense to suggest altruism, or an eleemosynary intent, or answerability for the administration of the arrangements. The looseness of terminology occurs in domestic practice also, as was noted in a remarkable case decided recently in England² in which one of the complex issues was whether, in relation to royalties payable on the sale of phosphates, the Crown was trustee under a true trust for the inhabitants of an island colony (and former protectorate) in the Western Pacific or whether the Crown had a governmental obligation for their benefit that could not be classified as an obligation of trusteeship. On the former assumption, the claims of the inhabitants were justiciable in a court of equity, but on the latter assumption they were not.

... I must also consider what is meant by "trust." The word is in common use in the English language, and whatever may be the position in this court, it must be recognised that the word is often used in a sense different from that of an equitable obligation enforceable as such by the courts. Many a man may be in a position of trust without being a trustee in the equitable sense; and terms such as "brains trust," "anti-trust," and "trust territories," though commonly used, are not understood as relating to a trust as enforced in a court of equity. At the same time, it can hardly be disputed that a trust may be created without using the word "trust." In every case one has to look to see whether in the circumstances of the case, and on the true construction

¹ Dec. No. 5069-(76/72), May 5, 1976, *SELECTED DECISIONS OF THE INTERNATIONAL MONETARY FUND AND SELECTED DOCUMENTS*, Eighth Issue 185-95 (1976) (hereinafter referred to as *SELECTED DECISIONS*).

² *Tito and others v. Waddell and others* (No. 2) [1977] 3 All ER 129.

of what was said and written, a sufficient intention to create a true trust has been manifested.³

Among arrangements governed by international law, including the proper law of an international organization that administers the arrangements, to which the word "trust" or the words "trust fund" are applied, some are closer than others to the concept of the true trust of national law. It is not easy, however, to distinguish or define the class of arrangements that more closely resemble the trusts of national law and that are more appropriately called trusts. One criterion that would seem to be both reasonable and essential is that, in relation to the assets subject to the trust, there exists some division of the full rights of ownership between a trustee and a beneficiary, together with the intention that the assets may be used or disposed of only for the advantage of the beneficiary and not the trustee. This criterion alone is probably not sufficient, and it would seem that a further criterion should be an express or implied intention of the creators of the trust that general principles governing trusts in national law—perhaps those principles that can be regarded as inherent in the concept itself and particularly the ethical principles on which it is based—should regulate the arrangements. The ethical principles are of particular importance because they are likely to correspond to some extent to the principles that inspire fiduciary concepts analogous to the trust in those national systems that have not received the trust.

If the two suggested criteria are met, it is appropriate to treat the arrangements as a trust even if the word trust has not been used to describe them. The IMF's Subsidy Account, which was established on August 1, 1975 with resources contributed by a number of members of the IMF to help some needy members to pay charges for balance of payments assistance under one of the IMF's policies, is an example of this kind.⁴ There is sometimes a reluctance to use the terminology of trusts because the concept is not a universal one in national law. If the criteria are not met, use of the word "trust" will not cure the deficiency and create a trust.⁵

According to the English case that has been mentioned, an essential element in the definition of a trust in national law is subjection of the administration of a trust to the jurisdiction of courts of equity.⁶ This criterion could not be applied to the class of arrangements subject to international law that closely resemble the trusts of national law without disqualifying them from being considered as trusts because there are no international courts of equity with jurisdiction over the arrangements.

³ *Id.*, at 216, *per* Megarry V.-C.

⁴ Dec. No. 4773-(75/136), Aug. 1, 1975, SELECTED DECISIONS 81-83. Contributions to the Subsidy Account were invited from members of the IMF in a sufficiently strong position to make them. The objective is to assist the 39 members that have been most seriously affected by the increase in the cost of importing petroleum and petroleum products to pay charges for the use of the IMF's resources under its policy called the "oil facility" for 1975. The charges levied by the IMF for the use of its resources under a policy must be uniform for all members (Art. V, (8)(d)).

⁵ See *Tito v. Waddell* (No. 2) [1977] 3 All ER 129, at 220.

⁶ See note 1 *supra*.

If it is accepted that a criterion for classifying arrangements under which assets are administered as indisputably a trust in international law is the intention of the creators of the trust that it is to be governed by general principles of the law of trusts as developed by national law, a number of problems must be faced in determining what those principles are. The first problem is one noted already. The trust, which originated in England, is not a concept known to all systems of national law, although some civil law jurisdictions, such as Scotland, Quebec, South Africa, Sri Lanka and a substantial number of other jurisdictions, have received the concept. Moreover, there are analogies, which sometimes are close, in many systems that do not recognize the trust as such. The *fideicommissum* is the Roman law ancestor of many of these analogies, but there is a profusion of other legal arrangements that more or less closely fulfill the functions of the trust.⁷ It should be noted that many of the states that are parties to the creation of trusts governed by international law have systems of national law in which the trust is not recognized, but these states seem to be comfortable enough with the concept to joint in international arrangements in the nature of trusts.

The problem of deciding which systems of law go into the chemistry from which the general principles of an international law of trusts are to be distilled is made even more difficult because the law of trusts, even when strictly defined, is not uniform throughout all the jurisdictions in which the trust is recognized. The law has been developed in most jurisdictions by local judicial decisions and statutes to meet domestic needs. The law of trusts in each system has become encrusted with its own idiosyncrasies. Sometimes, local variations take the form of modifications of, or even departures from, what some experts would regard as fundamental principles. The problem of diversity is aggravated further by the great number of jurisdictions in which there is a law of trusts. For example, each of the states and provinces of federal common law countries has a law of trusts of its own. The tendency to cite authority from other jurisdictions, however, exercises some influence in favor of uniformity.

Although there are now many examples of trusts in the practice of international organizations and among states, there is nothing resembling an established code of principles relating to trusts at the international level. It follows that the principles applied in international practice must necessarily be drawn from systems of national law, with such modifications as the organization or parties to particular international arrangements see fit to adopt for their own purposes. In a search for principles, a natural tendency is to look first to those systems of law in which the trust is a recognized concept, but it might also be useful to pay attention to other systems that employ concepts comparable to the trust. The only safe course seems to be to distill those principles of trust law, and perhaps analogous principles, that most experts would regard as fundamental and to ignore those modifications or departures that are adjudged to be local.

⁷ 6 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (Property and Trust), Ch. 11 (Trust, ed. William F. Fratcher 1972) §§ 101-141.

The experience of the IMF in creating and administering its Trust Fund already illustrates the need to determine fundamental principles. The Trust Fund was instituted under the Articles of Agreement of the IMF before the Second Amendment of the Articles became effective on April 1, 1978. The legal procedure for creating the Trust Fund did not take the form of an agreement between the IMF and any of its members. The constitutive act was a decision by which the Executive Board declared that it adopted the Instrument to Establish the Trust Fund that was annexed to the decision. Certain provisions that the IMF would observe in relation to the Trust Fund are set forth in seven paragraphs of the decision. The Instrument resembles a statute in form.

There was no specific authority in the Articles to create the Trust Fund. Authority was derived from the purpose of the IMF that is stated first in the list of its purposes:

To promote international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems.⁸

The action of the IMF was in accordance with a phenomenon in the practice of international organizations that has been described as follows:

International organizations may create *trust funds* for specific activities outside the regular budget. These funds have a wide variety of purposes. The only general condition for their establishment is that their purpose should fall within the aims of the organization. . . . The competence to create trust funds appears to be inherent in any international organization. Many trust funds have been created in the absence of any constitutional provision.⁹

The author from whose work this passage is quoted cites as examples various trust funds administered by the United Nations, the Food and Agriculture Organization, the World Health Organization, the International Labor Organization, and the Inter-American Development Bank. A former General Counsel of that Bank has said:

. . . we received 500 million dollars from the United States Government in the form of a trust fund, when the charter says absolutely nothing specific about such funds. We have received trust funds from non-member countries, when the charter says nothing about receiving funds from non-member countries in this way.¹⁰

The World Bank entered into an agreement in 1960¹¹ with a number of governments that provides for the creation and administration of, and contributions to, the Indus Basin Development Fund, the purpose of which is the effective utilization by Pakistan of the waters assigned to it by the Indus Waters Treaty, 1960.¹² Indonesia, the United Nations Fund for

⁸ Art. I(i).

⁹ 2 HENRY G. SCHERMERS, *INTERNATIONAL INSTITUTIONAL LAW* 419-20 (1972).

¹⁰ Elting Arnold in *THE EFFECTIVENESS OF INTERNATIONAL DECISIONS* 384 Stephen M. Schwebel ed. (1971).

¹¹ 444 UNTS 259; 503 UNTS 388.

Population Activities (UNFPA), and the International Development Association (IDA) entered into an agreement in 1972 under which the IDA administers a grant by UNFPA for a population project in Indonesia. In 1969 the Holy See and the Inter-American Development Bank concluded an agreement to establish the Populorum Progressio Fund under which the Bank administers funds contributed by the Holy See for loans and technical assistance for various purposes, including agrarian reform, for the benefit of developing member countries of the Bank. These trust funds are a few illustrations of a steadily growing number of similar arrangements entered into by these and other international organizations.

Authority for the IMF to perform specific services for members that are not mentioned in the Articles but are sufficiently related to the purposes of the IMF is made explicit by the Second Amendment:

If requested, the Fund may decide to perform financial and technical services, including the administration of resources contributed by members, that are consistent with the purposes of the Fund. Operations involved in the performance of such financial services shall not be on the account of the Fund. Services under this subsection shall not impose any obligation on a member without its consent.¹³

The establishment of trust funds for administration by existing international organizations under implied or express powers avoids the need to create new organizations with limited purposes and makes use of the experience and demonstrated skill of organizations already in the field. One effect of trust funds, therefore, is to increase the functions or the resources of the administering organization, although the criterion of consistency with its purposes places a limitation on its activities, at least if it is acting under implied powers.

Part of the IMF's gold is being mobilized to finance the activities of the Trust Fund. Before the Second Amendment of the Articles, the procedure involved sale of the gold to certain members under the IMF's power to replenish its resources of currency.¹⁴ The gold then ceased to belong to the IMF, but the purchasers were willing to resell the gold at the then official price for the benefit of the Trust Fund. The last stage of the procedure was sale by public auction by the IMF as Trustee at prices based on market prices. Under the Second Amendment the IMF can sell the gold by auction in the first instance.¹⁵

A portion of the proceeds that represents the capital value of the gold at the former official price of SDR 35 per ounce of fine gold is placed in the general resources of the IMF for use in its operations and transactions, and the rest of the proceeds, which represent profit beyond the capital value, is placed in the Trust Fund. The profit, together with the income earned by investing it, the income from loans through the Trust Fund, and any other resources contributed or lent by members, are administered by the IMF in

¹² 419 UNTS 125.

¹³ Art. V (2)(b).

¹⁴ Art. VII(2)(ii) (before the Second Amendment).

¹⁵ Schedule B para. 7.

accordance with the Trust Instrument that it has adopted. The total resources of the Trust Fund are likely to be substantial, and on certain assumptions based on average gold prices and average exchange rates over the twelve months ended February 1978 could be approximately SDR 1.3 billion. The purpose of the Trust Fund is to assist 61 members of the IMF that are eligible to receive loans through the Trust Fund, on the concessionary terms defined by the Trust Instrument, because the average per capita income in these countries was not in excess of SDR 300 in 1973.

The technique of a Trust Fund was employed for various reasons. The IMF had no express power to receive as part of its ordinary resources assets of the kind that became available. Moreover, in administering its ordinary (*i.e.* "general") resources the IMF must observe a principle of uniformity that prevents it from giving more favorable treatment to one member or one class of members than it would be prepared to give to all members.¹⁶ Another reason, therefore, was the need to keep the resources of the Trust Fund distinct from those that the IMF uses in its ordinary operations and transactions. This reason helps to explain why the Trust Fund continues to be employed for the purposes it serves even after the Second Amendment.

The decision of the IMF that created the Trust Fund states that certain provisions of the Trust Instrument will not be modified. This undertaking is regarded by the IMF as binding because members have transferred resources to the Trust Fund, including the profits foregone by those members that resold gold at the former official price for the benefit of the Trust Fund. One of the safeguarded provisions declares the purpose of the Trust Fund to be the extension of additional balance of payments assistance on concessionary terms to eligible members that qualify for assistance in accordance with the Trust Instrument, in order to support their efforts to pursue programs of balance of payments adjustment. The assistance provided through the Trust Fund is additional because it supplements the assistance made available by the IMF from its own resources. Some of the other provisions of the Trust Instrument that may not be modified require that the Trust Fund shall be administered by the IMF as Trustee and that certain transfers of assets to the Trust Fund shall be irrevocable.

In administering the Trust Fund the IMF takes decisions according to the procedures it follows in taking other decisions. For example, decisions are taken by the Executive Board on the basis of weighted voting power. Whenever a special majority is not required by the Articles for the adoption of a decision, it can be taken by a majority of the votes cast if there should be a formal vote. This rule would be observed if in the administration of the Trust Fund a particular decision were not taken by consensus but had to be voted on.

The IMF has been meticulous in observing what it has considered to be fundamental principles of the law of trusts, even though a less exacting standard applied to some opportunities for gain might have resulted in a

¹⁶ Joseph Gold, *Uniformity as a Legal Principle of the International Monetary Fund*, 7 LAW AND POLICY IN INTERNATIONAL BUSINESS, 765-811 (1975).

greater yield. This practice has been followed even though, as Jenks noted in connection with the Bank for International Settlements, one of the advantages of having such an organization act as a trustee is that it is governed only by its proper law and that there is no need to subject the trust agreement to any particular system of national law. Jenks also wrote that a possible disadvantage was that the proper law of the trustee might be far from fully developed, but that this disadvantage could be offset by precision in the terms of the trust agreement.¹⁷ These remarks apply to the Trust Fund of the IMF but are subject to the qualification that although the decision of the IMF creating the Trust Fund and the Trust Instrument are precise and reasonably detailed, much was left to administration and not all problems could be foreseen. In administering the Trust Fund and taking necessary decisions, the IMF has consciously limited its freedom by observing fundamental principles of the law of trusts.

Another limitation has been observed, although it can be considered not so much a qualification of the fundamental principles as a reconciliation of them with other legal principles. It will be seen that one of the principles of trust law recognized by the IMF is that a trustee owes duties of care and loyalty to the beneficiary. Normally, in the exercise of this duty, the trustee must act on the basis of all reliable information that is available to him. Banks when acting in a capacity other than as trustee sometimes become aware of material "inside information" about the affairs of a corporation whose securities the banks are holding as trustees that reflects on the value of the securities. The dilemma for the banks is how to deal with the interests of the trusts, the corporations, and the investing public. This dilemma has been the subject of much debate and many proposals for resolving it.

The IMF is in a position somewhat similar to that of the banks. It has supervisory or regulatory functions with respect to exchange rates and exchange arrangements, and in the discharge of these functions it receives confidential information. The problem is whether it must use this information in the administration of the Trust Fund. The problem was resolved at first by investing the resources of the Trust Fund in securities denominated in a single currency deemed appropriate for the purpose and by not moving to securities denominated in other currencies in any circumstances. Under a later decision, investment is authorized in the obligations of an international financial organization denominated in the SDR as the IMF's unit of account. By following these policies, the IMF avoids even the appearance of using its "inside information" about the probable development of the exchange rates of currencies.

II.

The principles that have been recognized so far by the IMF as fundamental in the law of trusts are discussed in the following paragraphs.

¹⁷ C. WILFRED JENKS, *THE PROPER LAW OF INTERNATIONAL ORGANISATIONS* 187 (1962).

(i) *The rights of ownership of property subject to a trust are divided between the trustee and the beneficiary or beneficiaries.* The IMF owns the resources of the Trust Fund as Trustee, but they may be used in accordance with the Trust Instrument solely for the benefit of the 61 members that have been selected as potential beneficiaries. The Executive Board has made it clear,¹⁸ however, that as the IMF is owner of the resources of

the Trust Fund, those resources are part of the "property and assets" of the IMF, and as such are covered by the various immunities conferred by the Articles on the IMF's property and assets.¹⁹ Nevertheless, the resources of the Trust Fund cannot be used in the operations and transactions of the IMF, and the other property and assets of the IMF cannot be used in the activities conducted on behalf of the Trust Fund or to meet obligations or liabilities incurred on the account of the Trust Fund.

(ii) *A trustee must keep trust property separate from his own property and from the property of other trusts, and must earmark trust property as such, unless relieved of this obligation by law or the terms of the trust.* The Trust Instrument provides that the resources of the Trust Fund shall be kept separate from the property and assets of the IMF and from the property and assets of all other accounts (such as the Subsidy Account) that it administers in a fiduciary capacity. The procedure employed for the sale of gold before the Second Amendment resulted automatically in the segregation of the capital value, which enters into the general resources of the IMF, and the profits, which go into the Trust Fund. The Second Amendment produces a change in procedure as a result of which the two portions are not automatically separated from each other. In conformity with the principle of segregation, a new account in the nature of a suspense account has been established into which the proceeds are paid and from which the two portions are promptly transferred to their proper destinations.

One consequence of the segregation of the resources of the Trust Fund from those of the IMF is that the obligation of members to maintain the value of the IMF's holdings of their currencies in its general resources²⁰ does not apply to the holdings of currencies that are part of the resources

¹⁸ The Commentary in the Report by the Executive Directors to the Board of Governors on the Proposed Second Amendment contains the following passage in explanation of Art. V (2)(b):

Operations and transactions involved in the performance of these financial services would not be on the account of the Fund. That is to say, the assets in the Accounts of the General Department or any assets in the Special Drawing Rights Department would not be available to meet obligations or liabilities incurred in the course of these services. The assets administered by the Fund under this provision might be owned by the Fund if certain legal techniques, such as a trust, were employed, and, therefore, to take one example, the assets would be assets of the Fund for the purposes of the immunities and privileges of Article IX even though they would not be held within the General Department (Article XVI, Section 2). Services rendered by the Fund under Article V, Section 2(b) cannot impose obligations on a member unless it agrees to assume them. As in the past, the Fund would be able to absorb the administrative costs of the services or agree with members on some other arrangement.

¹⁹ Art. IX.

²⁰ Art. V (11).

of the Trust Fund. The value of the IMF's holdings of currencies in its general resources is maintained in terms of the SDR. The difference in relation to maintenance of value has been described as a consequence of segregation, but it is equally appropriate to conclude that another reason for segregation is that members have not undertaken to maintain the value of the resources of the Trust Fund.

(iii) *A trust is not a legal entity in the sense that it is the bearer of rights or the subject of duties.* The trustee and not the trust owns property, acquires claims, and incurs obligations and liabilities, although certain claims may have to be satisfied from the trust property. To give legal personality to a trust it is necessary to take action in accordance with applicable law beyond the creation of the trust itself. The aggregation of property, rights, and duties that are the elements of a trust are divided between beneficiary and trustee or among these two and the settlor. The IMF has observed this principle in connection with the Trust Fund. To take one example, before the Second Amendment, gold was sold by the IMF to members, which then resold it for the benefit of the Trust Fund. It has been said sometimes that this gold was resold to the Trust Fund. In fact, the gold was resold to the IMF as Trustee of the Trust Fund, and the IMF has auctioned the gold. The IMF as Trustee has exercised all the rights and has assumed all the obligations under the Invitation to Bid in the auctions. It follows also that agreements cannot be entered into between the IMF and the Trust Fund.

(iv) *A trustee may not engage in "self-dealing" in administering the trust.* Claims to repayment against the IMF under borrowing agreements that it has entered into in order to finance certain policies on the use of its resources may be transferred with the prior consent of the IMF and on terms and conditions acceptable to it.²¹ These claims are attractive assets. Among their attractions are a reasonably high rate of interest and maintenance of the value of the claims in terms of the SDR.

The acquisition of these claims with resources of the Trust Fund, no matter how attractive the claims might be, would have been contrary to the principle that the purchase of a trustee's own securities even from other parties, if not authorized by the trust instrument, is impermissible. There was no difficulty in concluding, therefore, that the IMF as Trustee could not invest in the claims of lenders to the IMF in disregard of the fundamental objection to "self-dealing," because of a potential conflict of interest. It was not necessary to rely on the further objection that a trustee may not invest assets of the trust in his own obligations because he cannot enforce them against himself.

(v) *A trustee must administer the trust solely in the interest of the beneficiary.* A trustee, unless clearly authorized by the terms of the trust, must not use the assets that he holds in that capacity to make loans to himself. This action would be as objectionable as the acquisition with trust property of any outstanding obligation that the trustee may have incurred in his

²¹ Dec. No. 4242-(76/67), June 13, 1974, SELECTED DECISIONS 122-28.

personal capacity to other parties. "The shepherd must not become a wolf."²² This principle also is based on the obvious risk that a conflict of interest might arise as the result of such "self-dealing," because of the temptation the trustee might feel to act in his own interest in administering the trust. The prohibition against self-dealing is not overcome because the trustee believes in good faith, and is justified in believing, that the issuance of securities by the trustee to be held on behalf of the trust would be advantageous for the beneficiary. The decision of the IMF that creates the Trust Fund and the Trust Instrument have been drafted in conformity with fundamental principles of the law of trusts and the ethical principles on which they are based. Derogations from these principles have not been incorporated in either the decision or the Trust Instrument.

Under the Instrument establishing the Trust Fund, the IMF as Trustee is authorized to invest balances of currency held as part of the resources of the Trust Fund in marketable obligations of international financial organizations or in marketable obligations issued by and denominated in the currency of the member of the IMF whose currency is used to make the investment, provided that the concurrence is obtained of the member whose currency is used for investment. It was readily concluded that the reference to international financial organizations in the Trust Instrument does not include the IMF, even though it can be described in this way, if only because inclusion would offend the principle that a trustee must administer the trust for the exclusive advantage of the beneficiary. The clearest evidence of authority would have been necessary to permit conduct that might be inconsistent with this principle, but there was no evidence of such an intention.

(vi) *In administering a trust the trustee must use reasonable care and skill and avoid unreasonable risk.* The care and skill are those that a man of ordinary prudence would exercise in dealing with his own property. In applying this principle, the IMF, in conducting auctions of gold on behalf of the Trust Fund in order to raise resources for its operations, has not been willing to accept as a term of the Invitation to Bid authority for bidders to pay the necessary deposit with a particular form of financial instrument. Potential bidders might have found the instrument less costly, and therefore they might have been encouraged to bid, but there was doubt about the validity of the instrument in certain jurisdictions.

III.

In view of the increasing number of trust funds that are governed by international law, including the proper law of the international organization that acts as trustee, it may be desirable to attempt a codification of the fundamental principles that should be observed in the administration of these trusts unless they are qualified by the trust instrument. The experience of the IMF is, of course, affected by its special character, but it is

²² *Tito v. Waddell* (No. 2) [1977] 3 All ER 129, at 241.

suggested that the principles recognized by the IMF so far may have a wider relevance. If it should be thought desirable to formulate principles of general application for the regulation of trusts resembling the trusts of national law, the principles that have emerged so far in the practice of the IMF would seem to deserve consideration.

JOSEPH GOLD *

THE 50-MILE MILITARY BOUNDARY ZONE OF NORTH KOREA

When the 200-mile economic zone of North Korea came into force on August 1, 1977, a 50-mile military boundary zone was also proclaimed, in order "to reliably safeguard the economic sea zone and firmly defend the national interests and sovereignty of the country."¹ In the Yellow Sea, which is not wide enough for the application of a 200-mile limit, both zones are to extend only to what would be the median line between China and North Korea, a line which at many points would roughly coincide with a 50-mile limit. With its indented coastline and offshore islands, especially on the west, North Korea will have to use straight baselines to mark the zones, but it has not made public where and how it will draw them.² This omission raises the question of how the four lateral boundaries, *i.e.*, the boundaries with China at the Yalu estuary, with the Soviet Union at the

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¹ The English text, by the Korean Central News Agency, Aug. 1, 1977, in 4 FOREIGN BROADCAST INFORMATION SERVICE (hereinafter FBIS), Asia and Pacific, Aug. 1, 1977, at D6; and The People's Korea, Aug. 10, 1977, at 2, Col. 1:

Demanded by the situation prevailing in our country, the Supreme Command of the Korean People's Army establishes the military boundary to reliably safeguard the economic sea zone of the Democratic People's Republic of Korea and firmly defend militarily the national interests and sovereignty of the country.

The military boundary is up to 50 miles from the starting line of the territorial waters in the East Sea and to the boundary line of the economic sea zone in the West Sea.

In the military boundary (on the sea, in the sea and in the sky) acts of foreigners, foreign military vessels and foreign military planes are prohibited and civilian ships and civilian planes (excluding fishing boats) are allowed to navigate or fly only with appropriate prior agreement or approval.

In the military boundary (on the sea, in the sea and in the sky) civilian vessels and civilian planes shall not conduct acts for military purposes or acts infringing upon the economic interests.

² According to a Japanese source as reported in South Korean newspapers, *e.g.*, Han-kook Ilbo, Sept. 19, 1977, at 3; Col. 1, North Korea appears to have relied on a Soviet practice in drawing one of its baselines. In 1957, the Soviet Union declared the Peter the Great Bay to be its internal waters, enclosing it with a 108-mile straight baseline (*see, e.g.*, BUTLER, *THE SOVIET UNION AND THE LAW OF THE SEA* 108 (1971)). In the Sea of Japan, a straight baseline which North Korea is reported to have drawn enclosing two small bays is roughly 100 miles long; the waters so enclosed, however,

Tumen estuary and, where applicable, with South Korea at both ends of the cease-fire line, will be drawn. It is thus not possible for outside observers to determine precisely how far the North Korean military boundary zone will extend. In fairness, however, it should be noted that for largely geographical reasons the coastal states in the neighborhood of North Korea have been equally reluctant to be specific about their straight baselines and lateral boundaries and have thus far seemed to thrive on the ambiguity.³

In jurisdictional terms, the North Korean military boundary zone is singularly exclusive because within it even "civilian ships and civilian planes (excluding fishing boats) are allowed to navigate or fly only with appropriate prior agreement or approval."⁴ By design or otherwise, the proclamation has also erred on the side of brevity, which in turn makes it grossly ambiguous. For instance, it is not made clear what would constitute "acts of foreigners" or "acts infringing upon the economic interests" which would be prohibited within the zone. Furthermore, the provision whereby fishing boats are excluded from the category of "civilian ships" was misread by Japan's unofficial negotiators to mean that, subject to "prior agreement or approval," Japanese fishing vessels would be allowed in. They were later stunned to learn from the North Koreans that foreign fishing within a military zone was out of the question from the beginning.⁵ In any event, a sea defense zone as extensive and exclusive as North Korea's would not be easily conceivable in a normal peacetime situation, much less if it is partly to safeguard an economic zone, as one of its two stated purposes indicates.

As expected, South Korea reacted almost instantly with a barrage of protests denouncing the North Korean claim as unprecedented and untenable under international law. Japan was also prompt in disapproving it, as was the United States, speaking for itself and on behalf of the United Nations Command based in South Korea. The Soviet Union simply reported the North Korean announcement and Japan's disapproval, but made no comments of its own.⁶ Only China remained silent, but it was a con-

would fail to meet even the most elastic interpretation of the definition of a bay as given in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, Art. 7(2-6), or in the Informal Composite Negotiating Text of the Third United Nations Conference on the Law of the Sea, 6th Sess., Art. 10(2-5), UN Doc.A/CONF.62/WP.10 at 23 (1977).

³ For instance, China adopted a 12-mile limit for its territorial waters in 1959, but has still not made its straight baselines public. Japan extended its territorial waters from 3 to 12 miles in 1977, also without specifying the straight baselines. North Korea has not formally published the limit of its territorial waters; since the *Pueblo* incident of 1968, its limit has been assumed to be 12 miles. South Korea's 12-mile territorial sea law came into force on April 30, 1978. For the text of the law, see Guanbo (the official gazette), the Republic of Korea Government, Dec. 31, 1977, at 3-4, and Apr. 29, 1978, at 3.

⁴ See note 1 *supra*.

⁵ See Nihon Keizai Shinbun, Sept. 4, 1977, morning ed., at 2, Col. 1.

⁶ See, e.g., FBIS, III, Soviet Union, Aug. 5, 1977, at M3.

cerned silence, as will be explained later. Few other countries are likely to be directly affected by the North Korean claim.

Though each had its own reasons for reacting as it did, the initial responses of Japan and South Korea deserve particular attention. As North Korea began to hint of a 50-mile zone in mid-1976, a fact of which Japan and South Korea were aware,⁷ it would seem that they could hardly have been taken by surprise, as they claimed. Perhaps they were so obsessed with the impact of United States and Soviet 200-mile zones on their North Pacific fisheries that they did not recall the North Korean hint or, if they did, failed to take it seriously. In the hasty reportage by Seoul and Tokyo media, there even arose an amusing confusion over whether it was a military "boundary" zone or a military "warning" zone, the confusion resulting from the fact that the two words sound alike in Korean.⁸

The North Korean claim aroused different concerns in each of the affected countries. In the case of South Korea, the overriding concern was how its security would be affected by North Korea's extended jurisdiction. Specifically, it was feared that South Korean control of waters around its five islands situated well within 12 miles off the shore of North Korea might be jeopardized. In fact, this problem emerged as an extremely sensitive security issue between North and South Korea in 1973, when the North began to claim jurisdiction over what had previously not been contested.⁹ The Armistice Agreement of 1953 not only placed the islands under the control of the United Nations Command, and hence under South Korean administration, but also prohibited blockade by either side of the waters contiguous to, and the air space over, the areas under the control of the other.¹⁰ In these troubled waters, however, the South Korean islands are so delicately situated and the North Korean coastline so precariously in-

⁷ See, e.g., *Dong-A Ilbo*, July 6, 1977, at 2, Col. 1; and *Chung-Ang Ilbo*, Aug. 3, 1977, at 3, Col. 1.

⁸ See, e.g., *Hankook Ilbo*, Aug. 3, 1977, at 1, Col. 2 and 2, Col. 1; *Nihon Keizai Shinbun*, Aug. 1, 1977, evening ed. at 1, Col. 1 and Aug. 7, 1977, morning ed. at 7, Col. 9. Ironically, Western language newspapers did not confuse the name, having relied on the English language reports by North Korea. See, e.g., *The N. Y. Times*, Aug. 2, 1977, at 2, Col. 1; and *The Wash. Post*, Aug. 3, 1977, at A15, Col. 1:1. In substance, a military *boundary* zone and a military *warning* zone (like China's) do not seem to have a significant distinction.

⁹ At the 346th meeting of the Military Armistice Commission on December 1, 1973, North Korea insisted that the waters contiguous to the five South Korean islands situated offshore North Korea were North Korean territorial waters and that ships in transit should obtain prior permit from North Korea. See *Hankook Ilbo*, Aug. 3, 1977, at 3, Col. 1. For a recent study commissioned by the South Korean National Unification Board, see JAE-SHIK BAE, HYUNHAENG HWIJONHYUPJONGCHEJE ESO-BON SOHAE 5-DOSO-WI MUNJE JOM BALSANG WON-IN MIT DAECHEAEK (Problems of the five Western Offshore Islands in the Context of the Armistice Agreement: the Causes and Counter-Measures) (Seoul, 1978).

¹⁰ Agreement between the Commander-in-Chief, UN Command, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers concerning a Military Armistice in Korea, signed at Panmunjom, Korea, July 27, 1953, Art. II (13)(b), (15) and (16), UN Doc. S/3079.

dented that the provisions of the Agreement ought to have been made more specific, for example, by means of cartographic illustrations.¹¹ These islands, only five miles square and inhabited by 13,000 people, had become literally the raw nerves in South Korean security and were also used by South Korea to test the North Korean military boundary. With reinforced naval escorts, ferry service to the islands was carried on as usual and met with no interference.¹²

In the case of Japan, although the government immediately voiced objection to the North Korean claim, perhaps partially as a precautionary measure, the primary concern was whether Japanese fishermen would be allowed to continue operations within the military boundary. In the waters around North Korea, Japanese fishermen catch more than 80,000 tons every year, including quantities of globe-fish, a species popular mainly in Japan.¹³ With part of these landings now at stake, a private delegation including ten members of the Japanese parliament visited North Korea to negotiate over Japanese fishing within the economic and military zones of North Korea. As a result, a provisional agreement was signed on September 6, 1977, whereby, pending conclusion of a nongovernmental arrangement approximating the Sino-Japanese pattern of 1955-1975, Japanese fishermen would continue to operate within the economic zone but outside of the military boundary of North Korea.¹⁴ Politically, such contact between Japan and North Korea, even at a private level, was exactly what South Korea bitterly opposed and exactly what North Korea must have hoped to achieve in extending its maritime jurisdiction.

Speaking for the United Nations Command, the United States made its position clear: North Korea's unilateral action would in no way curtail or diminish the rights of the United States in Korea or of the United Nations Command or North Korea's own armistice obligations.¹⁵ On the security issue, the point of view of the United States broadly coincided with that of South Korea, and, in so far as it sought as a general precautionary measure to place its objection on record, with that of Japan as well. The United States, however, clearly did not share the same degree of sensitivity displayed by Japan, on account of its fisheries interests, or by South Korea, on account of its security interests. With the 1968 *Pueblo* and 1969 EC-121 plane incidents still in mind, perhaps the United States was not inclined to

¹¹ The Armistice Agreement was annexed with 22 maps. Map 3 indicated the location of the five islands, noting that: "(2) The rectangles which inclose the island groups are for the sole purpose of indicating island groups which shall remain under the military control of the Commander-in-Chief, United Nations Command. These rectangles have no other significance and none shall be attached thereto." Between the South Korean islands and the North Korean mainland, the United Nations Command has maintained the so-called northern patrol limit line as a unilateral self-regulatory measure.

¹² See, e.g., The Wash. Post, Aug. 3, 1977, at A15, Col. 1.

¹³ See, e.g., Nihon Keizai Shinbun, Sept. 3, 1977, evening ed., at 1, Col. 1.

¹⁴ See FBIS, IV, Asia and Pacific, Sept. 7, 1977, at D1; and Nihon Keizai Shinbun, Sept. 7, 1977, morning ed., at 2, Col. 1.

¹⁵ See note 8 *supra*.

become involved in disputes which would not directly affect its own interests.

Of the four major powers concerned with the North Korean military zone the Soviet Union is the least directly involved. In the northwest corner of the Sea of Japan, the geographical circumstances are simple enough for North Korea and the Soviet Union to draw a lateral boundary, one which could be based on the equidistance principle. Any equidistant line, however, would require agreement between the two sides on how to draw it. While North Korea is generally in favor of the equidistance principle as a basis for negotiations,¹⁶ the Soviet Union would apply it in the Sea of Japan only "to preserve living resources and regulate fishing."¹⁷ On the side of Soviet security interests, if it becomes necessary for the Soviet military vessels and aircraft, particularly those of the Vladivostok-based Soviet Pacific Fleet, to use the North Korean military zone, a "prior agreement" between the two allies with military ties should not be difficult. The noncommittal attitude of the Soviet Union may be attributed to the fact that the zone would not affect its interests seriously and to the consideration that, with other sea boundary problems to be settled under different circumstances, for example, in the Barents Sea,¹⁸ comments on a particular foreign claim ought to be made only with caution.

In contrast, China's silence on the North Korean claim betokens the plight of a continental power with a greater variety of territorial and sea boundary disputes than most other coastal states. The merits of each boundary issue are so complicated that the terms of settlement advantageous to China in one situation can prove to be equally favorable to the other claimant(s) in another. This makes it discreet for China to be unspecific or even silent in any particular instance. On the one hand, for example, China could not have possibly disapproved the North Korean military boundary because its own Military Warning Zone—now roughly adjacent to, and no less extensive than, the North Korean zone—has been in existence for more than two decades.¹⁹ On the other hand, China would have been equally reluctant to voice its support of what might imply an acceptance of the median-line principle, a criterion which, if rigidly applied in the East China Sea *vis-à-vis* Japan and South Korea, would drastically undermine its continental shelf

¹⁶ See 2 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, 2nd Sess., OFF. RECS., 215 (1974). North Korean Delegate Kim said: "[T]he boundary of the economic zone . . . between adjacent or opposite States should be determined by consultation in accordance with the principle of an equidistant line or a median line."

¹⁷ For the resolution adopted by the USSR Council of Ministers on Feb. 24, 1977, entitled "On the Institution of Temporary Measures to Preserve Living Resources and Regulate Fishing in Regions of the Pacific and Arctic Oceans Adjacent to the USSR's Coast," see THE CURRENT DIGEST OF THE SOVIET PRESS, March 23, 1977, at 19.

¹⁸ For details with maps, see, e.g., Traavik and Østreng, *Security and Ocean Law: Norway and the Soviet Union*, 4 OCEAN DEV. AND INT'L. L. J. 343 (1977).

¹⁹ For an illustrated analysis of China's Military Warning Zone and its other security zones, see, e.g., Park, *Fishing Under Troubled Waters: The Fisheries Controversy in Northeast Asia*, 2 OCEAN DEV. AND INT'L. L. J. 93 (1974).

claims based on the natural prolongation of land territory criterion.²⁰ China's economic and security interests are otherwise unlikely to be significantly affected by the North Korean military boundary, first, because the affected area in the northern Yellow Sea is relatively small and hence of limited economic significance, and, second, because China is another major ally of North Korea.

Against this background, how does the North Korean military boundary compare to current and past practices? According to a comprehensive survey of national claims to maritime jurisdictions,²¹ some 32 states²² currently maintain maritime defense zones of one form or another, each of which varies in spatial extent and jurisdictional exclusivity. The extent of these claims ranges from 3 to 200 miles, the majority coinciding with

²⁰ For further details, see, e.g., Park, *The Sino-Japanese-Korean Sea Resources Controversy and the Hypothesis of a 200-Mile Economic Zone*, 16 HARV. INT'L. L. J. 27 (1975). China's silence on the North Korean claim appears to be rather unnatural. Its inconsistency and overreaction with respect to sea problems in general also may be seen, *inter alia*, in the following instances: (1) When the United States designated a "Combat Zone" roughly 100 miles off the coast of Vietnam in 1965, which was intended for an income tax relief measure for U.S. military personnel serving in Vietnam, China strongly denounced it as an infringement on the freedom of navigation on the high seas. For the text of Executive Order No. 11216, see 30 FEDERAL REGISTER 5817; for the White House Press Release of April 24, 1965, see 52 DEPT. STATE BULL. 749 (1965); and for the Chinese protest and the comments on it, see, e.g., COHEN and CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW*, 546-7, 1499-1500 (1974); (2) When Japan and South Korea signed an East China Sea continental shelf joint development pact in 1974 to exploit mineral resources from an area which, in their view, lies beyond Chinese jurisdiction, China strongly protested, denouncing the action as an encroachment on its sovereign rights, and has since made it a major political issue against Japan. In 1975, however, China itself signed the Yellow and the East China Seas fisheries agreement with Japan, which is not a coastal state of the Yellow Sea, thereby flatly ignoring the interests of North and South Korea as the coastal state. For the Chinese protest against the Japan-South Korea shelf pact, see PEKING REV., February 8, 1974, at 3; and for the English text with a map of the Sino-Japanese fisheries agreement, see LIMITS IN THE SEAS, No. 70, Office of the Geographer, Dept. of State (Sept. 1977); (3) When Japan and the Soviet Union were negotiating in the spring of 1977 over Japanese fishing within the Soviet 200-mile zone, it was proposed by the Soviet Union that its fishermen be allowed to operate within 3 to 12 miles of Japanese territorial waters in return. China bitterly criticized the Soviet Union for a "hegemonic" attempt at what had never been preceded between any two truly sovereign states in history. However, the postwar practices between some countries do not support the Chinese criticism. For instance, Finnish fishermen have been permitted to operate within certain parts of Soviet territorial waters in the Gulf of Finland, and Italian fishermen within certain parts of the Yugoslavian territorial waters in the Adriatic Sea. For the Chinese criticism, see PEKING REV., April 22, 1977, at 46; and for the text of the Finnish-Soviet arrangements see 338 UNTS 3, 739 UNTS 77 or 9 ILM 507 (1970) and for the Italo-Yugoslavia arrangements see 171 UNTS 279 and 379 UNTS 23.

²¹ LIMITS IN THE SEAS, No. 36 (Dec. 1975, rev. Apr. 1, 1977).

²² Argentina, Bangladesh, Cambodia, Chile, Cuba, Cyprus, Denmark, Dominican Republic, Ecuador, Egypt, Finland, France, Germany(E), Germany(W), Greece, Indonesia, Iran, Israel, Italy, Lebanon, Nigeria, Poland, Portugal, Saudi Arabia, Somalia, Sudan, Syria, Tanzania, United States, Venezuela, Yemen(Aden), and Yugoslavia. See note 21 *supra*.

the limits of, or otherwise not exceeding 18 miles from baselines of, the claimants' territorial waters. In these modest cases, the claims represent preventive measures to regulate the innocent passage of foreign vessels within territorial waters in time of war or emergency. Besides the above-mentioned Chinese Military Warning Zone, which extends beyond 50 miles at some points, other particularly broad claims may be seen in Tanzania's 50 miles,²³ Chile's 100 kilometers (approximately 54 miles),²⁴ and Ecuador's and Somalia's 200 miles.²⁵ The wider claims of these few states are hardly more exclusive than the territorial waters of 15 other states whose limits range from 50 to 200 miles.²⁶ It may also be noted in passing that within its 200-mile territorial waters Somalia prohibits the innocent passage of ships of a nationality not recognized by it and requests prior notice for warships.²⁷

The United States and 21 American States, excluding Canada, set up a 300-mile sea defense zone in 1939, when they adopted the Declaration of Panama.²⁸ The zone has since been made permanent by the 1947 Inter-American Treaty of Reciprocal Assistance, which at the same time extended it roughly to an oval enclosure reaching both Poles.²⁹ Extravagant as the zone may appear, it is intended, *inter alia*, simply "to provide for effective reciprocal assistance to meet armed attacks against any American State." With the exception of China's, these current claims to sea defense jurisdiction represent peacetime measures adopted to provide a basis for taking protective action when the need arises; in jurisdictional exclusivity they are basically different from North Korea's or China's, which amount to an essentially territorial jurisdiction.

As for precedents no longer in effect, it is relevant to cite first the Sea Defense Zone, which the United Nations Command then in Tokyo proclaimed around Korea on September 27, 1952, during the Korean War. Enclosing the entire Korean peninsula by what was commonly called the Clark Line (after the name of the Commander), the Zone extended to a distance of roughly 100 miles at some points and was intended to be "strictly a wartime measure designed to safeguard the Korean coastline . . . and to bar the Korean coast to enemy agents and contraband."³⁰ Japanese

²³ See note 21 *supra*, at 190.

²⁴ See note 21 *supra*, at 41.

²⁵ Art. 9(1), Law No. 37 (Sept. 10, 1972), *Bollettino Ufficiale*, July 21, 1973, at 246.

²⁶ See the addendum of Apr. 1, 1977, to *op. cit.* note 21 *supra*.

²⁷ See note 21 *supra*, at 172.

²⁸ See 7 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 703 (1943).

²⁹ Inter-American Treaty of Reciprocal Assistance, signed at Rio de Janeiro Sept. 2, 1947, TIAS 1838, 21 UNTS 77, and 5 FOR. REL. U.S.: AMERICAN REPUBLICS 35 (1948). For a comment on the Rio Treaty, see, e.g., KUNZ, *The Inter-American Treaty of Reciprocal Assistance*, 42 AJIL 111 (1948). For the maps and the San Jose amendment of July 26, 1975, whereby Greenland has been excluded from the zone and its northern limit ends at 86° 30' North and 60° West, see INTER-AMERICAN TREATY OF RECIPROCAL ASSISTANCE, APPLICATIONS, Vols. I-II (1973) and Vol. III (1973-76), General Secretariat, OAS, Wash. D.C. (1977). For a comment in connection with the origin of the 200-mile zone, see HOLICK, *The Origins of 200-Mile Offshore Zones*, 71 AJIL 494 (1977).

³⁰ See CLARK, *FROM THE DANUBE TO THE YALU* 154 (1954).

fishing within the Zone was barred, but neutral vessels in transit were subject to restrictions necessary only for military security. Despite the wartime situation that gave rise to it, the Zone was not exclusive, although extensive.³¹

Japan and the United States also had their own wartime practices whereby sea defense zones were established to extend beyond the limits of their territorial waters. During the Russo-Japanese War of 1904-1905, the Japanese navy established "twelve or more of such areas," some of which extended beyond Japan's 3-mile territorial waters and "even 10 miles from land in some instances," prohibiting "the ingress and egress and passage of [non-military] vessels from sunset to sunrise."³² During the First World War, the United States established 30 such areas and, during the Second World War, over 40. The widest of these, the Southeastern Alaska Maritime Control Area, extended some 53 miles beyond the 3-mile limit of United States territorial waters.³³ The exclusivity of these zones varied, restrictions being applicable "between sunset and sunrise" mainly to non-military vessels. In the case of the Soviet Union, fortified zones were also occasionally established in certain areas contiguous to its territory; however, with its geographical disadvantage of having to use numerous narrow passages to reach warm-water ports and the major oceans of the world, this global maritime power has become less assertive of its traditional closed sea doctrine.³⁴

In the final analysis, the legal character of the North Korean claim should be identified with reference to the state of international law as it relates to the issue. Specifically, the Geneva Convention on the High Seas provides in Article 2 the freedoms of navigation and overflight on the high seas and, in Article 8(1), "complete immunity [for warships] from the jurisdiction of any state other than the flag state." Furthermore, the breadth of a contiguous zone as defined in Article 24(2) of the Convention on the Territorial Sea and the Contiguous Zone "may not extend beyond twelve miles" from the territorial sea, and according to Article 24(1)(a), the coastal state "may exercise the control necessary to [p]revent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea." In retrospect, the International Law Commission maintained in its draft of 1956 that "the extreme vagueness of the term 'security' would open the way for abuses and . . . the granting of such rights was not necessary."³⁵ It is, therefore, clear that a military boundary zone as extensive and exclusive as North Korea's would not even remotely approximate what the

³¹ The Zone was abolished on August 27, 1953, upon coming into force of the Armistice Agreement on July 27, 1953. For a map of the Zone, see, e.g., KUKJE JOYAKJIP (Collection of International Treaties) 446 (Lee *et al.* eds. 1958).

³² See U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW SITUATIONS 122 (1912).

³³ See U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW SITUATIONS 117 (1914); INTERNATIONAL LAW DOCUMENTS 83, 89 (1941); (1943) at 64; and 39 Stat. 1194.

³⁴ See, e.g., BUTLER, note 2 *supra*, at 116.

³⁵ See, [1956] International Law Commission Report, 11 GAOR, Supp. 9, at 39-40 UN Doc. A/3159 (1956).

Geneva Conventions on the Law of the Sea stipulate with respect to a coastal state's maritime jurisdiction.

Assuming that the Third United Nations Conference on the Law of the Sea will eventually adopt, without substantive changes, what its Informal Composite Negotiating Text provides on the freedom of the high seas and the contiguous zone, it is reasonable to assume that the law of the sea will never stand to recognize a security zone on the high seas. By the same token, it should be pointed out that although the spatial extent of 200 miles has become a certainty as a new limit of a coastal state's maritime jurisdiction, the Composite Text provides no grounds to expect that an extended economic jurisdiction may be defended with an exclusive military measure extending beyond the territorial waters except in time of active war.

Finally, one should consider the circumstances which motivated North Korea to proclaim the military zone. The relationship between North and South Korea is characterized by a quarter-century cease-fire, which has been maintained by the vigilance of roughly half a million soldiers on each side since 1953. However, the tenseness of the situation alone would not suffice to support the legality of the North Korean claim. International law has not entertained the concept of sea defense zone, largely on the grounds of its vagueness and susceptibility to abuse. The argument for a maritime security zone based on tension would be further weakened should either side or both be found partly or wholly answerable for perpetuating the tension.

Specifically, there are two highly sensitive issues. The first concerns the problem of maritime infiltration and espionage with which each side frequently and almost habitually charges the other. Obviously, the North Korean claim is partly based on this pretext,³⁶ just as South Korea's two Special Maritime Zones established in the Sea of Japan and the Yellow Sea for the safety of fishing operations are also partly intended to prevent the infiltration of North Korean agents.³⁷ The second issue, as noted above,

³⁶ For a North Korean explanation, see the commentator's article in the *Rodong Shinmun* (Labor News), Aug. 8, 1977; the English version *No One Can Meddle in DPRK's Step of Establishing Military Sea Boundary*, *People's Korea*, Aug. 17, 1977, at 1, Col. 1.

³⁷ For details with a map, see *Asahi Shinbun*, Oct. 29, 1975, morning ed., at 1, Col. 1. The two South Korean zones were established in the name of the Regulations for the Safety of Shipping Operations and revised twice, in 1973 and 1974. The zone in the Sea of Japan extends over 150 miles and in the Yellow Sea over 100 miles. In October 1975, the South Korean government informally requested the Japanese government to prohibit Japanese fishermen from operating in the two South Korean zones, a request with which the Japanese government refused to comply on the grounds that Japanese fishing off South Korean coast would be regulated solely by the fisheries agreement concluded between the two countries in 1965. For further details, see also SUSAN-OP DONGHYANG-E KWANHAN YONCHA BOGOSO (Annual Report on the Trends of Fishing Industry), Office of Fisheries, Seoul, 1976, at 224. It should also be recalled that at the First United Nations Law of the Sea Conference held at Geneva in 1958 (North Korea was not represented) South Korea was one of the six states that supported the concept of security zones. Its Delegate Kim "hoped that the omission [by the International Law Commission of special security rights in the contiguous zone] would

involves the problems of navigation in the waters contiguous to the five South Korean islands situated closely offshore North Korea. This issue raises highly technical legal questions relating to the demarcation of a lateral boundary in an area with exceptionally complicated geographical circumstances. As the primary mechanism of dispute settlement, however, the 1953 Armistice Agreement is both structurally defective and politically ineffective.³⁸

Economically, the sea surrounding Korea is a potential source of riches. Under divided leadership, however, it has also been a source of overriding security problems. Thus even in arguments on essentially legal issues such as maritime jurisdiction, the contending parties have at times subordinated the role of international law to merely providing inoffensive language. Although international law relating to maritime jurisdiction owes much to the old "cannon shot" criterion, it should not be called upon to yield to current efforts to substitute force for law.

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A NEW RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES

A look at a 1965 photograph is enough to persuade us that we are not now as we were then. Some turning of the pages of the RESTATEMENT SECOND OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, published by The American Law Institute in 1965, will produce much the same impression. For all of its authority and serviceability, the RESTATEMENT re-

be remedied and that the coastal State would be authorized to exercise the control necessary to safeguard its national safety." See FIRST UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFF. RECS., UN Doc. A/CONF.13/39, at 44 (1958). The other five states were Byelorussia, Czechoslovakia, the Philippines, Poland and Yemen. For a Comment on security zones in general, see Fell, *Maritime Contiguous Zones*, 62 MICHIGAN L. REV. 848 (1964).

³⁸ Since 1953 when the Armistice Agreement was signed between the United Nations on the one hand and North Korea and the People's Republic of China on the other, the political circumstances relating to the Korean situation have substantially changed. China, which the United Nations branded as an "aggressor" for sending its troops to aid North Korea, has now replaced the Republic of China (Taiwan) in the Security Council of the United Nations as one of its Permanent Members, and North Korea has also become a member of many Specialized Agencies of the United Nations. In recent years, attempts have been made at the General Assembly to abolish the United Nations Command in Korea. For an analysis of the legal status of the United Nations Command in Korea in relation to the United Nations itself, see Baxter, *Constitutional Forms and Some Legal Problems of International Military Command*, 29 BRIT. Y.B. INT. L. 325, 332 (1952).

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flects a body of law that has undergone a number of changes since 1963, when for all practical purposes work was completed on what was curiously identified as the *RESTATEMENT SECOND*.

The *RESTATEMENT SECOND* had four parts—"Jurisdiction," "Recognition," "International Agreements," and "Responsibility of States for Injuries to Aliens"—each one of which has undergone more or less change in the intervening years. The law of the sea, now a sweep of law of major proportions; then found shelter within "Jurisdiction." As the United States Government has quietly moved to the Estrada Doctrine, the significance of recognition has faded away, at least so far as this country is concerned. International agreements are no longer regulated by uncodified customary international law but by the Vienna Convention on the Law of Treaties of 1969, which is widely resorted to by the United States, even though this country is not yet a party to that important treaty. The Congress has also moved in to regulate and to influence the making of international agreements. And the law of Responsibility of States for Injuries to Aliens has been overshadowed by the developing interest in the protection of human rights.

Not only the substance of the law but also the form and sources of both the international law and municipal law components of foreign relations law have altered. The Part on "International Agreements," drafted to reflect customary international law, must now move closer to the rules and form of the Vienna Convention on the Law of Treaties. Similarly, Topic 3 of Chapter 4 of the Part on "Jurisdiction" must now reflect the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. The Foreign Sovereign Immunities Act of 1976 must displace the old law on sovereign immunity. If there is a new treaty on the law of the sea to which the United States becomes a party, then the *RESTATEMENT* can no longer speak in terms of the customary law and the old Conventions of 1958. A new *RESTATEMENT* will thus have to weave in customary international law, the common law of the United States, treaties, and statutes—no easy task if the *RESTATEMENT* is not to be a patchwork of law.

Moreover, if the United States has differing treaty relations with a variety of states, the *RESTATEMENT* will have to indicate that the rule of law applicable in the relations of the United States with one state may be different from the rule governing its relations with another country.

These major changes in the law and a perceived need to broaden the scope of the *RESTATEMENT SECOND* led the Council of The American Law Institute to take the decision to prepare a new *RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES*. It was thought desirable that the *RESTATEMENT* should embrace some of the new areas of international law that have achieved enhanced prominence since 1965—the law of the sea, the law of the environment, and human rights law—as well as to give major consideration to two topics that were only lightly touched upon in

- Part I. Sources of International Law
- Part II. International Agreements

the RESTATEMENT SECOND—remedies for violation of international law and international obligations and the sources of foreign relations law and their place in the law of the United States. Although no final decision has been taken on the matter, the table of contents of the new RESTATEMENT will probably look something like this:

- Part III. International Persons
- Part IV. Jurisdiction
- Part V. The Law of the Sea
- Part VI. The Law of the Environment
- Part VII. The Protection of Persons (Natural and Juridical)
- Part VIII. Remedies

Consideration is being given to the inclusion of one or more areas of international economic law. The new RESTATEMENT may well be double the size of the old one and will resemble more closely than does the RESTATEMENT SECOND a codification of international law and of the United States law bearing upon the conduct of foreign relations. Nevertheless, many areas of international law will not be touched upon, necessarily so because a comprehensive RESTATEMENT OF FOREIGN RELATIONS LAW would fill four or five volumes.

The preparation of the new RESTATEMENT, which is expected to take approximately five years, has been undertaken by Professors Thomas Buergethal, Andreas Lowenfeld, Louis B. Sohn (Associate Reporters), and R. R. Baxter (Chief Reporter). According to the normal practice of The American Law Institute, the texts prepared by the Reporters will be reviewed by an Advisory Committee, the first increment of which has been appointed; the Council of The American Law Institute; and the membership of the Institute at its annual meeting. The Institute may also convene a European or International Advisory Committee in order to avoid any parochialism that might creep into an entirely American product. There will thus be wide participation in this process of articulating the Foreign Relations Law of the United States, lending, it is hoped, particular authority to the resulting work.

R. R. BAXTER

CORRESPONDENCE

TO THE EDITORS-IN-CHIEF

Great Powers and UN Assessments
May 17, 1978

In his article entitled "The People's Republic of China and the Charter-Based International Legal Order" Samuel S. Kim states: "There is an almost universally shared assumption among the participants that such great powers as the United States (UNESCO, ILO), the Soviet Union (UNEF I and ONUC), and the PRC (UNEF II and UNDOF) cannot be expected to pay for the programs or items that are perceived as being contrary to their national interests. This is a matter of perception, not of law, which does not need to be debated here. However, the legal hazards and ambiguities in Chinese budgetary practices are self-consciously left unclarified by both China and other member states. The desire not to reopen the Pandora's box of Article 19 seems to be universal."¹

The cases cited are not the same. In the Article 19 situation, the Soviet Union and a few other states refused to pay assessments for UNEF I and the Congo operations. The Soviet Union did not claim that UNEF was contrary to its national interest. In the Congo operation, it voted for Security Council resolutions establishing and continuing the operation at least four times. The International Court of Justice rendered an advisory opinion that assessments for these operations were "expenses of the organization" in the sense of Article 17 of the UN Charter. The International Court of Justice opinion was accepted by a General Assembly vote of 76-19. Thus, the Soviet Union was considered in contravention of Article 17 by a majority of the General Assembly, but many countries who voted with the majority did not want to bring the issue to a head for fear that the U.S.S.R. would leave the United Nations. Ambassador Arthur Goldberg, in his statement of August 16, 1965, indicated that if the Soviet Union could refuse to pay, the United States and other members would also be within their rights in refusing to pay assessments for actions of which they disapproved; however, the United States has not thus far exercised that option.

The case of the United States and the ILO is very different. Here the United States paid all assessments due. It gave two years notice of its intention to withdraw as stipulated in the ILO Charter. One may argue whether or not a withdrawal was wise but there is no question that it was done in a completely legal manner. The Soviet action with respect to UNEF and the Congo, on the other hand, stands on a dubious legal ground, to say the least.

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¹ 72 AJIL 335 (1978).

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

MARIAN L. NASH *

The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

DIPLOMATIC RELATIONS AND RECOGNITION (U.S. *Digest*, Ch. 2, §3)

On April 27, 1978, the Government of Afghanistan was overthrown in a bloody coup in which President Mohammed Daud, his wife, several members of his family, and several Cabinet members and aides were slain. Power was assumed by a Revolutionary Council.

By a note to all the diplomatic missions in Kabul, April 30, 1978, the Ministry of Foreign Affairs of the Democratic Republic of Afghanistan provided details of the new Government; it also requested them to pass the information to their Governments, to obtain recognition of the Democratic Republic of Afghanistan, and to inform the Ministry of Foreign Affairs [thereof]. The operative portion of the reply of the American Embassy at Kabul reads:

The Government of the United States of America assumes that the Government of the Democratic Republic of Afghanistan will continue to honor and support the existing treaties and international agreements in force between our two States. On that assumption, it is the intention of the Government of the United States of America to maintain diplomatic relations with the Government of the Democratic Republic of Afghanistan.

The Ambassador of the United States of America hopes that it will be possible, at an early opportunity, to receive briefings on the policies and plans of the Government of the Democratic Republic of Afghanistan.¹

In reply to press inquiries on the question of recognition, the Department of State's Spokesman, Hodding Carter III, stated, on May 1, 1978:

As you know, the question of recognition under the formulation of the last few years doesn't arise per se. . . .

.....

The important question is not recognition. The question is whether diplomatic relations continue. . . .²

In its instructions to the American Embassy at Kabul, the Department of State referred to existing guidance incorporating S.Res. 205 (1969) which expressed the sense of

* Office of the Legal Adviser, Department of State.

¹ Note No. 92, May 6, 1978.

² Press Briefing, May 1, 1978, at 12-13.

the Senate that "when the United States recognizes a foreign government and exchanges diplomatic representatives with it, this does not of itself imply that the United States approves of the form, ideology, or policy of that foreign government." 115 CONG. REC. 27118 (1969). House Comm. on Int'l Relations & Sen. Comm. on For. Relations, 95th Cong., 2d sess., *Legislation on Foreign Relations through 1977*, Vol. I, p. 673 (Jt. Comm. Print 1978).

INTERNATIONAL ORGANIZATIONS
(U.S. *Digest*, Ch. 2, §4C)

Privileges and Immunities of Representatives of Members

On January 31, 1978, a Federal grand jury sitting in Alexandria, Virginia, returned a seven-count indictment against Ronald Louis Humphrey, an American citizen employed by the U.S. Information Agency, and Truong Dinh Hung, a national of Vietnam resident in the area, charging that the defendants conspired and acted to deliver material relating to the national defense of the United States to the Government of the Socialist Republic of Vietnam. The indictment also named five unindicted co-conspirators, one of whom was Ambassador Dinh Ba Thi, the Permanent Representative of the Socialist Republic of Vietnam to the United Nations. The indictment listed a series of overt acts, charged to have taken place in Virginia, the District of Columbia, and elsewhere, that involved the delivery of classified documents related to the national defense of the United States, including, but not limited to, information about U.S. political, military and diplomatic relations, efforts and intelligence assessments in Thailand, Singapore, Vietnam, China, and Ethiopia.

The Department of Justice having advised the Department of State of its evidence that Thi had been personally involved and that Thi would have been indicted upon the basis of the evidence, had he not possessed diplomatic immunity, the Department of State informed the office of the Secretary-General of the United Nations of its decision to expel Ambassador Thi. Following this notification and an oral demarche by the U.S. Mission to the United Nations to the Mission of the Socialist Republic of Vietnam, on February 1, the Department of State instructed the U.S. Mission to confirm the notification of expulsion, by a diplomatic note, February 3, 1978.

The Permanent Mission of the Socialist Republic of Vietnam to the United Nations issued a statement on February 3, 1978, declaring the decision of the U.S. Government "unacceptable" and announcing that Ambassador Thi would "continue to carry out normally his duty as the Representative of the Socialist Republic of Viet Nam." It also requested that the UN Committee on Relations with the Host Country be convened to consider the matter.¹

At the committee's meeting on February 9, 1978, Ambassador James F. Leonard, United States Deputy Representative to the United Nations, made a statement, the text of which reads in part as follows:

As most members are aware, the United States has, since the establishment of the United Nations Headquarters in New York City, re-

¹UN Doc. A/AC.154/161, Feb. 6, 1978.

served for itself the right to compel the departure of a diplomat who abuses the privileges of his or her residence here. This fundamental right, which flows from our sovereignty and our participation in the family of nations, is preserved by Section 13(b) of the Headquarters Agreement which the United Nations and the United States negotiated and concluded in 1947.

In order to assure that this basic right would be exercised in a responsible manner, my Government agreed to the inclusion in the Headquarters Agreement of the requirement that a request for the departure of a diplomat would be made only upon the authorization of the Secretary of State after consultation with the Member concerned. In addition, it has been our consistent practice to keep the Secretary General informed with respect to any instance in which the host country intends to request a diplomatic departure.

.....

To put the current case in perspective it is useful to recall that the United Nations has been established here for a generation with a community which now numbers over 4,000 diplomatic personnel and families. In addition, the United Nations international staff and their families include more than 15,000 additional persons. Yet there has been, on the average, less than one instance a year in which activities abusing privileges of residence have brought the United States to seek the departure of any person in accordance with the Headquarters Agreement. The rarity of such cases shows that on the whole there has been the greatest mutual respect—respect by the United Nations, its members and their representatives for the rights of the host country, and respect by the United States for the rights of the United Nations community....

.....

From the beginning the Department of State has been conscious of the fact that the United States has never before asked for the departure of the Permanent Representative of a Member State accredited to the United Nations. However, we felt compelled to take this action. The facts regarding Ambassador Thi are clear. The independent grand jury has named Ambassador Thi as a co-conspirator based on precise evidence of his personal involvement in a case relating to the security of the United States. It is for this reason that my Government requested his departure.²

The discussion in the committee³ focussed upon (1) the right of the host country to expel, under the terms of section 13(b) of the Headquarters Agreement, or, in the case of international organizations with headquarters in countries other than the United States, under analogous agreements, (2) the nature of the consultation specifically referred to in section 13(b) of the Headquarters Agreement, and (3) whether the United States had violated its obligations in these respects.

With respect to the meaning of "consultation" in section 13(b) of the Headquarters Agreement, the UN Legal Counsel, Under Secretary General

² Press Release USUN-1(78), Feb. 9, 1978. For the Summary Record of the meeting, see UN Doc. A/AC.154/SR 69 (1978).

³ UN Docs. A/AC.154/SR. 70, 71, and 72 (1978).

Erik Suy, delivered an opinion that supported the correctness of the procedure followed by the United States. The Summary Record of the 71st meeting reports as follows:

Mr. SUY (Under-Secretary-General, The Legal Counsel), replying to the question raised by the representative of Senegal concerning the legal definition of "prior consultation" said that, according to the only existing dictionary on the terminology of international law, the expression was used to describe either joint consideration of a matter or the action of requesting the opinion of another Government. During the meeting of the Trusteeship Council on 24 January 1950 the Belgian representative had stated that the expression "after consultation with" was more precise than "request the opinion of" but that neither went as far as "with the agreement of." The United States representative had said at that time that consultation implied a continuous action whereas a request for an opinion was a specific action that could prompt a negative or affirmative reply.

.....

Finally, according to a study prepared by the Secretariat some 15 years earlier on the expressions "in consultation with" and "after consultation with," a distinction must be made between "consultation" on the one hand and "agreement," "concurrence" or "consent" on the other unless it was clearly indicated in the text that the purpose of consultation was to secure agreement. The study observed that the expressions "in consultation with" and "after consultation with" were used with more or less the same meaning as "taking into account the views of" or "bearing in mind the recommendations of"; although United Nations practice indicated no significant differences between the first two expressions, "in consultation with" seemed to refer to a more continuous process leading to the reaching of a decision by the consulting parties. The study concluded that a careful distinction was made between the use of the expressions "in consultation with" or "after consultation with" and such expressions as "with the concurrence of".⁴

TRUST TERRITORIES (U.S. Digest, Ch. 2, §6)

Micronesia

On April 9, 1978, at Hilo, Hawaii, a statement of agreed principles for a free association between the peoples of Micronesia (the Caroline and Marshall Island archipelagoes) and the United States was signed by representatives of the Committee on Future Political Status of the Commission on Future Political Status and Transition of the Congress of Micronesia, the Marshall Islands Political Status Commission, the Palau Political Status Commission, and the United States. The principles are to be embodied in a final agreement, subject to the implementing authority of the United States Congress; the agreement will also be put to a UN-observed plebiscite. The statement of agreed principles reads as follows:

1. An agreement of free association will be concluded on a government-to-government basis and executed prior to termination of the United Nations trusteeship. During the life of the agreement the

⁴ UN Doc. A/AC.154/SR. 71 (1978).

political status of the peoples of Micronesia shall remain that of free association as distinguished from independence. The agreement will be subject to the implementing authority of the United States Congress.

2. The agreement of free association will be put to a United Nations observed plebiscite.

3. Constitutional arrangements for the governance of Micronesia shall be in accord with the political status of free association as set forth in these principles.

4. The peoples of Micronesia will enjoy full internal self-government.

5. The United States will have full authority and responsibility for security and defense matters in or relating to Micronesia, including the establishment of necessary military facilities and the exercise of appropriate operating rights. The peoples of Micronesia will refrain from actions which the United States determines after appropriate consultations to be incompatible with its authority and responsibility for security and defense matters in or relating to Micronesia. This authority and responsibility will be assured for 15 years, and thereafter as mutually agreed. Specific land arrangements will remain in effect according to their terms which shall be negotiated prior to the end of the trusteeship agreement.

6. The peoples of Micronesia will have authority and responsibility for their foreign affairs including marine resources. They will consult with the United States in the exercise of this authority and will refrain from actions which the United States determines to be incompatible with its authority and responsibility for security and defense matters in or relating to Micronesia. The United States may act on behalf of the peoples of Micronesia in the area of foreign affairs as mutually agreed from time to time.

7. The agreement will permit unilateral termination of the free association political status by the processes through which it was entered and set forth in the agreement and subject to the continuation of the United States defense authority and responsibility as set forth in Principle 5, but any plebiscite terminating the free association political status will not require United Nations observation.

8. Should the free association political status be mutually terminated the United States' economic assistance shall continue as mutually agreed. Should the United States terminate the free association relationship, its economic assistance to Micronesia shall continue at the levels and for the term initially agreed. If the agreement is otherwise terminated the United States shall no longer be obligated to provide the same amounts of economic assistance for the remainder of the term initially agreed. An early free association agreement based on the foregoing eight principles shall be pursued by the parties.¹

PROTECTION OF HUMAN RIGHTS
(U.S. *Digest*, Ch. 3, §6)

International Terrorism

Testifying before the Senate Governmental Affairs Committee in support of S. 2236, the Omnibus Antiterrorism Act of 1977, on January 23, 1978,

¹ 78 DEPT. STATE BULL., June 1978, at 49, UN Doc. T/1789 (1978).

Secretary of State Cyrus R. Vance identified its goals as being:

to deter terrorist attacks, to discourage other governments from co-operating with or giving refuge to terrorists, to capture and prosecute those who participate in such crimes, and to do this in cooperation with other governments.¹

He noted such "encouraging" developments as the refusal by nearly every Middle Eastern nation to give sanctuary to the hijackers in the then recent Japan Air Lines and Lufthansa hijackings, the rescue operations of the Israelis at Entebbe and of the West Germans at Mogadiscio, and the consensus reflected by UN General Assembly Resolution 32/8 of November 3, 1977. Secretary Vance then described actions taken by the United States on a number of fronts:

First, we have made clear to all that we will reject terrorist blackmail. We have clearly and repeatedly stated our intention to reject demands for ransom or for the release of prisoners.

Second, . . . we have strengthened airport security within the United States. . . .

Fourth, through action initiated this fall by Secretary [of Transportation Brock] Adams at the International Civil Aviation Organization, we have been working to upgrade the international standards for airport security. The primary focus of this effort is to require mandatory pre-flight inspection of all passengers and accompanying baggage.

Fifth, we have intensified our efforts to move other countries to ratify the Tokyo, Hague, and Montreal Conventions. . . . [T]hese conventions provide for the apprehension, prosecution, and extradition of those who hijack or sabotage commercial aircraft. To date, 62 countries have ratified all three conventions; 55 have ratified none. We are not satisfied with these numbers; worldwide acceptance of these basic principles is essential.

Sixth, we have developed, and are improving, procedures for co-operating and exchanging information among law enforcement agencies around the world. . . .

The Special Coordination Committee [of the National Security Council] supervises a senior-level interagency group to insure coordination among agencies dealing with terrorism. . . . It has met frequently since it was established in September 1977.

To fulfill our responsibilities within this framework, the State Department has developed its own procedures. Our Operations Center is fully staffed on a 24-hour basis to manage crisis situations. It has instantaneous communications to all parts of the government, direct access to top officials, and prompt communication to all posts overseas. . . .

Our procedures are designed to anticipate terrorist attempts, as well as to deal with ongoing incidents. . . .

¹ 78 DEPT. STATE BULL., March 1978, at 53 (1978).

When U.S. citizens in foreign countries are threatened, we immediately communicate with foreign governments and make available to them our information, advice, and experience to assist them in carrying out their responsibilities.

Eighth, cooperation on antiterrorism has become an important part of our bilateral relations with other nations. We are urging other governments to take appropriate steps to combat terrorism and bring terrorists to justice.

Obstacles to effective cooperation among governments remain. Some governments, sympathetic to the asserted cause of particular terrorist organizations, not only provide safe haven but also arm, train, and provide cover. Others shy away from resolute action to avoid jeopardizing relations with countries that support terrorist organizations; still others prefer to avoid the apprehension or prosecution of terrorists for fear of new terrorist attacks aimed at freeing comrades. We will continue to press these governments to assume the full measure of their international responsibilities.²

Among the provisions which Secretary Vance urged embodying in the legislation were a public list of countries aiding or abetting terrorist actions and imposition of sanctions against such countries. In regard to the question of sanctions, he said:

. . . We believe that any such sanctions should be considered on a case-by-case basis taking into account probable effectiveness; the interest of U.S. citizens living abroad; and our overall political, security, and economic relationships. In addition, to be effective, sanctions must be fashioned so that they can be altered or lifted in response to evidence of change.³

State Department Reports on Economic and Military Assistance

On March 8, 1978, the Subcommittee on International Scientific and Security Affairs of the House International Relations Committee held a hearing concerning the sale by U.S. companies of police and law enforcement equipment to foreign countries, during which Representative Thomas Downey raised a number of questions about current commercial weapons sales practices vis-à-vis governments with poor records in the human rights area. Afterwards, Representative Gerry E. Studds, by a letter of March 10, requested a letter from the Department of State, spelling out the Administration's views with respect to both the general thrust of, and the specific suggestions made by Congressman Downey.

By a letter signed by the Under Secretary of State for Security Assistance, Science and Technology, Lucy Wilson Benson, under date of April 8, 1978, the Department of State replied, in part as follows:

As you know, the Administration has placed a renewed emphasis on the observance of, and respect for, internationally recognized human rights as a fundamental tenet of United States foreign policy. Consistent with this policy and the provisions of section 502B of the

² *Id.*, at 54.

³ *Id.*, at 55.

Foreign Assistance Act of 1961, as amended, we carefully review all proposed exports of commercially sold items on the Munitions List intended for countries where substantial human rights problems exist. This is especially the case with respect to proposed exports of equipment that could be used by the police and other civil law enforcement authorities of those countries. The review process has recently been expanded to include police-related items not on the Munitions List, whose export is controlled by the Commerce Department. In many cases, applications for licenses for such exports have been denied on human rights grounds. In addition, we have made clear to a number of governments that the question of the nature and scope of any security assistance relationship with the United States is directly related to the state of human rights observance.

....

... The following comments are keyed to the questions which you have asked:

1. Section 38(e) of the Arms Export Control Act incorporates by reference the provisions of section 7(c) of the Export Administration Act of 1969, as amended, so that the requirements of the latter provision of law are made applicable to the activities of the Office of Munitions Control. Consequently, confidential business information, or information with respect to which a request for confidential treatment has been made by the person or firm supplying that information, received by the Office of Munitions Control, may not be released to third parties unless the Director of that office finds that withholding the information would be contrary to the national interest. (Section 38(e) carries with it the qualification that nothing therein shall be construed as authorizing the withholding of information from the Congress.) Moreover, the Freedom of Information Act exempts from disclosure under that statute "... commercial or financial information obtained from a person and privileged or confidential", 5 U.S.C. §552(b)(4).

....

On the other hand, the Department does make available to the public, upon request, statements submitted under section 38(b)(1) of the Act, which identify and describe the activities of persons engaged in the manufacture, export or import of defense articles and defense services, without reference to particular transactions. Further, the annual report submitted to Congress each year under section 657(a)(3) of the Foreign Assistance Act is almost entirely public information. This report documents arms exports to all countries during the preceding fiscal year.

2. As you know, we do not construe the term "internal security" as used in section 4 of the Arms Export Control Act to refer to police and other civil law enforcement activities, but rather to the maintenance of internal order in a military sense, a legitimate purpose for which all countries, including our own, have historically maintained and supported armed forces. While we could support in principle an appropriate clarification of the present language of section 4 to make this distinction explicit, any such modification would have to avoid a formulation that would condition the legal propriety of a particular transaction upon the subsequent actions of the purchaser not foreseen at the time the sale was made. ...

3. With respect to the financing under the Arms Export Control Act of purchases related to foreign police, prisons, law enforcement, or domestic intelligence-gathering activities, such activities do not fall within the authorized purposes for which FMS [Foreign Military Sales] sales may be made under section 4 of the Act, and consequently are not activities for which the use of FMS financing would be approved. . . .¹

By a letter to Chairman Clement J. Zablocki, Committee on International Relations, House of Representatives, March 14, 1978, Deputy Secretary of State Warren Christopher transmitted a memorandum describing the arrangements made by the Department of State through the Interagency Group on Human Rights and Foreign Assistance to comply with various statutory requirements requiring human rights considerations to be brought to bear on the distribution of foreign assistance. The memorandum reads:

THE INTERAGENCY GROUP ON HUMAN RIGHTS AND FOREIGN
ASSISTANCE STATUTORY FRAMEWORK

To assure compliance with our laws and policy on human rights and foreign assistance, the Interagency Group on Human Rights and Foreign Assistance was created pursuant to a National Security Council directive dated April 1, 1977.

The statutes which Congress has enacted in this area impose wide-ranging and substantial restrictions on the distribution of foreign assistance. Specifically, Section 116 of the Foreign Assistance Act of 1961, as amended, provides in pertinent part as follows with respect to U.S. bilateral economic assistance:

"Section 116. Human Rights—(a) No assistance may be provided under this part to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, or other flagrant denial of the right to life, liberty, and the security of person, unless such assistance will directly benefit the needy people in such country."

In addition, at the time the Interagency Group was created, a similar provision governed U.S. actions in the Inter-American Development Bank and the African Development Fund. In October 1977, that provision was extended to govern U.S. actions in the World Bank and the Asian Development Bank as well. The statutory provision applicable to these international financial institutions (IFI's) is Section 701 of P.L. 95-118, which provides in pertinent part as follows:

"Section 701. (a) The United States Government, in connection with its voice and vote in the International Bank for Reconstruction and Development, the International Development Association, the Inter-American Development Bank, the African Development Fund, and the Asian Development Bank, shall advance the cause of human rights, including by seeking to channel assistance toward countries other than those whose governments engage in—(1) a consistent pattern of gross violations of internationally recognized human rights such as torture or cruel, inhuman, or degrading treatment or punishment, prolonged

¹ 123 CONG. REC. E1808 (daily ed., Apr. 11, 1978).

detention without charges, or other flagrant denial to life, liberty, and the security of person; . . ."

"(f) The United States Executive Directors of the institutions listed in subsection (a) are authorized and instructed to oppose any loan, any extension of financial assistance, or any technical assistance to any country described in subsection (a)(1) or (2), unless such assistance is directed specifically to programs which serve the basic human needs of the citizens of such country."

In addition, Section 703 of the same Act imposes an affirmative duty on the Executive Branch to seek to channel the rewards in international economic programs to countries whose governments show respect for human rights and to "initiate a wide consultation" toward that end.

Further, the Ex-Im Bank is under a statutory injunction to:

"Take into account, in consultation with the Secretary of State, the observance of and respect for human rights in the country to receive the exports supported by a loan or financial guarantee and the effect such exports may have on human rights in such country." (PL 95-143, October 26, 1977.)

Similar legislation is pending as to the International Monetary Fund and the Overseas Private Investment Corporation.

Another statute to which the Interagency Group is responsive is the new human rights amendment to PL 480. This amendment, enacted in August 1977 provides in pertinent part as follows:

"Section 112. (a) No agreement may be entered into under this title to finance the sale of agricultural commodities to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, or other flagrant denial of the right to life, liberty, and the security of person, unless such agreement will directly benefit the needy people in such country. An agreement will not directly benefit the needy people in the country for purposes of the preceding sentence unless either the commodities themselves or the proceeds from their sale will be used for specific projects or programs which the President determines would directly benefit the needy people of that country. The agreement shall specify how the projects or programs will be used to benefit the needy people and shall require a report to the President on such use within six months after the commodities are delivered to the recipient country."

MANDATE AND COMPOSITION OF THE INTERAGENCY GROUP

In light of these extensive legislative requirements, and in pursuance of the Administration's human rights policy, the Interagency Group was directed by the NSC to examine our bilateral and multilateral foreign assistance decisions as they relate to human rights, to provide guidance regarding specific decisions on bilateral and multilateral assistance, and in general to coordinate the Administration's position in this area. It was directed further that the Group should be chaired by a representative of the Secretary of State, that it should include a representative of the Secretary of the Treasury, as well as officials of the Department of Defense, the National Security Council Staff, and the Agency for International Development. Shortly after this directive was issued, the Secretary of State designated the Deputy Secretary of State as his representative to chair the Interagency Group.

The Group has met regularly since April 1977. Participants in the Group's deliberations have also included representatives of the Agriculture Department, the Commerce Department and the Ex-Im Bank. In addition, Treasury's representatives, the Assistant Secretary of the Treasury for International Affairs (or his deputy), have usually been accompanied by the U.S. Executive Directors to the World Bank and the Inter-American Development Bank. Thus several agencies, each with an interest in the subject matter, are represented at every meeting.

PROCEEDINGS OF THE INTERAGENCY GROUP

Prior to each of its meetings, the Group receives extensive agenda materials. These materials include detailed descriptions of the loans or grants to be considered, including consideration as to whether the proposed assistance would benefit the needy. The agenda materials also include extensive information on human rights conditions in the countries proposed as recipients of assistance. In addition, other fundamental U.S. interests with respect to the country in question are described, since the Group pays close attention to the relationship of our human rights concerns to other critical U.S. objectives. The agenda materials also include a list of other U.S. or multilateral assistance to the proposed recipient which is likely to be presented for decision in the near future, as well as a description of previous U.S. actions concerning the human rights situation in the country in question.

At the Group's meetings, each loan or grant on the agenda is separately considered. The representative of the relevant State Department regional bureau leads off the discussion with an assessment of our overall bilateral relationship with the recipient country, of the human rights situation there, and of the role our position on the loan or grant under consideration might play. Comments are then called for by other participants. There is a full airing of the issue. Typically, the discussion will focus not only on the current situation but also on whether there is a genuine trend toward or away from improvements in human rights conditions.

After discussion, the Group frequently recommends that the loan or grant should be approved, either because human rights conditions in the recipient country are good or are authentically improving or because the assistance will benefit the needy. When appropriate, the Group may advise that the approval should be accompanied by a diplomatic *démarche* explaining our human rights concerns and making it clear that we are seriously taking human rights considerations into account in our foreign assistance decisions. In general and where possible under applicable law, we prefer to discuss our human rights concerns diplomatically before taking any steps with respect to foreign assistance.

When the human rights situation in the proposed recipient country is poor and not improving, the Group may recommend that the U.S. not support the proposed assistance. This will particularly be the case where the assistance will not be likely to benefit the needy. In these circumstances the Group will frequently recommend that a diplomatic *démarche* be made to the government concerned, explaining our position and urging human rights improvements.

In practice, the Group has recommended the deferral of several AID programs to certain governments whose human rights practices were judged to be highly abusive. The number of bilateral assistance loans or grants which were recommended for deferral is small in comparison to the number of projects which were recommended for approval. The approval ratio reflects the fact that much of our bilateral economic assistance goes to countries with good or improving human rights records as well as the fact that such assistance is so heavily concentrated on meeting basic human needs. As has been frequently stated, the Administration fully endorses the view that human rights include the right to fulfill such vital human needs as food, shelter, health care, and education.

The Group has also recommended that the U.S. abstain or vote against approximately 20 IFI loans to governments with poor human rights records. Again, the number of loans which the Group has recommended for approval greatly exceeds the number as to which abstention or opposition has been recommended. This also results from the fact that many proposed recipients of IFI assistance have good or improving human rights records and because a large proportion of IFI assistance is designed to serve basic human needs. This proportion is not as great as in the case of our bilateral economic assistance.

The Group stays abreast of human rights developments in the countries receiving U.S. foreign assistance and has on a number of occasions recommended approval of loans or programs as to which it had previously recommended opposition, abstention or deferral.

Needless to say, no automatic formula can be applied to decide how to vote on particular loans to particular countries, and inevitably seeming inconsistencies will appear. But the Group has learned that the diversity of cultures and the different stages of economic and political maturity make it essential to treat each country on the merits of its own situation and not to attempt to pursue our human rights objectives in precisely the same way as to all countries. In short, tactics must differ from country to country, but our goal—to enhance respect for human rights—remains constant as to all countries.

The Group is continually examining its own procedures to determine how best to improve its operation and effectiveness. The Group is conscious that in systematically bringing human rights considerations to bear on the range of our foreign assistance decisions, it is performing a new function. Inevitably, performance of this function has at times been controversial, as the various participants grow accustomed to the new situation. Nevertheless, we believe it is an important function that must be performed if we are to comply effectively with statutory commands and to be true to our human rights commitments.²

Economic and Military Assistance—Nicaragua

On March 9, 1978, Ambassador Terence A. Todman, Assistant Secretary of State for Inter-American Affairs testified before the Subcommittee on

² 123 CONG. REC. H2,326-27 (daily ed. Mar. 22, 1978).

International Development of the House Committee on International Relations. He focussed primarily on the purpose and effectiveness of U.S. economic and security assistance to Nicaragua and the status of fundamental human rights in that country. He said in part:

Our economic assistance in Nicaragua, as elsewhere, seeks to fulfill one primary objective: to improve the productivity and welfare of the poor majority, particularly those in rural areas. This objective is based on the Foreign Assistance Act, as amended in 1973, which directed that Agency for International Development programming should concentrate not simply on economic growth but on insuring that a nation's poorest people receive the benefits of our assistance. We provide economic assistance for activities which address the basic human needs of the poor and which permit them to participate in the economic development of their countries.

.....

No discussion of U.S. assistance to Nicaragua would be complete without a reference to the status of fundamental human rights and its linkage to such assistance. The Department of State has on numerous occasions expressed its concern regarding this matter to the Government of Nicaragua. . . .

.....

We will continue to observe the status of human rights in Nicaragua closely, as we do in all countries. We will continue by all appropriate means to impress on the Government of Nicaragua our concern regarding human rights violations and the effect that such violations have on the totality of our relations, not just our bilateral assistance programs. We believe that such a cooperative and constructive approach can have a beneficial effect on the welfare of all Nicaraguans, especially the poor.¹

In reply to a question from Congressman Larry Winn, Jr. whether the State Department could play a part in trying to calm down the aftermath of a series of assassinations that had taken place in Nicaragua, Ambassador Todman said:

We have had both direct and indirect conversation with all leaders whom we can identify, explaining to them our view, which we know must be their view, that the shedding of blood, and having the violence increase, destroying lives cannot be in the interest of their own country. It is important for them to get together, to seek a solution which is acceptable to them, the people of Nicaragua.²

¹ *Hearings on Rethinking United States Foreign Policy toward the Developing World: Nicaragua, before the Subcomm. on International Development of the House Comm. on International Relations*, 95th Cong., 2d Sess., 6-7, 9 (1978).

² *Id.*, at 9.

Following Ambassador Todman's testimony, Congressman Winn directed several questions to the Department of State about the mechanism for making and applying human rights decisions to specific economic and military aid programs. The operative part of the Department's reply, by letter of April 11, 1978, from Assistant Secretary for Congressional Relations, Douglas J. Bennet, Jr., reads:

Proposals for bilateral and multilateral economic development assistance are evaluated in a two-step process; the first step is a review by an interagency working group which screens proposals and recipient countries with regard to whether the loan will serve the needy in recipient countries when human rights problems are an issue. This group refers, as appropriate, projects and issues to the Interagency Group on Human Rights and Foreign Assistance chaired by the Deputy Secretary of State, Warren Christopher. . . .

As a practical matter, most arms transfer cases about which there is a difference of opinion are referred to the Secretary or the Deputy Secretary of State in the form of action memoranda which set forth differing opinions on the issues for decision. Each such project or arms transfer is considered on a case-by-case basis, taking into consideration the human rights situation in the proposed country, the nature and purposes of the assistance, the types of equipment and the end-use, for example, whether equipment is intended for civil law enforcement or for external defense purposes. Other security and foreign policy interests with respect to the recipient country are also considered. For example, the licensing of the sale of civilian aircraft in South Africa is approved only after thorough investigation of the proposed end-use of the aircraft in question by our Embassy in South Africa to assure that its use will in no way be related to military or police purposes.³

At the daily news briefing on May 16, 1978, Hodding Carter III, Assistant Secretary of State for Public Affairs and Spokesman for the Department, in confirming press reports that AID funds for projects in Nicaragua were to be released, denied that there was any change of policy in measuring foreign aid against a recipient country's human rights performance. Mr. Carter said:

. . . We will proceed with the \$3.3 million nutrition improvement program for Nicaragua, with several small grant programs addressing basic human needs, and with three programs being conducted by non-governmental organizations in Nicaragua. All of the programs will benefit the needy in Nicaragua.

We remain concerned about the human rights situation in Nicaragua, and we continue to urge the Government of Nicaragua to invite the Inter-American Human Rights Commission to pay an early visit for the purpose of clarifying that situation.⁴

³ *Id.*, at 22-5.

⁴ Dept. of State News Briefing DPC 92, May 16, 1978, at 18-19.

CONCLUSION AND ENTRY INTO FORCE OF TREATIES AND OTHER
INTERNATIONAL AGREEMENTS
(U.S. *Digest*, Ch. 5, §1)

Exchange of Ratifications

In connection with President Carter's planned visit to Panama City for a ceremonial exchange of instruments of ratification of the Panama Canal Treaties, Senator James A. McClure addressed the President, in a letter of April 21, 1978, concerning the timing of the exchange in the light of the "Brooke Reservation"¹ which provided that the exchange should not be effective earlier than March 31, 1979, and that the treaties should not enter into force prior to October 1, 1979, unless implementing legislation should have been enacted by the Congress before March 31, 1979. The Department of State replied on behalf of President Carter, in a letter from Douglas J. Bennet, Jr., Assistant Secretary of State for Congressional Relations, April 28, 1978, reading, in part, as follows:

As Senator Brooke's statements, and the terms of the reservation itself, indicate, the reservation does not address the matter of the date of physical delivery of instruments nor is that data relevant to the purposes of the reservation. Rather, it requires that exchange not be effective earlier than March 31, 1979, so that entry into force of the Treaty will not occur prior to October 1, 1979.

... [W]e do not find anything in the legislative history indicating that the Senate intended a meaning other than that conveyed by the plain text of the Brooke reservation which, in any event, must be considered governing. Moreover, we feel that the interests of the United States will be best served by a prompt delivery of instruments of ratification although these will take effect only later under the terms of the Brooke reservation.²

A letter from Senator Edward W. Brooke to President Carter, April 27, 1978, also suggested the possibility under international law, "that an exchange of the instruments of ratification before March 31, 1979, even if made only in a symbolic way, as is apparently contemplated regarding the . . . ceremony, may create a de jure situation that makes the symbolic exchange binding." The Department's reply on behalf of President Carter, in a letter from Assistant Secretary Bennet to Senator Brooke, May 11, 1978, stated, in part:

... I wish to assure you that such deliveries [of the U.S. instruments of ratification] will be made in full compliance with both the terms and intent of the reservation to the Panama Canal Treaty which you sponsored. In accordance with the reservation, the documents will clearly and unequivocally specify that the exchange of instruments will not be effective prior to March 31, 1979, and that the Treaties will therefore

¹ Reservation (a)(4) to the Panama Canal Treaty. 124 CONG. REC. 5796 (daily ed. Apr. 18, 1978), 72 AJIL 642 (1978). For the text of the treaties, see 77 DEPT. STATE BULL. 483, 496 (1977), S. Exec. N, 95th Cong., 1st Sess., 16 ILM 1022, 1040 (1977), 72 AJIL 225, 238 (1978).

² 124 CONG. REC. S9227 (daily ed. June 15, 1978).

not enter into force prior to October 1, 1979. (The effective date of the exchange could, of course, be advanced if legislation were enacted prior to March 31, 1979.)³

An excerpt from the Protocol of Exchange of Instruments of Ratification Regarding the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal and the Panama Canal Treaty, signed by President Carter and by Brigadier General Omar Torrijos Herrera, Chief of the Panamanian Government, on June 16, 1978, follows:

The respective instruments of ratification of the Treaties have been carefully compared and found to be in due form. Delivery of the respective instruments took place this day, it being understood and agreed by the United States of America and the Republic of Panama that, unless the Parties otherwise agree through an exchange of Notes in conformity with the resolution of the Senate of the United States of America of April 18, 1978, the exchange of the instruments of ratification shall be effective on April 1, 1979, and the date of the exchange of the instruments of ratification for the purposes of Article VIII of the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal and Article II of the Panama Canal Treaty shall therefore be April 1, 1979.

STATE TERRITORY AND TERRITORIAL JURISDICTION
(U.S. *Digest*, Ch. 6, §1)

Wrangell (Wrangel) Island

In reply to a request from Congressman Bill Frenzel for information about Wrangell (Wrangel) Island, located off the Siberian coast in the Arctic Ocean, Assistant Secretary of State for Congressional Relations Douglas J. Bennet, Jr., wrote, under date of July 13, 1978, in part:

Wrangell Island, which lies approximately 200 miles west of the 1867 Alaska Purchase line in the Bering Strait, was known to the aboriginal inhabitants of Siberia from an early period, but efforts by Baron Wrangel, a Russian national, to "discover" it in the 1820's were unsuccessful.

The date of eventual discovery is variously given as 1849 (a British explorer) and 1867. In the latter year an American, a Captain Long, sighted but apparently did not land on the Island; he was followed in that year by a number of other American whalers. In 1879, Commander G. W. DeLong of the U.S. Navy set out to explore the Island. His ship became entrapped by ice, and most of the crew perished when the ice eventually crushed the vessel. A Captain Hooper, sent to find DeLong and his ship, landed on Wrangell and claimed it for the United States in 1881.

In the 1920's, the Canadian explorer Vilhjalmur Stefansson was convinced that the age of the Arctic had come and organized a company to occupy Wrangell and perhaps adjacent islets in 1921, in order to exploit its resources and establish British sovereignty. In September of 1921, a party of four men and one Eskimo cook was landed. A supply

³ *Id.*, S9229.

ship was scheduled to return in 1922, but was prevented from doing so by ice conditions. In 1923, a relief ship disregarded Soviet instructions (in assertion of their claim to Wrangell) that it clear a Soviet port and sailed directly to Wrangell. All of the party had perished except the cook. A new party was left, including one American, thirteen Alaskan natives and one Canadian Eskimo. The group was removed by a Soviet vessel in August of 1924. The Soviets raised their flag, by some accounts removing the British flag still being flown over the Island, despite Stefansson's sale of his interest to an American group in 1924. Prior to the Soviet removal of the party on Wrangell, both the British and Canadian governments had disclaimed any interest in pursuing a claim to the Island.

We have found little evidence that the United States has ever actively asserted a claim to Wrangell Island. We are unaware of American actions subsequent to 1881 which evidence the actual, effective, and continuous functions of a state required to preserve and perfect a claim of sovereignty. While it is true that Wrangell Island was indicated shortly after the turn of the century as part of Alaska on Interior Department maps and in their geographical publications, this would not constitute by itself an exercise of such functions. Mere discovery, unsupported by effective occupation over time, is insufficient to acquire sovereignty over a "terra nullius," according to the legal authorities. The most recent official United States statement on Wrangell contained in our files dates from the period when the Soviets were establishing their control of it, in the early twenties. At the time, it was merely noted that the United States had not relinquished its claim. Notwithstanding considerable in-house study of the issue in the early twenties, we are unaware of diplomatic activity at any time to advance such a claim against the British, or after 1924, the Soviets.

The United States has never had occasion formally to recognize Soviet ownership of Wrangell Island, although it did reject Soviet claims based on a sector principle in the Arctic. The United States, however, has long since adopted the practice of dealing with authorities in *de facto* control of territory, and we do not consider that recent scientific cooperative activities with the Soviet Union with respect to Wrangell Island necessarily import any recognition of legal status.¹

United Arab Emirates

The Department of Justice requested the views of the Department of State concerning certain aspects of the case of *Occidental of Umm Al Qaiwain Inc. v. A Certain Cargo of Petroleum Laden aboard the Tanker "Dauntless Colocotonic," etc., et al.*,¹ in which the U.S. Court of Appeals for the Fifth Circuit had requested the United States to file an *amicus curiae* brief. The case consisted of three consolidated actions to recover crude oil extracted from the seabed of the Persian Gulf adjoining Sharjah and Umm Al Qaiwain, two of the Trucial Sheikdoms constituting the United Arab Emirates, and Iran, the oil having been lifted from a point

¹ Dept. of State File No. P78 0119-0676.

² No. 75-3088 (5th Cir., filed July 30, 1975). The decision, Aug. 9, 1978, is at 577 F.2d 1196.

located nine miles off the coast of the Island of Abu Musa. Occidental claimed the oil on the grounds that the oil had been obtained from an area of the seabed over which it had a valid lease from Umm Al Qaiwain that had been unlawfully confiscated by Sharjah and Iran. The defendants contended that the lease under which Occidental claimed was invalid on the grounds that Umm Al Qaiwain did not have sovereignty over that area at the time the lease was executed.

Legal Adviser Herbert J. Hansell replied, on May 12, 1978, that it was the Department of State's view that it would be contrary to the foreign relations interests of the United States if its domestic courts were to adjudicate boundary controversies between third countries, particularly the controversy involved in the instant litigation. Mr. Hansell continued:

The extent of territorial sovereignty is a highly sensitive issue to foreign governments. Territorial disputes are generally considered of national significance and politically delicate. Even arrangements for the peaceful settlement of territorial differences are often a matter of continued sensitivity.

These considerations are applicable to the question of Umm Al Qaiwain's sovereignty over the continental shelf surrounding Abu Musa at the time of the concession to Occidental and to the subsequent arrangements worked out among the affected states. For these reasons, the Department of State considers that it would be potentially harmful to the conduct of our foreign relations were a United States court to rule on the territorial issue involved in this case.

We believe that the political sensitivity of territorial issues, the need for unquestionable U.S. neutrality and the harm to our foreign relations which may otherwise ensue, as well as the evidentiary and jurisprudential difficulties for a U.S. court to determine such issues, are compelling grounds for judicial abstention.

We do not believe that this judicial self-restraint should turn on such analytical questions as whether the so-called act of state doctrine which is traditionally limited to governmental actions within the territory of the respective state can apply to an exercise of disputed territorial jurisdiction. It rather follows from the general notion that national courts should not assume the function of arbiters of territorial conflicts between third powers even in the context of a dispute between private parties. As a result, we are of the view that the court should be encouraged to refrain from setting the extent of Umm Al Qaiwain's sovereign rights in the continental shelf between its coast and Abu Musa at the time of its grant of the concession to Occidental.²

The Brief for the United States, *amicus curiae*, filed May 18, 1978, took the position that the resolution of foreign boundary disputes does not implicate the act of state doctrine but that, nonetheless, the Court should not adjudicate this boundary dispute, either because it presents a non-justiciable political question or because a special doctrine (judicial abstention) exists, restraining the courts from adjudicating such disputes. The Brief concluded that the complaint in the case should be dismissed.

² Dept. of State File No. P78-0078-1396.

ECONOMIC SANCTIONS
U.S. *Digest*, Ch. 10, §12)

South Africa

By revisions to the Export Administration Regulations (15 CFR Parts 371, 373, 379, 385, 386, and 399.1), effective February 16, 1978, the United States imposed a virtually total embargo on exports and reexports of commodities and technical data of U.S. origin for use by or for military or police entities in the Republic of South Africa or Namibia. The regulations were intended to further U.S. foreign policy regarding the preservation of human rights by denying access to such commodities and technical data by the military and police entities in question and were also intended to strengthen UN Security Council resolutions of 1963¹ and 1977² regarding arms and munitions exports to the Republic of South Africa.

The revisions prohibit the use of any general license authorization or special licensing procedure to export or reexport commodities, where the exporter or reexporter knows or has reason to know that they are intended for delivery, directly or indirectly, to or for use by or for military or police entities in the Republic of South Africa and Namibia. Exports and reexports of commodities and technical data necessary for repair of present equipment owned, controlled, or used by or for military or police entities were permitted for a period of two months from the effective date of the revisions, if the servicing were pursuant to a contract or other legal commitment in effect upon the effective date.

The Supplementary Information published with the revisions to the regulations also states, in part:

Foreign consignees, warehouses, distributors, end-users, exporters and service facilities utilizing the special licensing procedures are required to certify that commodities received under a particular special licensing procedure will not be sold or used contrary to the embargo. This certification must be submitted to the Office of Export Administration with new applications for special licenses and in support of current special licenses before additional goods may be shipped under these licenses.

Section 379.4 is revised to prohibit the use of General License GTDR where the exporter or reexporter knows or has reason to know that the technical data or any products of the data are intended for delivery, directly or indirectly to or for use by or for military or police entities in the Republic of South Africa and Namibia or for use in servicing equipment owned, controlled or used by such entities. "Products of the data" include direct products of the data, as well as any subsequent products of the direct product. Recipients of technical data exported or reexported to South Africa and Namibia under General License GTDR may not provide, directly or indirectly, the direct product of the data to military or police entities in those countries. This Section is

¹ SC res. 181 & 182. 18 SCOR, RES. & DEC., S/INF./18/Rev. 1, at 7 (1963).

² SC res. 418. UN Doc. S/RES/418, Nov. 4, 1977, 72 AJIL 408 (1978), 16 ILM 1548 (1977).

further revised to prohibit the use of General License G-DEST to export or reexport technical data relating to equipment or materials (including manufacturing and maintenance) to any country for their military or police entities.

Part 386.6 is revised to require exporters to enter a special destination control statement on all commercial bills of lading, air waybills and commercial invoices covering exports to the Republic of South Africa and Namibia. This statement is required for all validated license and applicable general license exports. The statement specifically prohibits resale to or delivery of the commodities or technical data involved to or for use by or for the police or military entities in these destinations.

The Special Country Policies and Provisions (Part 385) also have been revised to reflect the policy changes announced in this revision.

Finally, the Commodity Control List, incorporated by reference at 15 CFR §399.1(a), is revised to indicate that commodities otherwise eligible for export to the Republic of South Africa and Namibia under General License G-DEST will require a validated export license if they are for delivery to or for use by or for military or police entities in the Republic of South Africa and Namibia or for use in servicing equipment owned, controlled or used by or for these entities.³

Foreign Boycotts

Under date of January 18, 1978, the Department of Commerce promulgated final rules amending the Restrictive Trade Practices or Boycotts part of the Export Administration Regulations,¹ in implementation of title II of the Export Administration Amendments of 1977.²

Stanley J. Marcuss, Deputy Assistant Secretary of Commerce for Trade Regulation, described the principal issues raised by comments upon the proposed regulations, and the Department of Commerce's response to them, in a discussion reading in part, as follows:

"CONTROLLED IN FACT"

Title II of the Export Administration Amendments of 1977 applies only to United States persons. The statute defines "United States person" to include any domestic concern's foreign subsidiary or affiliate which is controlled in fact by such domestic concern as determined by the regulations.

.....

The final regulations provide that all presumptions of control are rebuttable; none are conclusive. . . .

The final regulations establish a rebuttable presumption of control where the domestic concern owns or controls more than 50 percent of the voting securities of the foreign subsidiary or affiliate. In addition,

³ 43 Fed. Reg. 7311 (1978). For the revised regulations, see *id.*, at 7,312-15.

¹ 15 CFR 369, 17 ILM 169 (1978).

² PL 95-52, 91 Stat. 235, 244, 71 AJIL 843 (1977).

they est: ; presumption of control where the domestic concern more than 25 percent of the voting securities of the foreign subsidiary, or affiliate and no other person owns or controls an equal or larger percentage.

Finally, the final regulations provide for a presumption of control if the domestic concern has the authority to appoint either a majority of the board of directors or the chief operating officer of the foreign subsidiary or affiliate. . . .

All these presumptions of control may be rebutted by competent evidence showing that control does not in fact exist.

The final regulations establish no presumptions regarding the absence of control. . . .

ACTIVITIES IN THE INTERSTATE AND FOREIGN COMMERCE OF THE UNITED STATES

Disposition of U.S.-origin goods by controlled foreign subsidiaries or affiliates. The proposed regulations provided that a controlled foreign subsidiary's or affiliate's activities with respect to U.S.-origin goods are in United States commerce if the goods are acquired for incorporation into or manufacture of another product for purposes of filling an order from or completing a transaction with a boycotting country. They further provided that the activities of such subsidiary or affiliate with respect to U.S.-origin goods are in United States commerce if the goods are ultimately used, without substantial alteration or modification, in filling an order from or completing a transaction with a boycotting country.

The final regulations remain essentially unchanged.

Several persons argued for adoption of a "come to rest" theory whereby United States commerce would end at the point where U.S.-origin goods reach the foreign subsidiary. . . .

The final regulations do not adopt this "come to rest" theory. The legislative history makes it clear that Congress intended the Act to apply to dispositions by a controlled foreign subsidiary of U.S.-origin goods and services. . . .

The regulations give the term "activities in the interstate or foreign commerce of the United States" a scope sufficiently broad to accomplish the Congressional purpose without unduly interfering in the interest of foreign countries in regulating the conduct of persons subject to their jurisdiction.

Ancillary services. The proposed regulations provided that if any part of a transaction were in U.S. commerce, the entire transaction would be in U.S. commerce. For example, a U.S. bank's financing (other than through a letter of credit) of a U.S.-controlled foreign subsidiary's transaction with a boycotting country would bring the subsidiary's transaction into U.S. commerce even though the transaction was otherwise wholly outside U.S. commerce.

.....

The final regulations provide that the furnishing of such U.S.-source "ancillary" services is itself an activity in U.S. commerce. However,

they further provide that a foreign subsidiary does not, in and of itself, bring the subsidiary transaction into U.S. commerce.

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Thus, the provision of project financing by a U.S. bank or legal services by a U.S. law firm to a U.S.-controlled foreign subsidiary is an ancillary service which, in and of itself, will not cause the subsidiary's transaction to be in U.S. commerce. By contrast, where a domestic concern, on behalf of its controlled foreign subsidiary, gives a guaranty of performance to a boycotting country customer, that is a service provided to the customer, and, as such, brings the subsidiary's transaction with the customer into U.S. commerce. . . .

Direction to a Foreign Subsidiary. The proposed regulations provided that the activities of a U.S. parent corporation in specifically directing the activities of its controlled foreign subsidiary or affiliate are activities in U.S. commerce. The proposed regulations further provided that such activities brought the foreign subsidiary's otherwise wholly foreign transaction into U.S. commerce.

Several of those who commented argued that it is an impermissible extension of the concept of U.S. commerce to bring within its framework otherwise wholly foreign activities simply because they were taken at the direction of a U.S. person. Furthermore, it was pointed out that jurisdiction over the person making the specific direction is sufficient to accomplish the anti-boycott objectives of the statute.

The final regulations agree with this view. The activities of a U.S. parent corporation in specifically directing prohibited boycott compliance by its controlled foreign subsidiary or affiliate are activities in U.S. commerce. In and of themselves they do not bring into U.S. commerce activities which are otherwise wholly outside U.S. commerce. From the point of view of U.S. anti-boycott policy, this distinction is immaterial. From the point of view of conformity with permissible notions of U.S. commerce, this distinction is essential.

FURNISHING PUBLICLY AVAILABLE BOYCOTT-RELATED INFORMATION

The statute prohibits a U.S. person from furnishing or knowingly agreeing to furnish information relating to its own or any other person's past, present or proposed business relationships with a boycotted country or any person who is known or believed to be blacklisted. However, the law permits the furnishing of normal business information in a commercial context.

.....

The final regulations carry forward the provision in the proposed regulations. No information about business relationships with blacklisted persons or boycotted countries may be furnished—with intent to comply with, further, or support a foreign boycott. It makes no difference whether the information is publicly available. The statute creates no exception for such circumstances. So long as the necessary intent exists, the furnishing of such information is a violation of the law.

“INTENT”

In order for there to be a violation of the law, the statute requires that a person take action with intent to comply with, further or support an unsanctioned foreign boycott.

.....

The final regulations provide that a person has the necessary intent when compliance with, furthering, or supporting an unsanctioned foreign boycott is at least one of the reasons for his action. So long as that is at least one of the reasons for his action, a violation occurs regardless of whether the action is also taken for non-boycott reasons. . . .

So far as the meaning of intent is concerned, the statute makes it clear that intent is a necessary element of any violation. It is not sufficient that one take action that is specifically prohibited under the statute. It is essential that one take such action with intent to comply with, further, or support a foreign boycott. Intent in that context means the reason or purpose for one's behavior. It does not mean that one has to agree with the boycott in question or desire that it succeed or that it be furthered or supported. But it does mean that the reason why a particular action was taken must be established.

.....

UNILATERAL SELECTION

The statute allows an exception for compliance with the unilateral and specific selection by a boycotting country, or national or resident thereof, of carriers, insurers, suppliers of services to be performed within the boycotting country or suppliers of specifically identifiable goods to be imported into a boycotting country.

Pre-selection services. Under the proposed regulations, a person's selection of goods or services is “unilateral” even if he has been provided pre-selection services so long as such services are not in any way boycott based.

Pre-selection services might consist of a general contractor supplying his client with a list of qualified architects or competent engineers from which the customer may make his selection.

.....

As in the proposed regulations, the final regulations provide that the provision of so-called “pre-selection” services does not, in and of itself, destroy the unilateral character of another person's selection so long as such services are not boycott-based. However, the final regulations also require that such services be of a type customarily provided in similar transactions by the firm (or industry of which the firm is a part) as measured by the practice in non-boycotting as well as boycotting countries. . . .

.....

To conclude otherwise would effectively bar U.S. persons, principally those engaged in general contracting, from providing in boycotting countries services which they customarily provide elsewhere, and there is no evidence of Congressional intent to do so. Indeed, such an ab-

solute bar would be counter-productive from the point of view of U.S. anti-boycott policy, since it would drive boycotting country buyers into the hands of foreign suppliers of pre-selection services who might have no compunction about excluding blacklisted suppliers from lists of qualified suppliers or otherwise discriminating against blacklisted persons. By permitting U.S. persons to supply pre-selection services and by insisting that they be provided wholly without reference to any boycott, the opportunity for blacklisted persons to participate in boycotting country transactions is likely to be enhanced.

Services to be performed within the boycotting country. The proposed regulations permitted a person to comply with a unilateral selection of a supplier of services so long as some portion of the services were to be performed within the boycotting country.

Neither the statute nor its legislative history restrict the availability of this exception to services which are performed totally or primarily within the boycotting country. However, in order to prevent use of this exception as a device for complying with foreign boycotts in circumstances where it was not intended, the final regulations provide that services are "to be performed within the boycotting country" for the purposes of this exception only if they are of a type which would customarily be performed within the boycotting country and the part performed within the country is a necessary and not insignificant part of the total service performed.

What is "customary" and "necessary" for these purposes depends on the practice of the supplier of the service or the industry of which it is a part as measured by the practice in non-boycotting as well as boycotting countries insofar as the practice in boycotting countries is not the result of accommodation to these regulations.

Specifically identifiable goods. The statute contains two exceptions—for "unilateral selections" and compliance with local law—which, under certain conditions, permit the boycott-based importation of products into a boycotting country. In order for the exceptions to be available, the statute requires that the origin of the products be specifically identifiable at the time of their entry into the boycotting country.

Under the proposed regulations, identifiability is measured by the ability to identify the source of the product either by physical inspection of the goods themselves or their packaging.

The final regulations . . . are retained as proposed. The legislative history of the statute makes it clear that the test for "identifiability" is whether it is generally possible, in the normal course of business, for the buyer or customs agent or similar official to identify the supplier or manufacturer of a particular product or component by inspection of the product itself. The "product" necessarily includes both the items and their packaging. . . . On the other hand, to permit identifiability to be measured by what the shipping documents would disclose would vitiate virtually all limitations on the notion of specific identifiability.

Regardless of whether an inspection is in fact made, the test is whether an inspection of the items, including their packaging but excluding their shipping documentation, would disclose the source of the product. If so, it is "specifically identifiable" for purposes of these exceptions; if not, it does not qualify. This view is consistent with legislative purpose and intent.

COMPLIANCE WITH LOCAL LAW

The statute contains an exception to the prohibitions to permit a U.S. person resident in a boycotting country to comply with that country's boycott laws with respect to his activities exclusively within the country and with respect to the importation of products "for his own use, including the performance of contractual services."

.....

Under the final regulations, the importation of goods that are to be placed in inventory for subsequent resale without further manufacture or incorporation into another product are excluded from the coverage of this exception. In addition, the final regulations restrict the availability of the exception to situations where goods are imported for further manufacture or incorporation into a project, such as a construction project, whether on a turnkey basis or otherwise. Moreover, under the final regulations, goods imported for such purposes are not for one's own use if they are not customarily incorporated into, or do not customarily become permanently affixed as a functional part of, the project.

These limitations are intended to ensure that this exception is not utilized for import transactions which are akin to import for resale operations. The legislative history of this exception makes it clear that it was not intended to be used for simple resale operations or where the person making the imports acts as a procurement agent for another. . . .

Importation of services. The exception which permits a U.S. person who is a bona fide resident of another country to comply with the import laws of that country with respect to the importation of products for his own use, makes no mention of services.

.....

The final regulations have not been modified to bring services within this exception. However forceful the arguments the other way, the language of the statute is simply not susceptible of such a construction. In other provisions of the statute (e.g., the exceptions for unilateral selection and compliance with import requirements) the Congress made express reference to services. It could have done so under this provision as well but did not.

Scope of the exception. The proposed regulations provide that the exception governing compliance with local import law would be available for *all* United States persons qualifying as bona fide residents of a foreign country in order to avoid serious adverse economic and political consequences for the United States.

.....

The final regulations governing the scope of this exception have not been substantively changed. The legislative history of the Act clearly

demonstrates Congressional intent that this exception be available through regulations and not through a case-by-case waiver system advocated in some of the comments. Under such a system, the exception would be available for a company only after its waiver application was approved by the Department. The result would be inherent unfairness for those whose applications awaited approval. In addition, it would impose on the Department an administrative burden which it could not possibly meet.

Congress intended this exception not as an avenue for general boycott compliance but rather as a means to permit limited boycott compliance by U.S. persons resident in a boycotting country. Accordingly, the final regulations place careful limits on its scope.

A resident must be a bona fide resident before the exception is available. Nine criteria are set out for determining whether a United States person is a bona fide resident. In addition, the regulations limit the exception's coverage to products that are both "specifically identifiable" and for the importing person's own use with stringent tests of what constitutes "own use."

Use of this exception will be monitored and continually reviewed to determine whether its continued availability is consistent with the national interest. Its availability may be limited or withdrawn as appropriate.

"RISK OF LOSS" CONTRACTUAL PROVISIONS

The statute prohibits boycott-based refusals to do business. . . .

The final regulations recognize that various devices, including risk of loss provisions, may be employed in such a way as to place a person at a commercial disadvantage because he is blacklisted and thereby effect discrimination against him because of his blacklisted status. Accordingly, use of any artifice, device, or scheme which is intended to place a person at a commercial disadvantage or imposes on him special burdens because he is blacklisted or otherwise restricted from having a business relationship with or in a boycotting country will be regarded as evidence of evasion for purposes of these regulations. Among the factors which will be considered in determining whether a particular arrangement is employed for purposes of evasion are customary practice and usage.

Unless permitted under one of the exceptions, use of risk of loss provisions which expressly impose a financial risk on another because of the import laws of a boycotting country may constitute evasion. If they are introduced after the effective date of these regulations, there is a rebuttable presumption that they are used for purposes of evasion. If used by a U.S. person prior to the effective date of these regulations, there is a presumption that his use does not constitute evasion.

The Department recognizes that it is not possible to deal categorically with the variety of contractual or other arrangements that may be employed in transactions with boycotting countries. But unusual arrangements which have the effect of limiting the economic opportunities of blacklisted persons because of their blacklisted status will be

carefully scrutinized to determine whether they are employed for purposes of evading these regulations.

EVASION

The anti-evasion section of the statute provides that the law applies to any transaction or activity undertaken with intent to evade the provisions of the law.

.....

The final regulations on evasion make it clear that the exceptions do not permit activities or agreements (express or implied by a course of conduct, including a pattern of responses) which are otherwise prohibited and which are not within the intent of the exceptions. However, activities within the coverage and intent of the exceptions do not constitute evasion regardless of how often the exceptions are utilized. The rationale for this position is that repeated lawful actions cannot be treated as violations of the law just because they are repeated. The creation of these exceptions would have been a futile gesture by the Congress if their use were itself a violation of the law.

Under the final regulations, use of any artifice, device or scheme which is intended to place a person at a commercial disadvantage or impose on him special burdens because he is blacklisted will be regarded as evasion unless permitted by one of the exceptions. In addition, unless permitted under one of the exceptions, use of risk of loss provisions which expressly impose a financial risk on another because of the import laws of a boycotting country may constitute evasion. If they are introduced after the effective date of these regulations, there will be a rebuttable presumption that they are used for purposes of evasion. If used by a U.S. person prior to the effective date of these regulations, there is a presumption that such use does not constitute evasion. Furthermore, use of dummy corporations or other devices to mask prohibited activity will also be regarded as evasion. Similarly, it is evasion to divert specific boycotting country orders from United States parent companies to their foreign subsidiaries for purposes of complying with prohibited boycott requirements. However, alteration of a person's structure or method of doing business will not constitute a violation of this section so long as the alteration is based on legitimate business considerations and is not undertaken solely to avoid the application of the prohibitions of this Part.

In all potential cases of evasion, the facts and circumstances of an arrangement or transaction will be carefully scrutinized to see whether appearances conform to reality.³

Under date of January 20, 1978, the Department of the Treasury issued new guidelines, consisting of questions and answers, relating to provisions of the Tax Reform Act of 1976 which deny certain tax benefits for participation in or cooperation with international boycotts. The guidelines superseded earlier guidelines issued November 4, 1976, December 30, 1976, and August 17, 1977, and were generally effective for operations occurring after, requests received after, and agreements made after November 3, 1976. Provision was also made for deferred effective dates in certain listed instances.⁴

³ 43 Fed. Reg. 3508-12 (1978).

⁴ *Id.*, at 3454-70, 17 ILM 198 (1978).

Subsequently, the Department of Commerce set forth its views on new boycotting country requirements with respect to shipping and insurance certifications and certificates of origin, and on new contractual provisions in connection with certain foreign government or foreign government agency contracts, which had come to its attention.⁵

Crime Control and Detection Commodities

Effective June 23, 1978, the Export Administration Regulations¹ covering export of commodities particularly useful in crime control and detection were revised to extend validated license control, already in existence for export of such commodities to the Union of Soviet Socialist Republics, the East European communist countries (except Yugoslavia), the People's Republic of China, the Republic of South Africa, and Namibia, to all other destinations, except Australia, Belgium, Canada, Denmark, France, the Federal Republic of Germany (including West Berlin), Greece, Iceland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Turkey, and the United Kingdom. The revised rules² were in support of U.S. foreign policy to preserve human rights and to promote their observance throughout the world, by providing for the prior review of the end-use of proposed exports and reexports of crime control and detection commodities to assure that they would be used in a manner consistent with such policy.

NEGOTIATION, INQUIRY, CONCILIATION, MEDIATION (U.S. *Digest*, Ch. 13, §1)

In an address delivered at Atlanta, Georgia, on April 5, 1978, Assistant Secretary of State Alfred L. Atherton, Jr., identified U.S. concerns and interests in the search for peace in the Middle East. Discussing the diplomatic effort to achieve a resolution of tensions in the area, he stated:

... UN Security Council Resolution 242, adopted unanimously by the Council in November 1967... spelled out the framework for a settlement of the Arab-Israeli conflict. That resolution was and remains the basis for all the peacemaking efforts over the past decade. At its heart is a very simple formula: In return for Israeli withdrawal from territories occupied in the 1967 conflict, the Arabs will recognize Israel within a framework of peace and security agreed by both. It calls for a just and lasting peace based upon the right of every state in the area to live in peace within secure and recognized boundaries and upon Israeli withdrawal from territories occupied in 1967....

... The emphasis of Resolution 242 taken as a whole, however, is clear. The emphasis is on establishing conditions of peace and security based upon the concept of withdrawal-for-peace. It is also clear that

⁵ 43 Fed. Reg. 16969-70 (1978), Appendix, "Interpretations" to 15 CFR 369.

¹ 15 CFR 373 *et seq.* (1978), 43 Fed. Reg. 27985-86 (1978).

² 43 Fed. Reg. 27985-86 (1978).

all the principles of Resolution 242, including the principle of withdrawal, were intended by its authors, and understood at the time by all the governments concerned, to apply wherever territory was occupied in 1967. In other words, the withdrawal-for-peace formula applies to all fronts of the conflict. . . .

. . . Resolution [242] does not deal in a comprehensive way with a solution to the Palestinian problem. In the decade since the passage of the resolution it has become inescapably clear that a solution to the Palestinian problem is essential in reaching a lasting settlement of the Middle East conflict. No party to the conflict today disputes that the Palestinians have a sense of identity which must be taken into account. President Carter has recognized this by speaking of the need for a homeland for the Palestinians. In our own view, no settlement in the Middle East can endure, for Israel and Arab states alike, which does not include a just solution of the Palestinian problem in all its aspects.

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First, the definition of true peace. Peace does not mean simply a cessation of hostility or belligerency. It means open borders, normal commerce and tourism, diplomatic relations and a range of official and unofficial contacts, free navigation through waterways, and an end to all boycotts.

The United States regards normal relations among the parties as an indispensable component of a lasting settlement. The keystone of this is the recognition of Israel's right to exist permanently and formal recognition of its nationhood.

Second is the dilemma of providing borders that are both secure and acceptable to all. This is the other half of the withdrawal-for-peace equation set up in Resolution 242. Israel, which has fought for its very existence for 30 years, must be able to feel secure within recognized borders. But borders that might give Israel the greatest sense of security in geographic and military terms are not those acceptable to Israel's neighbors. They could not, therefore, provide true security.

We understand the very real security concerns posed for Israel by withdrawal from occupied territory. But we also believe that without withdrawal, coupled with meaningful security arrangements, there can be no peace; and without peace between Israel and its Arab neighbors, Israel can have no true security. The goal has to be the territorial integrity and sovereignty of all states in the area.

Third is the issue of the future of the Palestinian people. To achieve a durable peace, the Palestinians must demonstrate a willingness to live in peace with Israel. At the same time, a durable peace requires meeting the humanitarian needs of the Palestinian refugees, responding to the aspiration of Palestinian Arabs for an identity of their own, and agreement on the future status of the West Bank and Gaza where the largest single group of Palestinian Arabs live.

This is not a simple question. It involves vital security considerations for Israel which must be taken into account. At the same time, it also involves interests of other Arab states, in particular Jordan and Egypt. And it involves the interests of the Palestinian Arabs themselves, over one million of whom reside still in the West Bank and Gaza.

A way must be found for the Palestinians to participate in the determination of their own future. Any solution, if it is to be viable and lasting, must be based ultimately on the consent of the governed.¹

THE LAWS OF WAR
(U.S. *Digest*, Ch. 14, §2)

Israeli-occupied Territories

Herbert J. Hansell, Legal Adviser of the Department of State, in a letter dated April 21, 1978, written jointly to Chairman Donald M. Fraser, Subcommittee on International Organizations, and Chairman Lee H. Hamilton, Subcommittee on Europe and the Middle East, both of the Committee on International Relations, House of Representatives, stated the legal considerations underlying the U.S. view that the establishment of the Israeli civilian settlements in the territories occupied by Israel is inconsistent with international law. The substantive portion of the Legal Adviser's opinion read:

THE TERRITORIES INVOLVED

The Sinai Peninsula, Gaza, the West Bank, and the Golan Heights were ruled by the Ottoman Empire before World War I. Following World War I, Sinai was part of Egypt; the Gaza Strip and the West Bank (as well as the area east of the Jordan) were part of the British Mandate for Palestine; and the Golan Heights were part of the French Mandate for Syria. Syria and Jordan later became independent. The West Bank and Gaza continued under British Mandate until May 1948.

In 1947, the United Nations recommended a plan of partition, never effectuated, that allocated some territory to a Jewish state and other territory (including the West Bank and Gaza) to an Arab state. On May 14, 1948, immediately prior to British termination of the Mandate, a provisional government of Israel proclaimed the establishment of a Jewish state in the areas allocated to it under the partition plan. The Arab League rejected partition and commenced hostilities. When the hostilities ceased, Egypt occupied Gaza, and Jordan occupied the West Bank. These territorial lines of demarcation were incorporated, with minor changes, in the armistice agreements concluded in 1949. The armistice agreements expressly denied political significance to the new lines, but they were de facto boundaries until June 1967.

During the June 1967 war, Israeli forces occupied Gaza, the Sinai Peninsula, the West Bank, and the Golan Heights. Egypt regained some territory in Sinai during the October 1973 war and in subsequent disengagement agreements, but Israeli control of the other occupied territories was not affected, except for minor changes on the Golan Heights through a disengagement agreement with Syria.

THE SETTLEMENTS

Some seventy-five Israeli settlements have been established in the above territories (excluding military camps on the West Bank into

¹ 78 DEPT. STATE BULL., May 1978, at 43-44.

For earlier statements by Secretary of State Vance that the provision for withdrawal from occupied territories included "all fronts" involved in the 1967 conflict; see *ibid.*, p. 25, and 78 DEPT. STATE BULL., March 1978, at 13.

which small groups of civilians have recently moved). Israel established its first settlements in the occupied territories in 1967 as para-military "nahals." A number of "nahals" have become civilian settlements as they have become economically viable.

Israel began establishing civilian settlements in 1968. Civilian settlements are supported by the government, and also by non-governmental settlement movements affiliated in most cases with political parties. Most are reportedly built on public lands outside the boundaries of any municipality, but some are built on private or municipal lands expropriated for the purpose.

LEGAL CONSIDERATIONS

1. As noted above, Israeli armed forces entered Gaza, the West Bank, Sinai, and the Golan Heights in June 1967, in the course of an armed conflict. Those areas had not previously been part of Israel's sovereign territory nor otherwise under its administration. By reason of such entry of its armed forces, Israel established control and began to exercise authority over these territories; and under international law, Israel thus became a belligerent occupant of these territories.

Territory coming under the control of a belligerent occupant does not thereby become its sovereign territory. International law confers upon the occupying state authority to undertake interim military administration over the territory and its inhabitants; that authority is not unlimited. The governing rules are designed to permit pursuit of its military needs by the occupying power, to protect the security of the occupying forces, to provide for orderly government, to protect the rights and interests of the inhabitants, and to reserve questions of territorial change and sovereignty to a later stage when the war is ended. See L. Oppenheim, 2 International Law 432-438 (7th ed., H. Lauterpacht ed., 1952); E. Feilchenfeld, The International Economic Law of Belligerent Occupation 4-5, 11-12, 15-17, 87 (1942); M. McDougal & F. Feliciano, Law and Minimum World Public Order 734-46, 751-7 (1961); Regulations annexed to the 1907 Hague Convention on the Laws and Customs of War on Land, Articles 42-56, 1 Bevans 643; Department of the Army, The Law of Land Warfare, Chapter 6 (1956) (FM-27-10).

"In positive terms, and broadly stated, the Occupant's powers are (1) to continue orderly government, (2) to exercise control over and utilize the resources of the country so far as necessary for that purpose and to meet his own military needs. He may thus, under the latter head, apply its resources to his own military objects, claim services from the inhabitants, use, requisition, seize or destroy their property, within the limits of what is required for the army of occupation and the needs of the local population. But beyond the limits of quality, quantum and duration thus implied, the Occupant's acts will not have legal effect, although they may in fact be unchallengeable until the territory is liberated. He is not entitled to treat the country as his own territory or its inhabitants as his own subjects, . . . and over a wide range of public property, he can confer rights only as against himself, and within his own limited period of *de facto* rule." J. Stone, Legal Controls of International Conflict, 697 (1959).

On the basis of the available information, the civilian settlements in the territories occupied by Israel do not appear to be consistent with these limits on Israel's authority as belligerent occupant in that they do not seem intended to be of limited duration or established to pro-

vide orderly government of the territories and, though some may serve incidental security purposes, they do not appear to be required to meet military needs during the occupation.

2. Article 49 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 UST 3516, provides, in paragraph 6:

"The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

Paragraph 6 appears to apply by its terms to any transfer by an occupying power of parts of its civilian population, whatever the objective and whether involuntary or voluntary.* It seems clearly to reach such involvements of the occupying power as determining the location of settlements, making land available and financing of settlements, as well as other kinds of assistance and participation in their creation. And the paragraph appears applicable whether or not harm is done by a particular transfer. The language and history of the provision lead to the conclusion that transfers of a belligerent occupant's civilian population into occupied territory are broadly proscribed as beyond the scope of interim military administration.

The view has been advanced that a transfer is prohibited under paragraph 6 only to the extent that it involves the displacement of the local population. Although one respected authority, Lauterpacht, evidently took this view, it is otherwise unsupported in the literature, in the rules of international law or in the language and negotiating history of the Convention, and it clearly seems not correct. Displacement of protected persons is dealt with separately in the Convention and paragraph 6 would be redundant if limited to cases of displacement. Another view of paragraph 6 is that it is directed against mass population transfers such as occurred in World War II for political, racial or colonization ends; but there is no apparent support or reason for limiting its application to such cases.

The Israeli civilian settlements thus appear to constitute a "transfer of parts of its own civilian population into the territory it occupies" within the scope of paragraph 6.

3. Under Article 6 of the Fourth Geneva Convention, paragraph 6 of Article 49 would cease to be applicable to Israel in the territories occupied by it if and when it discontinues the exercise of governmental functions in those territories. The laws of belligerent occupation generally would continue to apply with respect to particular occupied territory until Israel leaves it or the war ends between Israel and its neighbors concerned with the particular territory. The war can end in many ways, including by express agreement or by de facto acceptance of the status quo by the belligerents.

4. It has been suggested that the principles of belligerent occupation, including Article 49, paragraph 6, of the Fourth Geneva Convention, may not apply in the West Bank and Gaza because Jordan and Egypt were not the respective legitimate sovereigns of these territories. However, those principles appear applicable whether or not Jordan and Egypt possessed legitimate sovereign rights in respect of those territor-

* Paragraph 1 of Article 49 prohibits "forcible" transfers of protected persons out of occupied territory; paragraph 6 is not so limited. (Footnote in original.)

ies. Protecting the reversionary interest of an ousted sovereign is not their sole or essential purpose; the paramount purposes are protecting the civilian population of an occupied territory and reserving permanent territorial changes, if any, until settlement of the conflict. The Fourth Geneva Convention, to which Israel, Egypt and Jordan are parties, binds signatories with respect to their territories and the territory of other contracting parties, and "in all circumstances" (Article 1), in "all cases" of armed conflict among them (Article 2) and with respect to all persons who "in any manner whatsoever" find themselves under the control of a party of which they are not nationals (Article 4).

CONCLUSION

While Israel may undertake, in the occupied territories, actions necessary to meet its military needs and to provide for orderly government during the occupation, for the reasons indicated above the establishment of the civilian settlements in those territories is inconsistent with international law.¹

UNITED NATIONS PEACEKEEPING FORCES (U.S. *Digest*, Ch. 14, §5)

UN Interim Force in Lebanon (UNIFIL)

Following an attack on March 11, 1978, by a group of Palestinian terrorists upon Israeli civilians on the Haifa-Tel Aviv highway, during which they had blown up a bus containing bound hostages, large numbers of Israeli infantry, supported by Israeli armor and naval and air bombardment, crossed the frontier into southern Lebanon on the night of March 14/15. The combined offensive was directed against Palestinian guerrilla strongholds. Israeli Defense Minister Ezer Weizman stated that its purpose had been to "destroy and uproot, as far as possible, terrorist concentrations in southern Lebanon." Israeli control was extended within a five-day period to a takeover of nearly all of southern Lebanon.

On March 19, the UN Security Council, which had been summoned into emergency session, adopted, by a vote of 12-0-2-1 (with the Soviet Union and Czechoslovakia abstaining and China not participating), a U.S.-sponsored resolution calling for withdrawal of Israeli troops and for their replacement by a UN interim peacekeeping force.¹

In introducing the draft resolution on March 18, Ambassador Andrew Young, U.S. Representative to the United Nations, said, in part:

... [T]he United States Government is introducing a draft resolution for consideration by this Council. That draft resolution, in its first operative paragraph, calls for strict respect for the territorial integrity, sovereignty and political independence of Lebanon. May I say that the statements made in this chamber leave no doubt that the preservation of Lebanese territorial integrity is the Council's primary goal in this debate. That goal is made explicit in the third operative paragraph of the draft resolution sponsored by my Government. That

¹ Dept. of State File No. P78 0065-0030.

¹ UN Doc. S/RES./425 (1978), 17 ILM 491 (1978).

paragraph describes the purpose of a United Nations peace-keeping force as:

"... confirming the withdrawal of Israeli forces, restoring international peace and security and assisting the Government of Lebanon in ensuring the return of its effective authority in the area . . ."

The second operative paragraph calls on the Government of Israel immediately to cease its military action against Lebanese territory and withdraw its forces from Lebanese territory. Immediate Israeli withdrawal is, in my Government's view, one of the key conditions of restoring full political independence and territorial integrity to Lebanon. In the third operative paragraph the Council would decide to set up immediately a United Nations force for southern Lebanon. The mandate of such a force, in my Government's view, should be of temporary duration. It should restore peace and security to the area and transfer effective authority to the Lebanese Government. When that is done, the objectives established by this draft resolution will have been fully achieved and, we fully expect, the cause of peace and justice in the Middle East substantially advanced.²

In a letter to Secretary of State Cyrus R. Vance, March 22, 1978, Chairman John Sparkman, Committee on Foreign Relations, United States Senate, requested confirmation, with reference to Resolution 425 and to the contents of the sixth paragraph of the UN Secretary General's report on implementation,³ of the objectives and mandate of the United Nations Interim Force in Lebanon. In reply, Assistant Secretary of State for Congressional Relations Douglas J. Bennet, Jr., wrote, on March 31, in part:

In view of the delicacy of the situation in south Lebanon and the complexity of the task there, Secretary General Waldheim's mandate to the UN Force is not detailed and explicit on all points. The main lines of UNIFIL's mandate are nonetheless clear.

It is clearly the intention of both Resolution 425 and Secretary General Waldheim's March 19 report that the area of UNIFIL's responsibility should no longer be a battlefield or used as a launching pad for attacks on Israel. Paragraph 2(b) of the March 19 report calls upon the Force to "assist the Government of Lebanon in ensuring the return of its effective authority in the area." Paragraph 2(d) states that the Force "will use its best efforts to prevent the recurrence of fighting and to ensure that its area of operation is not utilized for hostile activities of any kind." Paragraph 6 states that the Force "will supervise the cessation of hostilities, ensure the peaceful character of the area of operation, control movement and take all measures deemed necessary to assure the effective restoration of Lebanese sovereignty." As soon as the report was approved by the Security Council, the Secretary General made a statement elaborating on it and specifying that the Force would endeavor to control movement "into and out of the zone." We regard this as an important clarification of the language of the report itself and as responsive to your query whether one objective of UNIFIL is to prevent the reentry of armed Palestinian forces into southern Lebanon. As you know, some such forces are still in southern Leb-

² UN Doc. S/PV.2073, at 4-6 (1978). See also Press Release USUN-12(78), Mar. 18, 1978.

³ UN Doc. S/12611 (1978).

anon, however, both in areas south of the Litani River, and north and east of the Litani, where Israeli military operations did not reach. This is why it is important to consider UNIFIL's mandate in its totality, including ensuring that its area of operation is not utilized for hostile activities of any kind, rather than to rely on any one element of that mandate in isolation.

Initially, the Force will expand its area of operation by moving south from the Litani River to the Israeli border. There is, of course, no direct link or conditionality in Resolution 425 between Israeli withdrawal and UNIFIL deployment. Nevertheless, we would expect UN officials on the ground to be in touch with Israeli authorities to discuss practical problems of UN deployment and Israeli withdrawal. We believe the definition of the "area of operation" for the Force is sufficiently broad to permit it to move into other areas as requested by the Government of Lebanon as well, once it has been deployed in adequate strength and its initial tasks have been fulfilled.

As concerns your question about UNIFIL's mandate in regard to prevention of the establishment of organizational and political structures that might be rearmed and reequipped to become a fighting force, the key to this issue is precisely the restoration of effective Lebanese authority in the area of the conflict. This is the heart of the crisis, and one that we will bear in mind in our contacts with the United Nations and the parties.⁴

ARMS CONTROL AND DISARMAMENT
(U.S. *Digest*, Ch. 14, §7)

International Safeguards and Nuclear Weapons

On February 9, 1978, President Carter transmitted to the Senate the Agreement between the United States and the International Atomic Energy Agency for the Application of Safeguards in the United States, with attached Protocol, approved by the Board of Governors of the Agency on September 17, 1976. The Agreement provides for application of Agency safeguards to nuclear facilities in the United States, other than those having direct national security significance, and would enter into force when the United States notifies the Agency that the constitutional and statutory requirements for entry into force have been met.

The Department of State's report, December 14, 1977, on the agreement (which has come to be known as the "Voluntary Offer") gives background information and describes key provisions.

Background

The Treaty on the Non-Proliferation of Nuclear Weapons ("NPT"), to which the United States is a party, commits non-nuclear weapon states parties to accept Agency safeguards on all their peaceful nuclear activities. Although the United States, as a nuclear weapons state, is under no legal obligation to accept such safeguards, it has been the announced policy of this Government to permit the application of Agency safeguards to its nuclear facilities, excluding only those of

⁴ 124 CONG. REC. S4753-54 (daily ed. Apr. 4, 1978).

direct national security significance. By submitting itself to the same safeguard others are subject to, it is the United States intention to demonstrate that adherence to the Treaty does not place other countries at a commercial disadvantage, either because of the increased costs associated with safeguards or because of risk of exposure of proprietary information. . . .

In addition to encouraging adherence to the Non-Proliferation Treaty, it is hoped that the Offer will help to improve Agency safeguards. Agency inspectors and United States personnel from the Department of Energy ("DOE") and the Nuclear Regulatory Commission ("NRC") will be able to combine their experience and collaborate in making the safeguards system more efficient and effective.

The Voluntary Offer by the United States has already had several effects. In anticipation of the United States bringing the Offer into force, both the Federal Republic of Germany and Japan ratified the Non-Proliferation Treaty. In both cases, United States willingness to enter into a safeguards agreement with the Agency was a substantial incentive. Moreover, to ensure uniformity in its non-proliferation policy, the Canadian Government has conditioned use of Canadian-origin uranium by United States utilities on the entry into force of Agency safeguards in the United States. Until the offer enters into force, Canadian ore may be enriched in DOE facilities, but may not, without written permission of the Atomic Energy Control Board of Canada, be fabricated into fuel or used in United States power reactors.

Description of Proposed Agreement

The Agreement is based on the standard Agency safeguards agreement with NPT parties (INFCIRC/153), except that United States facilities of direct national security significance are excluded from its coverage. Part I of the Agreement (Articles 1-26) sets out Agency and United States commitments; Part II (Articles 27-90) describes the implementing procedures. The Protocol to the Agreement describes procedures for facilities not subject to routine inspection by the Agency.

Under the Agreement, the United States will submit to the Agency a list of eligible facilities, i.e. all U.S. nuclear facilities except those with direct national security significance. The eligible list will be part of the Subsidiary Arrangements of the Agreement. Pursuant to Articles 2(b), 39(b), and 39(c), the Agency will identify on that list certain facilities which will be subject to the full provision of Agency safeguards. For these facilities, the United States must submit inventory and design information to the Agency. NRC or DOE, as appropriate, will obtain the information from the operator. Within 90 days of the entry into force of the Agreement, the United States will submit the design information to the Agency, which will prepare facility attachments specifying accountancy procedures, key measurement points, material balance areas, and the like, to enable it effectively to apply safeguards. From time to time pursuant to Article 39(b)(ii) the Agency will designate new facilities to which it will apply safeguards. Within 90 days of such designation, the United States must submit the relevant inventory and design information to the Agency. Eventually, it is estimated that there will be about 12 to 15 facilities subject to safeguards inspection at any one time, although the actual number identified by the Agency will represent a balance between the political objectives of the Agreement and the cost of applying safeguards.

Pursuant to the Protocol, the Agency may also designate facilities from the eligible list which it will not inspect, but for which inventory and design information must be submitted and Transitional Subsidiary Arrangements prepared. The same accountancy reports required by the Agency for facilities identified under Articles 2(b), 39(b), and 39(c) must also be provided for facilities identified under the Protocol. It is anticipated that all facilities not designated under these Articles will eventually be included on the list prepared pursuant to the Protocol.

As stated previously, one purpose of the Offer was to reassure those States concerned about the possibility that safeguards might compromise proprietary information. It should be noted that under Article 5 of the Agreement, as well as Article VII F of the IAEA Statute, the Agency is committed to protect commercial and industrial secrets, and other confidential information. The Agency's operating regulations provide physical protection to safeguard confidential information similar to that which the United States Government provides for classified national security information. The Agency will require only the minimum amount of information necessary to carry out its responsibilities under the Agreement (Article 8(b)). Moreover, when particularly sensitive design information is required to be shown to the Agency, the United States may ask that it be examined on United States premises and not physically communicated to the Agency (Article 8(c)). These provisions are common to all Agency safeguards agreements written pursuant to the NPT. . . .

As has been indicated, not all United States facilities on the eligible list will be subject to Agency safeguards inspection and the attendant costs. To remove the potential inequitable treatment of various facilities, the Agency has agreed, to "proceed in a manner which the Agency and the United States mutually agree takes into account the requirement on the United States to avoid discriminatory treatment as between United States commercial firms similarly situated." (Article 2(c)). . . .

The Agency's fundamental safeguards measure is materials accountancy. As in other countries, the accountancy system in the United States is based upon a system of records kept at the direction of the responsible national agencies—here the NRC and DOE. For facilities identified under Articles 2(b), 39(b), and 39(c) an initial inventory of nuclear materials (source and special nuclear materials) is established, and the accountancy system tracks subsequent changes in the inventory. Facility operators will be required to keep accounting and operating records and submit accounting reports based on these records to the NRC or DOE. In turn, the United States will submit to the Agency accounting reports in respect of nuclear material subject to safeguards.

Not all nuclear material is subject to the safeguards. Mining and ore processing activities are excluded (Article 33). At the request of the United States, the Agency is required to exempt small quantities of nuclear materials (Article 36).

The Agency may inspect the facilities identified under Articles 2(b), 39(b), and 39(c) in order to verify design information; verify the initial inventory information; identify and verify changes that have

occurred after the initial report; verify that reports to it are consistent with the records kept by the operators; verify the identity, location, quantity and composition of nuclear material subject to safeguards; and verify information on the possible causes of material unaccounted for, shipper/receiver differences and uncertainties in book inventory (Articles 48, 69, 70). The United States must also report without delay any unusual incidents or circumstances that may indicate loss of material subject to safeguards or unexpected changes in containment of nuclear material (Articles 66, 71).

Except for a relatively small number of unannounced inspections of random facilities subject to safeguards, Agency inspections must be announced in advance (Articles 81, 82). They must also be performed in such a way as to avoid hampering the operation of the facility (Article 85). Agency inspectors may not themselves take samples; they must ask the operator's personnel to take them. Nor may they operate a facility or direct that the staff carry out any operation. As to the inspectors themselves, the United States may object to inspectors, whereupon the Agency would propose others (Article 9). If the United States repeatedly refuses to accept inspectors, however, the Director General must so notify the Board of Governors, with a view to its taking "appropriate action" (Article 9(a)(iii)).

The Agency also uses containment and surveillance measures. In general, the Agency makes use of existing containment features of a facility and of containers of special nuclear material, storage areas and other places holding nuclear material. Surveillance includes human, optical, and electronic observation of; e.g., storage areas.

Safeguards on a given quantity of special nuclear material terminate when the material is consumed, becomes diluted so that it is no longer usable for any nuclear activity relevant from the point of view of safeguards, has become practically irrecoverable, or is moved to a facility not subject to Agency safeguards (Article 11). In addition, the United States may remove facilities from the eligible list, including facilities currently being safeguarded; at such time, safeguards on the material therein are terminated (Article 34).

Articles 17 to 21 of the Agreement deal with disputes or questions arising under the Agreement. In general disputes will be settled by binding arbitration. Notwithstanding the general procedure, if the Board of Governors of the Agency decides that "an action by the United States is essential and urgent to ensure compliance" with the Agreement, it may call on the United States to take such action. If the Board determines that there has been non-compliance, it may call upon the United States to remedy the non-compliance and, if the United States fails to take "fully corrective action within a reasonable time," the Board is to report the non-compliance to the Security Council and the General Assembly of the United Nations and take other action provided for by Article XII of the Agency Statute. These other measures may include the suspension of the privileges and rights of membership, including the right to ask for the application of safeguards. Both the United States and the Agency are committed to consult at the request of the other on any questions arising out of the application or interpretation of the Agreement, and the United States may ask the Board of Governors to consider any such questions.

Under Article 22 of the Agreement the United States must initiate steps to suspend the application of Agency safeguards in effect in the United States under trilateral safeguards transfer agreements, while assuring that material of like amount and composition is subject to Agency safeguards under the new Agreement. For example, certain Japanese-origin material in the United States is under Agency safeguards. We are preparing a protocol to the trilateral United States-Japan-IAEA safeguards transfer agreement to effect a transfer of this material from coverage under that agreement to coverage under the United States-IAEA Agreement.

As stated earlier, the Agreement will come into force only when the United States has notified the Agency in writing that its statutory and constitutional requirements for entry into force have been met. These include approval by two-thirds of the Senate as required under Article II, section 2 of the United States Constitution, ratification by the President, and subsequent deposit of the treaty instrument. The Agreement is to remain in force as long as the United States is a party to the Treaty on the Non-Proliferation of Nuclear Weapons. The parties may agree to modify the Agreement in order to ensure that it continues to serve its originally intended purposes, and failing agreement, may terminate the Agreement on six-months' notice.¹

WAR AND EMERGENCY POWERS (U.S. *Digest*, Ch. 14, §8)

On or about May 12, 1978, the southern province of Shaba, formerly known as Katanga, in Zaire (formerly the Belgian Congo) was attacked by Communist-backed Katangan secessionist exiles from Angola, who, having seizing and occupying the copper mining town of Kolwezi, began to kill European civilian residents. In response to an appeal for assistance from President Mobutu Sese Seko to all friendly nations, including the United States, France, Belgium, Morocco, and China, President Jimmy Carter despatched eighteen U.S. Air Force transport aircraft (C-14's) to transport French and Belgian paratroopers to secure locations in Zaire, from which they launched rescue operations. The Air Force transports also carried cargoes consisting of communications equipment, aircraft spare parts, gasoline, and medical supplies.

It was the opinion of the Legal Adviser to the Chairman of the Joint Chiefs of Staff, concurred in by the General Counsel of the Department of Defense and the Legal Adviser of the Department of State, that the airlift did not require a report to the Congress under section 4 of the War Powers Resolution.¹ These opinions were based upon two facts:

(1) the United States forces to be introduced into Zaire were not equipped for combat, but were to be involved solely in the operation of the aircraft, and the loading, unloading and handling of the air cargoes; and

¹ For the President's letter of transmittal, the Department of State report, and the texts of the Agreement and Protocol, see S. Ex. B, 95th Cong., 2d Sess. (1978). A similar agreement between the Agency and the United Kingdom was also approved by the Board of Governors of the International Atomic Energy Agency.

¹ PL 93-148, 87 Stat. 555, 50 USC §1543 (1970, Supp. III 1973), 68 AJIL 372 (1974).

(2) the United States forces so introduced into Zaire would not be present at any location where they might become involved in hostilities or where their imminent involvement in hostilities would be clearly indicated by the circumstances.²

Thereafter, in response to an inquiry directed to David D. Newsom, Under Secretary for Political Affairs, by Congressman Gerry E. Studds, concerning the possible application of the War Powers Resolution to the May 19-23 U.S. airlift of foreign military personnel and equipment into Zaire, Herbert J. Hansell, Legal Adviser of the Department of State, prepared a memorandum, dated June 16, 1978, for despatch to the Committee on International Relations of the House of Representatives, reading as follows:

This memorandum explains why the War Powers Resolution did not apply to the May 1978, United States airlift of foreign military personnel and equipment into Zaire.

During the period May 19-23, 1978, the United States Air Force flew approximately thirty missions into Zaire, transporting Belgian and French materiel and some French military personnel to secure staging areas in Zaire which were more than 100 miles from the site of hostilities at Kolwezi. The foreign personnel and matériel proceeded from these secure areas to the combat area. United States military personnel did not proceed beyond these secure staging areas and were engaged solely in the operation of the transport aircraft and the loading, unloading, and handling of cargo. None of the involved U.S. personnel was equipped for combat.

The Office of the Legal Adviser, Department of State, and the Office of General Counsel, Department of Defense, concluded that a report to Congress on these circumstances was not required by the War Powers Resolution (Public Law 93-148, 50 U.S.C. 1543).

Section 4(a) of the War Powers Resolution provides as follows:

"In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—

- (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
- (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or
- (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation;

the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

- (A) the circumstances necessitating the introduction of United States Armed Forces;
- (B) the constitutional and legislative authority under which such introduction took place; and

² Memorandum for the Record, approved by Legal Adviser Herbert J. Hansell, May 19, 1978. Dept. of State File No. P78 0093-0420.

(C) the estimated scope and duration of the hostilities or involvement."

The above-quoted statute seems clearly inapplicable to the Zaire airlift. No United States forces were involved in hostilities or were in any situation where their "imminent involvement in hostilities was clearly indicated by the circumstances . . ."; and no United States forces involved in the airlift were equipped for combat.

However, the question has been raised whether that conclusion is altered by section 8(c) of the War Powers Resolution, which provides as follows:

"For purposes of this joint resolution, the term 'introduction of United States Armed Forces' includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities."

The purpose of the provision which later became section 8(c) was described as follows by Senator Javits in the Senate debate of July 18, 1973:

"The purpose of this provision is to prevent secret, unauthorized military support activities and to prevent a repetition of many of the most controversial and regrettable actions in Indochina. The ever deepening ground combat involvement of the United States in South Vietnam began with the assignment of U.S. 'advisors' to accompany South Vietnamese units on combat patrols; and in Laos, secretly and without congressional authorization, U.S. 'advisors' were deeply engaged in the war in northern Laos." 119 Cong. Rec. 24541, 93d Cong., 1st Sess.

The same explanation was given in the report of the Senate Foreign Relations Committee, S. Rept. No. 220, 93d Cong., 1st Sess. (1973).

The effect of section 8(c) is that, when U.S. forces are participating in the movement of or accompanying foreign forces, the War Powers Resolution would not be applicable where the U.S. forces are not participating or accompanying the foreign forces at the time the foreign forces are engaged, or face an imminent threat of becoming engaged, in hostilities. Section 8(c) does not eliminate the requirement of the Resolution that the U.S. forces be in or exposed to hostilities: it only clarifies that the Resolution encompasses cases in which they encounter or face hostilities while associated with a foreign force rather than a solely U.S. force. The language of the statute is unambiguous in stating that a report is required when U.S. forces, not foreign forces, are introduced into hostilities or circumstances indicating involvement in hostilities.

The legislative history is clear that Congress, in enacting the War Powers Resolution, intended to establish a system whereby it would be informed, and given an opportunity to act, when U.S. forces were deployed in situations which would or might lead the United States into hostilities. The Zaire airlift was not such a situation, and the Resolution did not apply to that activity.³

In transmitting the Legal Adviser's memorandum to the Committee Chairman, Clement J. Zablocki, on June 17, 1978, Under Secretary Newsom

³ Dept. of State File No. P78 0124-1719.

noted:

I want to emphasize that although the consultation and report procedures of the War Powers Resolution are not applicable, we recognized the importance of having the views of Congress on our actions in Zaire, and we consulted with the leaders and concerned committee chairmen in the House and Senate at the time this airlift was initiated.⁴

MILITARY ASSISTANCE AND SALES

(U.S. *Digest*, Ch. 14, §9)

In reply to Congressional inquiries, as to whether Israel had violated section 3(c) of the Arms Export Control Act, as amended,¹ by its military operations in Lebanon commencing March 15, 1978, Secretary of State Cyrus Vance informed Speaker of the House of Representatives Thomas P. O'Neill, Jr., in a letter of April 5, 1978, as follows:

Those operations have involved use of defense articles furnished to Israel by the United States under the foreign military sales program. Sales to Israel under this program are governed by a Mutual Defense Assistance Agreement of July 23, 1952, which provides:

"The Government of Israel assures the United States Government that such equipment, materials, or services as may be acquired from the United States . . . are required for and will be used solely to maintain its internal security, its legitimate self-defense, or to permit it to participate in the defense of the area of which it is a part, or in United Nations collective security arrangements and measures, and that it will not undertake any act of aggression against any other state."

In the circumstances, I must report that a violation of the 1952 Agreement may have occurred by reason of the Israeli operations in Lebanon.

We have discussed with senior officials of the Israeli Government these operations and the use of U.S.-origin equipment in them. The Israeli Government has said that it intends to comply with UN Security Council Resolution 425, which among other things calls for the withdrawal of Israeli forces from Lebanon. We are actively engaged in discussing with officials of the Israeli Government the date for the completion of such withdrawal.

In these circumstances, including the ongoing efforts to restore momentum to the vital peace negotiations and Israel's assurance that it intends to withdraw from Lebanon, I am not recommending to the President any further action.²

A reply by Counselor of the Department of State Matthew Nimitz on April 13, 1978, to a similar inquiry from Director of Public Affairs John P. Richardson, National Association of Arab Americans, referred to the Secretary's report to Congress and stated:

Procedurally, section 3(c)(2) [of the Arms Export Control Act, as amended], requires the President to "report to the Congress promptly

⁴ *Id.*

¹ PL 94-329, 90 Stat. 729, 754-55, 22 USC §2753(c), 15 ILM 1197 (1976).

² Dept. of State File No. P78 0061-2329.

upon receipt of information that a violation described in paragraph (1) of this subsection may have occurred." However, ineligibility is not a necessary result in each case where a report is submitted. Rather, according to section 3(c)(3)(A), "[a] country shall be deemed ineligible" for credits, guaranties, cash sales or deliveries pursuant to previous sales in the case of a violation described in section 3(c)(1) "if the President so determines and so reports in writing to the Congress, or if the Congress so determines by joint resolution."

Thus, under the statute, the President is required to report to Congress in any instance where a substantial violation may have occurred. Thereafter, ineligibility results from a Presidential determination or from a joint resolution of the Congress. . . .

.....

In the case of the recent Israeli incursion into southern Lebanon, the Secretary of State reported to Congress on April 5 that a violation "may have occurred." The President has not determined that Israel is ineligible for further U.S. assistance. . . . Israel's assurance that it intends to withdraw from Lebanon and our ongoing efforts to restore momentum to the vital peace negotiations underlay this U.S. position.³

Earlier, by a letter of December 7, 1977, replying to an inquiry by Congressman Paul Findley about the use of U.S. equipment, Assistant Secretary of State for Congressional Relations, Douglas J. Bennet, Jr., noted that the Israelis had taken the position that their use of U.S. aircraft to bomb targets in south Lebanon was in "legitimate self-defense." While the United States considered the response "excessive," it had decided that "a conclusion that the Israeli action in this one case might constitute a substantial violation" of the agreement "was not appropriate." Dept. of State File No. P78 0001-0518.

On the same date, April 13, 1978, Zbigniew Brzezinski, Assistant to the President for National Security Affairs, in acknowledgment of letters to the President from Congressman Paul N. McCloskey, Jr., March 22 and April 10, protesting reported Israeli use of cluster bomb units in southern Lebanon, stated that the Israeli Government had confirmed that cluster bomb units had in fact been used there, "in contradiction to previous assurances given to us." He also stated that the Department of State had communicated to the Israeli Government the concern of the United States over the matter. A more detailed response to Congressman McCloskey was supplied by the Department of State under date of May 5, 1978, in a letter from the Assistant Secretary of State for Congressional Relations, Douglas J. Bennet, Jr., reading in part, as follows:

The Government of Israel has confirmed to us that it used cluster bomb units (CBU's) during the military operation in southern Lebanon, a use contrary to previous assurances given to us. At present there are no outstanding prior or current orders requiring delivery of CBU's to Israel.

The United States requested, and has received, a reaffirmation of Israel's acceptance of stipulations and conditions on the use of CBU's. This reaffirmation is in the form of a classified agreement concluded

³ Dept. of State File No. P78 0149-1642.

by an exchange of notes dated April 10 and April 11, 1978, which has been transmitted to the Chairmen of the House International Relations Committee and the Senate Foreign Relations Committee pursuant to 1 U.S.C. 112b. We have also expressed our strong concern to Israel that effective procedures be instituted to ensure that the assurances given the United States are known and effective in the context of Israeli decision-making.

We appreciate your informing us of possible Congressional action on the issue of CBU's and will be prepared to comment whenever such legislation is submitted.

The Departments of State and Defense share your concern about this issue. We can assure you that we will make every effort to ensure that the Government of Israel institutes measures that will prove effective in guarding against the misuse of this weapon in the future.*

*Dept. of State File No. P78.0085-1720.

JUDICIAL DECISIONS

ALONA E. EVANS

Aliens—permanent residents—eligibility for admission to licensed professions

KULKARNI v. NYQUIST. 446 F.Supp. 1269.
U.S. District Court, N.D. New York, Jan. 5, 1977.

In a consolidated action, plaintiffs, permanent resident aliens, sought licenses to practice the professions of civil engineer and physical therapist, respectively, in the state of New York. According to the New York Education Law, Sections 7206.1(6) and 6534(6), such professional licenses were limited to American citizens or to aliens who had filed declarations of intention to become citizens. Plaintiffs argued that this requirement violated their rights under the Equal Protection Clause of the Fourteenth Amendment. They also sought to have their consolidated action designated as a single class action (Fed. R. Civ. P. 23) which would comprehend the licensed professions of physician (§6524(6)), chiropractor (§6554(6)), dentist (§6604(6)), pharmacist (§6805(6)), landscape architect (§7324.1(6)), certified shorthand reporter (§7504.1(6)), and masseur or masseuse (§7804(6)). Plaintiffs' motion for summary judgment on their first contention was granted by the District Court. The Court denied their motion for class action certification and defendants' cross motion for summary judgment.

In a memorandum opinion, Chief Judge Foley stated that there was no longer any question that the New York requirement of citizenship or declaration of intention to become a citizen in order to exercise a particular licensed profession was unconstitutional. On the other hand, the Court held that plaintiffs lacked standing to use their complaints as a vehicle for a class action suit designed to strike down citizenship restrictions upon other licensed professions because they could not show the requisite personal injury arising under these other sections of the statute.

Aliens—permanent residents—non-eligibility for appointment to state police—the law of New York

FOLEY v. CONNELIE. 98 S.Ct. 1067.
U.S. Supreme Court, March 22, 1978.

Appellant, a permanent resident alien, brought a class action for a declaratory judgment that New York Executive Law §215(3) which restricted appointment to the state police to American citizens violated the Equal Protection Clause of the Fourteenth Amendment. A three-judge district court found that the statute was constitutional. (419 F.Supp. 889 (S.D.N.Y. 1977)). The Supreme Court affirmed this decision.

Chief Justice Burger observed that the Supreme Court in recent years has

closely scrutinized state laws which purported to limit the right of permanent resident aliens as a class to enjoy the benefits of membership in the community.¹ In so doing, however, the Court has been cognizant of the "State's constitutional prerogatives,"² in particular, the restriction of political rights to citizens. The Court stated that "[t]he essence of our holdings to date is that although we extend to aliens the right to education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved to citizens."³

In the opinion of Chief Justice Burger, the police function, while not primarily a policymaking function, nevertheless involved the use of wide discretionary powers as to arrest, search, and other types of interference with the right to privacy of individuals. It followed that the performance of this function should be restricted to citizens "whom the State may reasonably presume to be more familiar with and sympathetic to American traditions"⁴ than aliens would be. The Court concluded that "[i]n the enforcement and execution of the laws the police function is one where citizenship bears a rational relationship to the special demands of the particular position. A State may, therefore, consonant with the Constitution, confine the performance of this important public responsibility to citizens of the United States."⁵

Justice Stewart concurred; Justice Blackmun concurred in the result. Justice Marshall, joined by Justices Brennan and Stevens, dissenting, pointed out that if under New York law "any person" may make an arrest and a search incidental thereto where an offense has been committed in his presence,⁶ an authority which is not restricted to citizens, it is difficult to justify the majority's argument for placing a citizenship restriction on appointment to the state police. As "no compelling state interest"⁷ has been shown in the matter, Justice Marshall concluded that the statute at issue violated the Equal Protection Clause.

Justice Stevens, joined by Justice Brennan, dissenting, objected that the majority failed to show why aliens as a class should be discriminated against with regard to appointment to the state police. In their opinion, "the Court's unique decision fails either to apply or to reject established rules of law. . . ."⁸

Aliens—political refugees—evaluation of evidence of potential political persecution—Protocol Relating to the Status of Refugees

CORIOLAN V. IMMIGRATION & NATURALIZATION SERVICE. 559 F.2d 993.
U.S. Court of Appeals, 5th Cir., Sept. 22, 1977.

Petitioners, Haitian nationals and admittedly deportable aliens, applied for political asylum. When the Immigration and Naturalization Service

¹ Citing, *inter alia*, *Graham v. Richardson*, 403 U.S. 365 (1971) (footnotes by the Court omitted).

² Quoting *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973); 68 AJIL 335 (1974).

³ 98 S.Ct. 1067, 1071.

⁴ *Id.*, 1072.

⁵ *Id.*, 1073.

⁶ N.Y. Crim. Proc. Law §140.30, cited by the Court.

⁷ 98 S.Ct. 1067, 1076.

⁸ *Id.*, 1079.

(Service) denied this request, they sought relief under Section 243(h) of the Immigration and Nationality Act of 1952 as amended (8 U.S.C. §1253(h)) which authorized the Attorney General in his discretion to withhold deportation where it was likely that the alien would be subject to political persecution in the state of destination. The immigration judge denied this petition on the ground that petitioners had failed to establish that their lives or freedom would be endangered in Haiti because of their political beliefs or commitments. The Board of Immigration Appeals affirmed. On appeal, the Court of Appeals reversed and remanded the case for further proceedings.

Circuit Judge Tuttle observed that although the courts have not decided whether the adherence of the United States to the Protocol Relating to the Status of Refugees of 1967 (19 UST 6223, TIAS 6577, 606 UNTS 267), in particular Article 33, restricts the exercise of the Attorney General's discretion under Section 243(h), "[w]e do believe that our adherence to the Protocol reflects or even augments the seriousness of this country's commitment to humanitarian concerns, even in this stern field of law. It may be appropriate to add that the foreign policy of the United States has recently become more dramatically focused in the protection of human rights around the world."¹ The basic question here was how to evaluate the evidence submitted in support of petitioners' allegations as to their prospects of political persecution in Haiti. The Court found that the immigration judge's opinion did not provide precise reasons for discounting petitioners' evidence, nor was it clear why he discounted petitioners' assertions that having left Haiti illegally, they would be subject to prosecution, hence political persecution, upon their return, when there were a number of administrative and judicial decisions which recognized this factor. The Court was also unclear as to why the Service chose to disregard the oppressive political conditions obtaining in Haiti, particularly as described in a report by Amnesty International. Since this report had not been available for consideration at the hearings before the immigration judge and because the Board of Immigration Appeals did not rule out the right of petitioners to have the proceedings reopened in order to have the report considered, refusal by the Service to reopen the proceedings in the circumstances would be ground for appeal on a complaint of abuse of discretion. In the opinion of the Court, the case should be remanded, so that the report could be taken into account.

Circuit Judge Coleman, dissenting, took the view that the majority's decision was contrary to the Court's holdings in such recent cases concerning illegal immigrants from Haiti as *Martineau v. Immigration & Naturalization Service*, 556 F.2d 306 (5th Cir. 1977), 72 AJIL 158 (1978) and *Henry v. Immigration & Naturalization Service*, 552 F.2d 130 (5th Cir. 1977), 71 AJIL 784 (1977). He objected, moreover, to the fact that the decision turned on evidence in an unauthorized report issued by a private organization.

¹ 559 F.2d 993, 997.

Extradition—renewal of request after dismissal—res judicata—extradition treaties with Canada

HOOKE v. KLEIN. 573 F. 2d 1360.

U.S. Court of Appeals, 9th Cir., May 3, 1978.

Pursuant to the extradition treaties in force between the United States and Canada as of March 1975,¹ Canada requested the extradition of the accused on charges of theft of the assets of a corporation which had been dissolved. The extradition magistrate dismissed the request on the ground that it had not been shown that the accused had committed an extraditable offense in Canada. A second request was then filed in a district court which granted the request. Thereafter, the accused sought habeas corpus relief on the ground that a second proceeding was barred where extradition had been previously denied. His petition was denied. On appeal, the Court of Appeals affirmed this decision.

District Judge Kelleher, sitting by designation, pointed out that there was no direct appeal from a decision in an extradition proceeding; the scope of review in this case was limited to matters which might be raised pursuant to a petition for habeas corpus relief. While the sufficiency of the evidence submitted in support of the extradition request could not be considered on habeas corpus, the Court was prepared to consider the accused's contentions insofar as they were relevant to the jurisdiction of the District Court in the second proceeding.

The accused argued that the request could not be renewed on the basis of the same evidentiary facts which had been submitted in the first proceedings. An examination by the Court of relevant case law, however, supported the conclusion that "where the government in good faith determines that extradition is warranted, it is not barred from pursuing multiple extradition requests irrespective of whether earlier requests were denied on the merits or on procedural grounds."² The accused had contended that the doctrine of *res judicata* applied where the original extradition request had been denied on the merits. Judge Kelleher, observing that there was little case law on the matter, noted that the doctrine of *res judicata* applied only to final judgments. An extradition proceeding, in his opinion, was, in no sense, final but rather similar to a preliminary hearing in a criminal proceeding; consequently, *res judicata* did not apply here. Moreover, an extradition proceeding did not result in a judgment on the merits, a necessary factor if *res judicata* were to be invoked.

¹ Art. X, Webster-Ashburton Treaty, 1842, 8 Stat. 572, TS 119, 12 Bevans 82; Extradition Convention, 1889, 26 Stat. 1508, TS 139, 12 Bevans 211; Supplementary Extradition Convention, 1900, 32 Stat. 1864, TS 391, 12 Bevans 256; Supplementary Extradition Convention 1905, 34 Stat. 2903, TS 458, 12 Bevans 272; Supplementary Extradition Convention, 1922, 42 Stat. 2224, TS 666, 12 Bevans 392, 14 LNTS 90; Supplementary Convention to Extradition Convention of 1900, 1951, 3 UST 2826, TIAS 2454, 206 UNTS 319. These conventions were superseded by the Extradition Treaty of 1971, which entered into force on March 22, 1976, 27 UST 983, TIAS 8237.

² Construing *Collins v. Loisel* (*Loisel II*), 262 U.S. 426 (1923) (footnotes by Court omitted).

Circuit Judge Chambers, concurring, said with regard to the matter of review: "I would give the government at least one more shot on extradition when the magistrate has clearly made a wrong ruling, and I think he did here. He let the fugitive put on a pretty fair defense, whereas the fugitive is only entitled to explain or clarify government allegations."³

Jurisdiction—improper service on foreign government—sovereign immunity—Foreign Sovereign Immunities Act of 1976

40 D 6262 REALTY CORP. v. UNITED ARAB EMIRATES GOVERNMENT.

447 F.Supp. 710.

U.S. District Court, S.D. New York, Feb. 28, 1978.

Respondent moved to dismiss an action which had been removed to the federal district court on the grounds of sovereign immunity and improper service. Petitioners replied that the method of service was not properly before the District Court, as respondent had not raised this issue in the state court before removal. The District Court granted respondent's motion.

District Judge Weinfeld pointed out that petitioners' method of service, *i.e.*, to affix a copy of a "notice of petition" to respondent's premises, was improper as it did not conform to the requirements of the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §1608) which provided, in essence, that service be made by delivering or sending a copy of the summons and complaint to a defendant. The Court observed, that contrary to petitioners' contention, respondent had raised the issue of service in the state court. Since the action would be dismissed because of improper service, the Court did not reach the issue of sovereign immunity.

Jurisdiction—United States occupation of Ryukyu Islands—contractual liability—Treaty for Reversion of Ryukyu Islands to Japan of 1972

DEMAURO CONSTRUCTION CORP. v. UNITED STATES. 568 F.2d 1322.

U.S. Court of Claims, Jan. 25, 1978.

Plaintiff brought suit for breach of contract, alleging that the United States Government had failed to assume liability for a changed condition in the course of the construction of the Tengan Dam in Okinawa during the American military occupation of the Ryukyu Islands. In 1964, plaintiff contracted with the United States Army Corps of Engineers, acting for the Ryukyu Domestic Water Corp. (RDWC), to build an earthen dam. Once construction was under way, plaintiff discovered that there was less impervious fill available for the core than the contract had provided for; consequently, plaintiff requested additional compensation on the ground of a changed condition. Plaintiff's claim was denied by the contracting officer of the Corps of Engineers. On appeal to the Armed Services Board of Contract Appeals, the claim was upheld by the Board in 1972 and an adjustment was ordered. After several unsuccessful attempts to institute negotiations with the appropriate government authorities regarding the

³ 573 F.2d 1360, 1369.

amount of the claim, plaintiff was informed that responsibility for RDWC had been assumed by Japan following the entry into force on May 15, 1972 of the Treaty Providing for the Reversion of the Ryukyu Islands to Japan and Daito (23 UST 446, TIAS 7314); moreover, that RDWC had at all times been the real party to the contract rather than the government, so that the latter had no responsibility in the matter. Cross motions were filed for summary judgment. The Court of Claims granted plaintiff's motion and denied defendant's motion.

Judge Nichols held that the United States, not RDWC, was party to the contract and that a modification in 1967 making RDWC party for purposes of handling supplies and services did not constitute a novation. The Court pointed out, moreover, that RDWC had been created as an instrumentality of the United States Civil Administration of the Ryukyu Islands in 1958, so that even if it had executed the contract with plaintiff, liability would have accrued to the United States. Defendant's argument that Congress had never appropriated funds for the construction of the dam was found to have no validity, as it could be shown that in 1964 Congress had appropriated \$2,000,000 for use by the RDWC in the construction of a water system (78 Stat. 1015, 1020) and had appropriated an additional \$4,000,000 for this purpose in 1965.

Defendant argued that as the 1972 treaty had terminated United States responsibility for the administration of the Islands, plaintiff's only recourse would be to bring an action against the government of Japan in a Japanese court. Judge Nichols pointed out, however, that "it is well-established law that a treaty cannot extinguish . . . [accrued contractual] rights."¹ There was nothing in the treaty to indicate that Japan was supposed to assume this type of obligation.

¹ 568 F.2d 1322, 1329.

BOOK REVIEWS AND NOTES

EDITED BY LEO GROSS

Individual Rights and the State in Foreign Affairs. An International Compendium. Edited by Elihu Lauterpacht and John C. Collier. New York and London: Praeger Publishers, 1977. Pp. xiii, 743. Index.

Twenty-one scholars deal with selected phases of individual rights, which may be affected by the foreign activities of states. The emphasis of the comparative study (the chapters of which were originally presented as papers at a 1972 conference in Bellagio) is on the content of individual rights in regard to such topics as movement between countries, location within a state, diplomatic protection, activities conducted abroad, consequences of legal injuries incurred abroad, national implementation of the individual's international rights and duties, and the methods of enforcement. Considerable attention is also given to the implementing procedural standards applied within these diverse legal orders. A basic distinction is drawn between the rights of nationals and the more limited guarantees accorded to aliens.

As John Hargrove mentions in the foreword, "this large and variegated cluster of individual rights and duties, the corresponding rights and duties of states, and the bodies of national law and practice in which they are reflected provide important insights into the evolving role of the individual as an actor in the global community" (p. vii).

The thrust of the Bellagio conference and this resulting publication stem from the inspiration of the editor, Elihu Lauterpacht, whose purpose was to explore an area previously neglected by legal literature. Because of the broad scope of the investigation and the diverse nature of systems analyzed, the collaboration of a group of distinguished scholars conversant with the precise topics under investigation was necessary. Indeed, Lauterpacht is sympathetic to a "collective" or group approach to the examination of major segments of international law, which cannot be adequately dealt with by a single author.

Published under the auspices of the American Society of International Law with the cosponsorship of the Carnegie Endowment for International Peace, the volume consists of twenty chapters (including a comprehensive introduction). Each chapter is devoted to a single national legal system selected from the world's primary legal systems. Though emphasis has been placed on the legal orders of the western powers, examples are drawn from Africa, Asia, Latin America, and Eastern Europe. Noteworthy is Krzysztof Skubiszewski's introductory chapter, which synthesizes the nineteen specialized essays. In addition to writing the chapter on *Poland and Some Other Eastern European Countries*, he has drawn together the underlying themes which are examined in the specialized presentations, namely, "the belief that reconciliation of state and individual interests is

not beyond the reach of law, international and municipal" (p. 23). The fundamental assumption is that international law and codified standards, plus the decisions of international tribunals, have an impact on national laws and practices. Nonetheless, the idealistic theme (that the welfare of the individual, be he a national or an alien, is no longer to be found within the exclusive domain of municipal law) is critically examined, and it is regretfully conceded that there is no right under international law for every individual to move freely across national frontiers. However, the book unmistakably enunciates the trend of states to respect the emerging rights of their nationals and to provide administrative and judicial remedies. Accordingly, the editors and the authors have concentrated much of their attention on practice, namely the tendency of governments to grant passports, recognize the right of establishment, accord diplomatic protection, and grant compensation from lump sum settlements. Authors, who are particularly conscious of the law's application, include Michel Waelbroeck (Belgium), Jacques-Yvan Morin (Canada), Ibrahim Shihata (Egypt), and C. F. Amerasinghe (Sri Lanka). Leading cases and administrative rulings are analyzed.

Collectively, these studies provide a considerable degree of insight into state practice. The internal organization of each presentation centers on the concept of the individual as a national (including a dual national) or an alien, national implementation of international rights and duties, and treaties that affect private persons. Within this broader context, specific topics include the right of nationals to depart from and reenter their country, procedural guarantees of freedom of movement, diplomatic protection, compensation for injuries suffered abroad, the act of state doctrine, the issuance of executive certificates, the impact of recognition of foreign governments, and the implementation by municipal organs of international resolutions and treaties, as the rights of private persons are modified.

The book has a clearly defined parallel structure, which unifies the topics under consideration; it does not merely provide a series of independent essays. Thus, Ignaz Seidl-Hohenveldern has written the chapters on Austria and Germany, with the result that it is possible to draw comparisons between these two legal orders. Moreover, the other authors were conscious of the volume's underlying structure.

Despite this unmistakable parallel structure concerning the book's main subdivisions, there is considerable variation within the scope of each chapter, owing to the differing nature of the diverse legal orders and the personal style of each contributor. Considerable differences exist as to the competence of local courts over crimes committed abroad. For instance, John Collier, in examining the law of the United Kingdom, demonstrates the limited extraterritorial application of U.K. law in selected instances. However, the sections dealing with national implementation of individual rights, *e.g.*, passport regulations, the right to enter and leave a country, freedom of movement, and procedural remedies are accorded a more extensive coverage than the subject of treaties and their subsequent implementation through municipal law. Topics dealing with the decisions of inter-

national and regional organizations, as for example those by the European Communities, are minimized. However, Lucius Cafilish (Switzerland) and Monroe Leigh (United States) are especially conscious of this area. By way of comparison, the discussions of the issuance of executive certificates and their juridical effect, and injuries caused by the application of the act of state doctrine are particularly helpful.

State action necessarily results in assertions of national sovereignty, which in turn affect the rights of private individuals. While it would be incorrect to assume that the exercise of sovereign powers in all cases prejudices private interests, several of the authors are conscious of the action taken by their governments to protect internal security, even at the cost of suppressing human rights. By way of illustration, Joseph-Marie Bipoun-Woum (Cameroon) concludes that "As a general rule, the African states give no protection to movements that constitute, or could constitute, a danger to national development in their eyes. . . . [A]ll states are openly against tribes or ethnic groups. These latter receive neither official recognition nor any protection of the law, notwithstanding the principle of freedom of association" (p. 79). Indeed, limitations of varying degrees are to be found in all of the systems examined, but this reviewer experienced considerable anguish while reading P. G. Mugerwa's chapter on Uganda and Francisco Orrego Vicuña's examination of Chile. Events subsequent to the Bellagio conference rendered any further updating impracticable. Consequently, the lesson to be learned is that state actions, of the extreme left and the extreme right, can subvert not only the individual's domestic rights but, simultaneously, international and regional guarantees.

The purpose of the editors has been achieved in that a uniform analysis of state practice has resulted; Lauterpacht and Collier have, therefore, rendered a major contribution by providing guidance to this large and complex subject. The authors are objective in their presentations: they do not hesitate to indicate the shortcomings inherent in municipal law and practice which frequently result in restrictions being placed on individual protection.

The studies are particularly well documented, and, considered collectively, the notes contain a comprehensive coverage of the literature. An exhaustive index permits easy cross-reference. This highly significant book will serve as an indispensable research tool, and beyond question it will emerge as the standard text in its field.

W. PAUL GORMLEY
Of the District of Columbia Bar

Managing the Sea's Living Resources. Legal and Political Aspects of High Seas Fisheries. By H. Gary Knight. Lexington, Mass. and Toronto, Canada: Lexington Books, D. C. Heath and Co., 1977. Pp. xiii, 140. Index. \$16.

This book provides an excellent introduction to the international law of fisheries. It is particularly good in summarizing the historical background of the contemporary ocean legal system and in interdisciplinary analysis of the standards for fisheries management. Though a substantial portion of

the materials has been published previously by Knight, the materials have good unity and do not suffer from the usual collection of articles malaise. Anyone interested in contemporary fisheries management or ocean law can read this monograph with pleasure and profit.

In some respects, however, this book is disappointing. Though it purports to deal broadly with the "sea's living resources" it mentions whales and other marine mammals only in passing. In doing so it accepts uncritically the early State Department categorization of marine mammals together with highly migratory fish stocks such as tuna. It is factually accurate that many marine mammals are highly migratory; indeed some species of whales seem to be highly migratory on a global basis and some species of the family Delphinidae are taken incidentally in purse seine fishing for Yellowfin tuna. As a basis for policy, however, treating whales and tuna together as something to be commonly managed by regional fishery organizations is not the most perceptive position politically or from the standpoint of sound conservation and management. To his credit, Ambassador Elliot Richardson has recognized this failing and has changed the United States position on this point within the law of the sea negotiations. Aside from the current inadequacy of the Informal Composite Negotiating Text (and at the time of Knight's book the RSNT) in treatment of marine mammals, I am sorry that we did not get the benefit of Knight's thought on the important whale conservation and tuna/porpoise issues, both within the LOS negotiations and within the International Whaling Commission (and regional tuna organizations such as the Interamerican Tropical Tuna Commission).

Another disappointment is that the book has a number of inaccuracies in discussing the crucial law of the sea negotiations. In discussing a "North-South" split in the negotiations, Knight treats Canada as a member of the "North" group purportedly emphasizing freedom of navigation and scientific research. That characterization, I suspect, would puzzle even the Canadian delegation. As this example illustrates, the reality of national positions and groupings at the Conference is a great deal more complex than this "North-South" dichotomy suggests. Similarly, Knight implies that the United States accepted the economic zone concept before the Soviets, when in fact the United States made its first public statement at Caracas conditionally accepting the idea (as part of a comprehensive LOS treaty) after the Soviets had for some months been indicating conditional acceptance. Equally puzzling is the statement that the primary impetus for a United States policy of preferential as opposed to exclusive coastal state fishery rights "came from the Department of Defense. . . ." In fact, the doctrine was primarily intended to protect U. S. distant water coastal fisheries (and a slim reed it was) and to discourage political factors from interfering with the production of protein from the oceans. The literature tends to ascribe a greater influence to the Defense Department in oceans policy than is the case and this suggested trade-off, like that rumored about the deep seabed for straits, is exaggerated.

Most disappointing, however, is the one-sided and wooden presentation of the arguments surrounding passage of the 200-mile fishing bill. Elsewhere

Knight has established a reputation as one of the leading oceans unilateralists. His discussion of the 200-mile fish fight does nothing to detract from that reputation.

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The Law of the Sea. Issues in Ocean Resource Management. Edited by Don Walsh. New York and London: Praeger Publishers, 1977. Pp. xi, 264.

After reading the views of the ten contributing authors to this book, it becomes clear why decades have been spent in the development of a new international approach to ocean resource management. The issues, which are authoritatively discussed by such experts as Arvid Pardo, Elisabeth Mann Borgese and Carl Cristol, are as numerous as the fish in the sea (a better analogy might be couched in terms of the delegates to the law of the sea conferences because, unlike the fish, the number of delegates continues to increase). The following chapter titles exemplify the spectrum of issues discussed in the book: "The New International Economic Order and the Law of the Sea" and "Offshore Petroleum Development: A Practical Perspective."

The book is a collection of essays resulting from a lecture series completed in 1976. It is admittedly dated, but, considered among the countless articles and books discussing the relatively recent flux in the law of the sea, this collection has a perspective that makes it a valuable source for understanding the policy problems confronting negotiators and ocean resource managers at this time. The repetitive summarization of the provisions for an International Seabed Authority is a drawback. However, that feature is balanced by the varying analyses of the ISA that the respective authors contribute.

A composite message of the essays is that ocean resources must be managed properly for the good of mankind, taking into account the rights and duties of nations. How the management is accomplished is the big question. Impediments to reaching the answer include: prolonged negotiations which have strained continuity; increasing numbers in the developing nations bloc which have made negotiations and compromise difficult; parochial state interests being represented in the negotiations which have resulted in a failure to address basic issues. Other problems may arise in the future. The ambitions and plans for the ISA might follow precedent and degenerate like the Conference on International Economic Cooperation or the negotiations for the Common Fund. A final oceans treaty could suffer the same fate at the hands of the U.S. Congress that was suffered by the Havana Charter and its International Trade Organization. The telling point right now, however, is that the negotiations continue. This evidences the political as well as scientific realization that the management of ocean resources is an international question that can only be answered on a cooperative basis.

CHARLES R. JOHNSTON, JR.
Senate Committee on Finance

Ocean Thermal Energy Conversion. Legal, Political and Institutional Aspects. Edited by H. Gary Knight, J. D. Nyhart, and Robert E. Stein. Lexington and Toronto: Lexington Books, D. C. Heath and Co., 1977, for the American Society of International Law. Pp. xiii, 251. Index. \$19; special price to ASIL members, \$15.20.

This report, prepared by the Panel on Ocean Thermal Energy Conversion (OTEC) of the American Society of International Law, is a comprehensive and scholarly appraisal of prospective legal/political aspects of an OTEC operation, assuming one were mounted in the near future. The study does not evaluate the technical feasibility of OTEC, nor does it assess the details of the technology yet to be worked out, although two opening chapters give sufficient details on technological and economic problems to make discussions of the operation meaningful to the reader. It is assumed, as a basis for the study, that at least one full-sized OTEC power plant will be in operation in the 1990-2000 time frame somewhere off the continental United States plus Hawaii, at a distance offshore of between 3 and 200 miles. The plant will be moored, and linked to a land-based power grid by cable.

Given these assumptions, the authors then discuss the implications. Throughout the text, references are made to the fact that much of the discussion is speculative, but most of the authors, in their definitions of alternative problems and courses of action, are quite realistic as they proceed from the known to the unknown.

The interrelationships of national and international issues are skillfully addressed. At the national level is the initial problem of United States jurisdiction over the siting of OTEC, the ownership of ocean thermal energy, and then its protection of OTEC installations from accidental and deliberate interference. Other problems include possible conflicts between OTEC and other users of ocean space, domestic regulatory authorities at the federal and state levels, legal responsibilities and liabilities associated with OTEC, environmental aspects of the power plants, and techniques of financing, as have been developed by oil companies, shipping firms, and nuclear power groups. It is pointed out that "No private right or power exists under current U.S. law enabling or authorizing the siting or operation of an OTEC plant beyond the U.S. territorial sea. Congress must therefore enact legislation legitimatizing OTEC siting in areas beyond the territorial sea." Several of the authors call for the designation of a lead agency within the federal government to have responsibility over OTEC activities.

Internationally, prime consideration must be given to the impact of the prevailing international system (including law of the sea developments) on the use of OTEC plants, as well as the effect a significant number of OTEC plants might have on the conduct of international relations. Within this framework, the authors then consider other topics such as the international regulatory agencies which should have jurisdiction over OTEC operations, the international legal responsibilities of OTEC operators, and international environmental problems such as the possibility that OTEC

operations might induce new upwelling patterns, or affect the movement of highly migratory species of fish.

The authors are to be commended for their imagination, and for their willingness to express themselves on highly speculative issues. As the time for OTEC development draws near, it might be hoped that some sort of followup session could be held so that the authors might confirm or amend their forecasts in the light of new technological, legal, and political developments.

LEWIS M. ALEXANDER
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Livre du Centenaire 1873-1973. Evolution et perspectives du droit international. By the Institut de Droit International. Basel: Editions S. Karger, 1973. Pp. xx, 473. \$118.75.

Annuaire de l'Institut de Droit International, 1973. Volume 55. Session du Centenaire, Rome, Septembre 1973. Basel: Editions S. Karger, 1974. Pp. xcvi, 916.

The *Livre Centenaire, 1873-1973: Evolution et perspectives du droit international* is divided into two parts. The first contains 118 pages of thumbnail sketches of the founders of the Institute. The second consists of scholarly special reports by C. Wilfred Jenks, Charles de Visscher, Henri Batiffol, Sir Gerald Fitzmaurice and Oscar Schachter. There is a brief summary of a discussion of the reports by Batiffol and Schachter and a considerably longer summary of comments by members of the Institute on Fitzmaurice's study of "The Future of International Law and of the International Legal System in the Circumstances of Today," which, with annexes, covers 169 pages.

The sketches of the founders, all eminent jurists and statesmen, contain entertaining and surprising details. For example, the mother of that towering legal genius David Dudley Field had been given, by no doubt a worthy parent, the name "Submit." Asser who is read (or at least quoted) today for his analytical skills and his work on international arbitration and on the codification of private international law, loved to recite French romantic poetry (especially that of Alfred de Musset). Auguste Pierantoni, a leading scholar of his time, had been in 1860 (at age 20) one of Garibaldi's "Thousand."

The first report of the four in this volume, that of the late C. Wilfred Jenks, entitled "Law for a Welfare World" is a brief but eloquent call to international lawyers to transcend (while continuing also to fulfill) their traditional functions. He advocates proscription of the use of force, and prescription of economic stability and growth. This requires, he argues, the development of a complex institutional framework to receive and disseminate scientific and technological innovations to expand "world public services," and to "bring the operations of multinational entities within the rule of law." He asserts that there must be a responsiveness to change without a sacrifice of due process. He also calls for a "new openness of mind" and for cooperation with other disciplines, for a transcending of

cultural divergences, ideological conflicts and of differences of economic and social development. These and other developments which he calls for are to mature in the future and make more just and more fair, as well as institutionally more stable and more complex the present international legal order. Jenks saw these innovations as conferring upon the present members of the Institute and those who succeed them an assured stature and a worthiness similar to that of the founders.

The second special report, that by Charles de Visscher, entitled "La contribution de l'Institut de droit international au développement du droit international," is essentially an inspired survey dealing first with public and then with private international law. He traces the long and pioneering history of the Institute's Declaration of the International Rights of Man adopted at New York in 1929 and of the importance, in that context, of rights of emigration and of admission and reception, remedying the disabilities of refugees, stateless persons and expellees. For him the Resolution asserting: "Un ordre juridique efficace entre Etats est inséparable du respect de la personne humaine dans l'ordre interne de chaque Etat." Having surveyed the Institute's contribution to the development of international legal norms regarding nationality, treaties, international communications (including sea and outer space), diplomatic protection and international responsibility, war, neutrality and armed reprisals, and the pacific management of international conflicts, he turns to the development of private international law to assure universalist transnational guarantees of the human person.

In the context of private international law he covers the Institute's contributions to the subject under the headings of problems of general order (and its choices between the alternatives of treaty-created uniform transnational private law and rules for regulating the conflict of domestic laws between nonuniform systems), rights of the person (physical and corporate), the protection of property rights and transfers of title, the effect of territorial changes on the rights of individuals and collectivities, and the law governing the form and qualifications ("characterization") of acts having legal consequences (*locus regit actum*), contractual and tortious obligations, penal matters, and jurisdiction. Wherever the material, the subject matter and the state of evolution of a topic permits, de Visscher takes a universalist rather than a narrow internationalist position. But, he is, particularly in the context of private international law (and not only there), intensely sensitive to the vitality, role and even intransigence of state sovereignty.

Batiffol's special report, "L'avenir du droit international privé," examines the continued broadening of horizons and the deepening of the problems from the recent past. He also extrapolates both of those processes into the future. Among the topics which have come within the new horizons of private international law are the problems of the nationalization of foreign-owned businesses and especially the fate of the intangible (credits and liabilities) assets originally extended to the private enterprise but still in existence at the time of nationalization, contracts of publicly owned enter-

prises and the emerging problems in a world of social welfare legislation, of transnational claims for social service, custody and child support claims. Again, the status and capacity of international organizations and their private law relations give rise to conflict of laws problems posing questions of the scope and limits of the public international law under whose auspices those bodies are created.

With the multiplication of internal laws and policies and their transnational conflicts and interactions, there has been a movement for entering into bilateral and multilateral treaties for either unification of substantive rules or the resolution of conflicts between rules stemming from different jurisdictions. Batiffol takes the view that in family law, as well as in matters of economic rights which have become heavily affected by state intervention, treaty rules will not emerge as exclusive, or even dominant factors in reconciling contradictions.

In another area, also related to material rules, Batiffol decries a movement in the development of law which he characterizes as "spontaneous" ("spontané"). This arises from the conduct of business. Hence the forms of contracts, the general conditions of sale, common ("boiler plate") clauses ("les clauses usuelles"), corporate, professional and trade usages are presented as the true law governing private international legal relations. Although contemporary, these developments have a tradition of a thousand years in the laws of the mediaeval fairs and the sea laws of the shipmen and merchants. So once again, in Batiffol's view, the mediaeval term *lex mercatoria* becomes current, or, to evoke the feel of classical Roman law, we may speak of a new *jus gentium*.

In reviewing the deepening trends of private international law, Batiffol critically notes recent American developments in private international law ("conflict of laws") theory and in adjudication, which he characterizes within the broader category of "unilateralism." He notes that the American advocates of "unilateralism" professed that the incontestable primacy "of his own forum's (and internal) law for each judge" should be viewed as becoming a general rule. Thus foreign law would only come into play under very limited exceptions to the standard reference to the forum's (internal) law. The theories which he refers to without naming their progenitors would thus seem to be the "governmental interest analysis" of the late Brainerd Currie or the "forum law basic doctrine" of the late Albert Ehrenzweig (the "unilateralism" of which was mitigated by his theory of "true rules") among the many American skeptics of traditional conflict of laws theory. Batiffol criticizes such theories on the footing that to argue that conflict of laws escapes all regulation would be moving to the opposite extreme of the traditional doctrine. Following the late Hessel Yntema he sees in such a movement a return to the Middle Ages. He agrees that the need to apply foreign laws when assessing the validity and effects of rights born within a foreign system will always exist. He concludes that the future presents rich materials for further development and study. He does not agree that the current plurality and diversification of methodology would necessarily lead to confusion and to dislocations in the science of

private international law, provided that the scholars and practitioners are knowledgeable in disentangling the respective functions of each method and its relations mutually with others. He calls for a homogeneity in purpose and specificity of methods.

Willis L. M. Reese echoes Batiffol's comments on the negativism of the unilateral theorists, but points to the emerging affirmative solutions which are replacing the former abstract and general rules with new and more numerous specific ones. He adds that such new rules should take account of the interests of the states and the goals of their laws. He gives as examples the values underpinning conflicts rules which have survived, or been renewed through, "unilateralism" the policy of fulfilling reasonable expectations of testators and the contemporary demand for consumer protection in the area of products liability. Indeed, his brief exposition has the affirmative and optimistic view of the post-Brainerd Currie era. One may see in Reese's contribution a perception that, in the dialectic of the contemporary and recent development of private international law, the elimination of traditional rules (as, for example, many of the conflict of torts and contracts rules which were exemplified in the *Restatement First* of the conflict of laws and in the once very influential writings of Beale) is giving place to an emerging phase of building new rules in which specificity of application and teleological values play an important part.

The longest and most substantially thorough study in the volume is that by Sir Gerald Fitzmaurice who stresses the importance of customary international law, not only for the past, but also for future developments. He includes, under that heading, the "general principles of law" as specified in Article 38 paragraph 1(c) of the Statute of the International Court of Justice and adds that "By 'customary' international law we shall, for present purposes, understand all these branches and aspects of the law that are not exclusively dependent for their formulation and legal force on treaty or convention—in short, which are in the nature of *lex generalis* rather than *lex specialis*."

Fitzmaurice designates treaty law, including the law of multilateral treaties, as *leges speciales* in that their problems are not *primarily* legal in character, but technical, economic, or sociological. That is, they are "special" to individual topics. Some emerging topics, moreover, pass straight into customary international law without the intermediary of a treaty. He gives as an example, the continental shelf doctrine, "even though it subsequently became the subject of a treaty." In this regard Fitzmaurice's view of codification conventions is of great interest. In codifying customary international law an element of new law may be added or intermingled with existing law. But even when a customary international law rule is not thereby supplanted or reduced to a minimum, codification creates problems of flexibility and change owing to the difficulties of amending multilateral treaties. Hence international law will continue to develop through custom outside the relevant conventions but "operating upon and beyond the codifying treaties."

But Fitzmaurice sees the most important basis for the significance of

customary international law to be the assumption on all sides of its continued relevance and indispensability. In addition to perspectives on the past and future of international law, he offers, under the heading of "the art of the possible," some thought-provoking comments and proposals on international lawmaking, international adjudication and international implementation and enforcement.

Under the rubric of "Challenge and Controversy" Fitzmaurice looks critically at the *ratio decidendi* of the *Lotus Case* as a "lingering off-shoot of the extreme doctrine of State sovereignty." According to that theory the "liberty of action of the State was in principle unfettered except in so far as, by treaty of acquiescence, or participation in general State practice, or restrictions on that liberty had been accepted." Fitzmaurice perceives that doctrine wrong as a description of international law and dangerous as providing justifications for unilateral acts of determining the content and extent of states' territorial and jurisdictional claims over the high seas. He sees the *Lotus* principle as having pernicious effects because of its self-judging and subjective effects on nonintervention and the use of national territory as a hostile base for armed bands and terrorists.

Under the heading of "international law-making," Fitzmaurice points to analogies between international law on the one hand and the body of law of countries of the Common Law especially, in that these systems have developed through "a process other than a legislative or quasi-legislative process." He also agrees with the evaluation by Kaplan and Katzenbach that international law should look less to the use of treaties to lay down substantive rules and more to their use for setting up common constitutional procedures for the formulation of rules within the scope and competence of the treaty. Fitzmaurice draws attention to the undoubted fact that the process of codification (or "law-identifying") through the ILC and the UN General Assembly acting under Article 13 paragraph 1(a) of the Charter reflects just this approach.

The rapporteur characterizes much of the contemporary writing on the "quasi-legislative competence" of the UN General Assembly and of the "quasi-statutory" effect of some of its resolutions as the "'mirage' of international statute-law." He gives two reasons for this appraisal, namely: (a) to recognize the General Assembly as having a legislative power would be inconsistent with the basic constitution of the Charter; and (b) the General Assembly's composition and practices render it an inappropriate forum for this kind of a development.

His proposal of a complex procedure whereby, possibly, a General Assembly resolution could become the initiating point of an international legislative process is of considerable interest. While it follows the example, to some extent, of current procedure regarding the codification process utilizing the services of the ILC, it elaborates considerably on that comparatively simple theme.

Under the subheading, "(B) International Adjudication," Fitzmaurice identifies the causes of the reluctance of states to litigate and the fewness of requests for advisory opinions by international organizations. After ex-

amining a number of hypotheses he concludes that an important factor in the reluctance of states to submit disputes to judicial settlement lies in the lack of control by the parties over the future of the case. This leads, he argues, to a preference for political settlement. Unpredictability, which reinforces the reluctance of many states to embark on a course of judicial settlement, derives in part, Fitzmaurice argues, from the fact that although the judges of the ICJ hold office for a nine-year term, a third (and frequently more, owing to the creation of casual vacancies) is elected every three years, thus preventing the Court from developing a consistent jurisprudence.

Fitzmaurice presents some remedies for the present political and psychological impasse. These include: I. the submission of politically unimportant cases; II. amendment of the Statute by permitting states to seek advisory opinions under the following limited circumstances: (1) parties to a dispute might make a joint reference to "test the waters" as it were, or one of them might do so *ex parte*; in the latter case the nonappearance of the other party would not, in Fitzmaurice's view, bar the Court from giving the requested opinion, but the other party should still have the right of asking the Court to reconsider; (2) individual states, not parties to a dispute could request, in specified classes of cases, an anticipatory declaratory opinion even though no dispute had as yet arisen. One may imagine problems arising in such event similar to those in the *Eastern Carelia* case. The absence of an essential party could distort the perspective of a court or expose it to giving a decision *per incuriam*—inadvertently or without adequate briefing or argument; (3) make provision for requests by states for declaratory opinions in advance of a dispute; (4) the provision of an international system of appeals; and (5) the creation of a factfinding jurisdiction (possibly by resort to the ICJ's Chambers jurisdiction). In response to the lack of collegiate homogeneity and consistency, he advocates that at least three-fifths of the judges of the Court should be public international lawyers. He expresses support for Max Huber's earlier proposal that the judges' terms be extended from nine to fifteen years with a retirement age of 75 (although Fitzmaurice believes that the exact length of the term and the age limit should be open for further discussion).

He identifies the causes of the reluctance of international organizations to seek advisory opinions as not dissimilar, *mutatis mutandis*, to that observed in connection with the reluctance of states to litigate. In addition to the remedies already outlined, Fitzmaurice proposes that international organizations should be entitled to litigate disputes before the ICJ and other international judicial tribunals as well as request advisory opinions as at the present time.

Fitzmaurice's suggestion of a place for the Roman Law *actio popularis* is an original insight of great interest. He recognizes the validity of the ICJ's rejection of such a procedure (penal in nature) in the *Barcelona Traction* case. On the other hand he suggests: a limited recognition of the claims of the interests and values underpinning such an action; and a limited compass for that procedure's juridical function. He suggests a parallel in the practice of permitting an international organization acting on behalf

of its member states to request an advisory opinion from the ICJ and of permitting states to initiate proceedings, for example for the interpretation of a treaty, on behalf, not only of their individual interest, but also on behalf of the general interest in terms of the recognition of a "world community spirit."

Oscar Schachter's contribution, "The Role of the Institute of International Law and its Methods of Work—Today and Tomorrow" includes an interesting perspective on changes in the philosophical foundations of the natural sciences and of legal studies. His discussion of the relation of "scientific objectivity" to the normative goals of the Institute raises the problem of objectivity in the social sciences in general and specifically with respect to the elucidation and the progressive development of international law. In this context he indicates the need for diversity and a consciousness of the biases inherent in one's origins and affinities. Furthermore, Schachter emphasizes the role of scholarship and legal science in the deployment of normative fundamental principles and concepts in the analysis and criticism of *lex lata*.

Over and above the problems of objectivity and fundamental criticism is the problem of the Institute as a collectivity and hence of the study of law as a collective enterprise, thereby adding a further dimension. Schachter advocates that the Institute should eschew fragmentation into subdivisions of specialists, without, however, minimizing the contributions of specialists who have devoted themselves to particular problems. He argues that their findings should be subjected to the independent judgment of jurists who are not members of the group of specialists whose work is under review. Even the growing heterogeneity of the Institute should not be seen as a barrier to collective action; rather it could provide the means of achieving a contemporary and global approach. He also advocates that the Institute recruit a larger relative representation in its membership from: (1) the less-developed countries of Africa, Asia and Latin America; (2) the major powers with disproportionately small membership, "Notably China and the USSR and, one might add, the USA and Japan"; (3) some "middle powers" for example Canada, Brazil and India.

Observing that the Institute appears to play a diminished role when measured against the growth of international bodies with similar ends, he points to the permeability of such bodies and the vital influence the Institute may have. This permeability leads also to "another type of 'dédoublement fonctionnel'" whereby jurists move from one role to another without changing their perspectives and frames of reference. Indeed he observes the existence of a rapidly expanded "invisible college" of international lawyers engaging in a continuous process of communication and collaboration and dedicated to a common intellectual enterprise. He perceives this college as manifest on the official level as on the academic, and its communication by no means confined to the media of scholarship. He believes it is also manifested in the active professional community through the "*pénétration pacifique*" of ideas from nongovernmental into official channels. That interpenetration, moreover, operates in both directions. These move-

ments, interpenetrations and developments of ideas provide the means for the Institute's continuing role of persuasion and influence.

In addition to the discussions of scientific objectivity, of the critical and creative aspects and of the social function of the Institute in a transnational network of professionals generating and receiving international legal ideas, Schachter proposes a number of tasks, procedures, methodologies, and topics. Of these the most interesting, to this reviewer, is his proposed "fifth task" namely the "Systematic Consideration of a Comprehensive Intellectual Framework for Better Understanding of International Legal Processes and their Relation to the Ends Expressed in the Statute of the Institute."

Although writing specifically on the traditional perspectives, methods, structures and functions of the Institute, and with their reformation and reformulation in mind, Schachter has articulated for the professional community of international lawyers some of the major intellectual and normative issues and questions facing international legal scholarship today and has made valuable suggestions for effectively working with them and resolving them in terms of a more inclusive community of justice.

In addition to the Centenary volume, the Institute produced its 1973 *Annuaire* as the record of its Centenary Session in Rome. This volume contains a number of important studies (Provisional and Final Reports) and commentaries thereon. They are: the problem of the intertemporal law in the international order; the effects of adoption in private international law; the application of the rules of general international law of treaties to agreements concluded by international organizations; and, the principle of nonintervention in civil wars. Of these topics, the ones regarding the question of the intertemporal law and the nonintervention in civil wars were most interesting to this reviewer.

The dimension of time has always been, for lawyers, a fascinating study. For this may be crucial, not only for the making and crystallization of rules of international law, but also for their concrete application in a given case, and for their termination. This becomes even more significant when the question of the relevance of a recently emerged peremptory rule or norm (*jus cogens*) is in play. Relative to the problem, Max Sørensen, the rapporteur, suggests that the question of interpretation is one of knowing whether the term should be understood as having the acceptance it was given at the time a treaty was concluded or that which subsequently obtained over the course of a later evolution. He concludes his presentation by offering criteria for determining the validity or applicability of the temporal dimension in terms of the needs of security, justice, individual expectations, legitimacy of object, and effectiveness.

The provisional report is accompanied by an exposé of the nature of the problem, a questionnaire (Annex I) and observations regarding the above (and specifically responsive to the questionnaire) by Manfred Lachs, Paul Reuter, Shabtai Rosenne and Wilhelm Wengler (Annex II).

Sørensen's "Rapport définitif" including his further thoughts regarding the preceding materials is accompanied by observations by Herbert W. Briggs;

Paul Guggenheim, Manfred Lachs, Gaetano Morelli, Paul Reuter, and Shabtai Rosenne.

The debate on the Report did not rest there. At the Session in Wiesbaden in 1975, Sørensen's Report and his proposed resolution on the subject (which he had revised after the Rome session and in anticipation of the discussion in Wiesbaden) were again reviewed. The resolution which finally emerged reflected considerable modifications.

On the problem of the "Principle of Non-intervention in Civil Wars" the Institute took up a pressing current juridical problem of imperative political importance. This was, however, only a provisional report. The Institute took up the subject in depth at its 1975 Session at Wiesbaden.

In producing these volumes under review, the Institute has made an important contribution to justice and peace, the guiding principle of its existence and of its creative work over the past one hundred years.

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The Treaty on the Non-Proliferation of Nuclear Weapons: A Study Based on the Five Principles of UN General Assembly Resolution 2028(XX). By Mohamed Ibrahim Shaker. Geneva: Imprimerie Avenir, S.A., 1976. Pp. xvi, 993. (Thesis presented at the University of Geneva for a doctorate of political science.)

This unrevised doctoral thesis analyzes the 1968 Non-Proliferation Treaty from the point of view of the five principles stated in a General Assembly resolution adopted three years earlier to guide the Conference of the Eighteen-Nation Committee on Disarmament (ENDC) in negotiating a nonproliferation treaty. Each of the following principles is presented in turn, as a standard against which to examine the related provisions of the Treaty: (a) avoidance of loopholes (NPT Articles I, II); (b) balance of mutual responsibilities and obligations (Articles IV, V; Security Council Resolution 255 (1968)); (c) step towards general and complete disarmament (VI); (d) insurance of effectiveness (III, VIII-X); (e) consistency with regional treaties (VII). In a sense, this is a *tour de force*, comparable to examining every provision of the League Covenant against Wilson's Fourteen Points; but, because the two instruments whose congruence is here explored are relatively simple, the exercise is on the whole successful, though one cannot help wondering whether the 1965 principles are really the best framework for evaluating the Treaty.

The study is exhaustive, analyzing each Treaty provision phrase by phrase and sometimes word by word, primarily in the light of the negotiating history, starting with the 1961 "Irish Resolution" of the General Assembly and ending in 1974, after the Indian "peaceful explosion" but before the Five-year Review Conference, whose outcome did not justify the somewhat forlorn hopes the author had expressed. He draws most heavily on the records of ENDC and of the negotiating fora in the United Nations, in particular the General Assembly; also extensively cited are the academic literature as well as parliamentary hearings. Presumably because

of their less ready availability, certain sources, such as those relating to the development of the IAEA safeguards system, are insufficiently taken into account; for example to show that the Indian aversion to Agency controls stems from the mid-1950s, while the Soviet position on safeguards changed dramatically at least twice during that period.

This is not primarily a legal study, and thus certain points of special interest to lawyers are passed over lightly. For example, little is said about the unique requirement in NPT Article III.4 (adapted from Article 13 of the Tlatelolco Treaty) requiring the nonnuclear-weapons parties to the Treaty to negotiate safeguards agreements with the IAEA (not an NPT party) within fixed deadlines. Nor is there any investigation of the legal implications of the overt American violation of NPT Article III.2 in continuing its nuclear supplies to states that had not yet concluded the necessary safeguards agreements with the IAEA. Incidentally, little is said about whether Article III.2 may be implemented in non-NPT parties by applying safeguards just to particular supplies or whether only "full-scale safeguards" analogous to those applied to parties can satisfy that requirement.

Obviously, this is no brief guide to the important arms control agreement it analyzes. Instead, this study, which pulls together a wealth of relevant data (including all the successive Treaty drafts, and the texts of relevant resolutions and related treaties) bearing on most questions of interest in connection with the NPT, should be a useful tool to those who have to deal with that Treaty or with similar or later instruments.

PAUL C. SZASZ

Die Behandlung internationaler Organakte durch staatliche Gerichte. By Christoph Schreuer. Berlin: Duncker & Humblot, 1977. Pp. 381. Index. DM 88.

In the present work, the author examines how domestic courts deal with acts of international organizations. The problem is of great practical importance; yet, to my knowledge it has not received due attention. In fact, the ever growing number of international organizations produces more and more acts likely to have an impact on the domestic law of member states and sometimes even of nonmember states. The acts thus examined by the author do not all qualify as "international legislation." An important part of the volume is devoted to the problem of how "secondary legislation" by international organizations shall be transformed into the domestic law of the member states. The term "secondary legislation" covers *e.g.*, decisions adopted by an organ of an international organization which according to the constitution of the organization shall be binding on the member states.

The author, moreover, deals with the problem of whether and how judicial and quasi-judicial acts of organs of international organizations (*e.g.*, awards by international tribunals or decisions by an administrative tribunal established by an organization) shall be enforced in domestic law. The treaties establishing some organizations provide that domestic tribunals under certain circumstances will have to obtain a preliminary ruling to be rendered by an international tribunal established by the organization con-

cerned. This is the case, *e.g.*, in the European Communities. In view of the fact that the legal effects of community law in the domestic law of the member states have recently been the object of much scholarly discussion, the author rightly has refrained from duplicating those efforts.

He devotes relatively large space to the problem as to whether acts by international organizations may produce binding effects within the domestic law of member states, although the acts concerned shall enjoy a merely hortatory character under the constitution of the organization itself (*e.g.*, resolutions of the General Assembly of the United Nations). The author, in principle, would like to strengthen the powers of international organizations and hence is rather favorable to granting even to such acts some significance in the domestic law of the member states. However, he is not blind to possible abuses which virtually would empower a majority within an international organization to impose its will on the minority states. In my opinion, a way out of this dilemma would be to grant whatever legal effects such recommendations should enjoy in the domestic law of member states only to such resolutions as had received the consent of the member states concerned.

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Internationale Konflikte—verbotene und erlaubte Mittel ihrer Austragung.

By Hanspeter Neuhold. Vienna and New York: Springer-Verlag, 1977.
Pp. xx, 598. Index. DM 123; \$54.20.

This scholarly treatise on "international disputes—forbidden and legitimate means of resolution" was published as volume 37 in the series "Forschungen aus Staat und Recht" of the University of Vienna. The author is lecturer in law at the Institute of International Law in Vienna and a disciple of Karl Zemanek. Although the title might lead one to expect chapters on the laws of war, the Red Cross conventions or 1977 Geneva Protocols, the author does not deal with any of those matters but concentrates on three major problems: the prohibition of the threat or use of force, the prohibition of intervention in the domestic affairs of states, and the pacific settlement of disputes.

In an introductory essay on the UN "Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States" (General Assembly Resolution 1966 (XVIII)), Neuhold reports on the progressive codification of international law, the setting up of the Special Committee upon a proposal of the Soviet bloc, the dominating role of the third-world states, the legal import of General Assembly resolutions including the "Friendly Relations" Declaration (Resolution 2625 (XXV)), etc. Considering how much political polemic was displayed during the Committee's six sessions 1964–1970, the author is to be commended for his fair and sober reporting.

A horn-book-like commentary on the prohibition of the use of armed force follows. Neuhold ably surveys the development of this norm from the *bellum justum* doctrine, to the Briand-Kellogg Pact, to the UN Charter's

Article 2(4), and finally to the Special Committee's contribution. A comprehensive study of theory and practice since 1945 includes an analysis of the UN definition of aggression (Resolution 3314 (XXIX)), the right of individual or collective self-defense, UN sanctions, the invalidity of territorial conquest, etc. Concrete examples of the violation of the prohibition of the use of force are given, like the Warsaw Pact's invasion of Czechoslovakia and the Brezhnev doctrine's vain attempt to mask it as collective self-defense. The author shows that although there is general agreement that the prohibition of the use of force is *jus cogens*, the Special Committee could not agree on the meaning of "force" or on the exceptions to the rule. UN practice shows that anticolonial wars of self-determination are an exception, although the Western democracies plead for pacific settlement, since the United Nations, which was created to keep the peace, cannot be turned into an organization that encourages armed terror.

The section on the inadmissibility of intervention in the domestic affairs of states and the protection of their independence and sovereignty focuses primarily on the origin and meaning of Resolution 2131 (XX). The author gives a lucid commentary on each paragraph of the resolution and shows the implications of the absolute prohibition of intervention in civil wars. An interdisciplinary approach takes into account the contributions of political science and of the science of international relations. The section on the pacific settlement of disputes begins with a comprehensive description of traditional means of negotiation, enquiry, mediation, conciliation, arbitration and judicial settlement. The author proceeds to examine the contributions of the social sciences and psychology in achieving pacific settlements. Some readers will find these 90 pages rather long, but they are well integrated into the author's treatise.

As an American accustomed to reading labyrinthine German sentences, this reviewer was pleasantly surprised at Neuhold's uncomplicated German. Notwithstanding some overlapping and repetition this treatise is of high quality throughout and should be valuable as a primer on all important questions related to the settlement of international disputes. An excellent bibliography and a well-made index add to its usefulness.

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Die deutsche Militärjustiz in der Zeit des Nationalsozialismus. By Otto Schweling. Marburg: N. G. Elwert Verlag. Pp. xvi, 396. DM 30.

Hermann Weinkauff, former Chief Justice of the Supreme Court of the Federal Republic of Germany and editor of the eight-volume series *Die deutsche Justiz und der Nationalsozialismus* (German Law in the Nazi Era) called upon Schweling, a Prosecutor at the Supreme Court, to write the history of the German military courts from 1933 to 1945. Schweling, who was a military judge during that period, has produced a clearly written and informative monograph on a topic about which very little is known.

According to available statistics, 626,022 cases came before German military courts through mid-1944. It may be estimated that through the

end of the war the number approached 700,000. This figure should not surprise one considering that the U.S. Armed Forces had 109,000 courts martial during the year 1969. Schweling gives a survey of German courts martial from routine cases of theft of military property or pillage to cases of desertion. The controversial issue of unnecessary death sentences is dealt with soberly and several miscarriages of justice are analyzed in detail. In all, it is estimated that 10,000 death sentences were passed against German soldiers in the course of the war. Schweling shows, however, that many cases of desertion did not end with the death sentence and explains the exercise of discretion by military judges, who numbered some 2,000. It is also interesting to note that ten percent of the courts martial ended with acquittals.

More important, perhaps, than the valuable tables and statistics is the author's analysis of the development of the German military courts before the war and their relationship to the Nazi Party. The "Justice Trial" (*In re Altstötter and Others/Nuremberg, 1947*)¹ showed to what extent the Nazi Party had succeeded in perverting Germany's judicial system. The fourteen accused were judges, public prosecutors or high officials of the Reich Ministry of Justice. None were military judges. Schweling throws much light on the strained relationship between the military courts and the Party. It is interesting to learn that none of the four legal division heads, Dr. Lehmann (Wehrmacht), Dr. Sack (Heer), Dr. Rudolphi (Marine) or Dr. von Hammerstein (Luftwaffe) were members of the Party. Indeed, because of involvement in the conspiracy of July 20, 1944 (abortive attempt on Hitler's life), Dr. Sack and a former chief of the legal division of the Luftwaffe, Dr. Schleicher, were executed. It was Hitler's suspicion of the military courts that resulted in the progressive restriction of their jurisdiction. During the war on Poland, for instance, military courts prosecuted SS soldiers who had murdered Polish civilians. Immediately after the war an independent SS Court was set up to prevent the military courts from poking into the activities of the SS. Shortly before the war on Russia Hitler decided that the military courts would stay home. Only the opposition of Dr. Lehmann and of higher officers succeeded in upsetting this decision, although the resulting Barbarossa decree (IMT Document C-50, volume 34) further restricted the jurisdiction of the military courts.

A weak point of this monograph is its superficial treatment of the important issue of courts martial of German soldiers in occupied countries because of crimes committed against the civilian population. Although the courts martial records of the Wehrmacht and Luftwaffe were partly destroyed by air bombardment at the end of the war, numerous files are still intact at the Bundesarchiv in Kornelimünster. The records of the legal division of the German Navy are nearly complete and contain hundreds of courts martial in cases of rape, pillage and shooting of prisoners of war. The records of courts martial in Norway, Denmark, Holland, Belgium, France, Greece and Russia show that numerous soldiers were sentenced to

¹ LAUTERPACHT, ANNUAL DIGEST, 1947, pp. 278 et seq.

death and executed because of crimes committed against the civilian population. The author did not even mention the eighteen cases briefly described and published in volume 40 of the Nuremberg Trials as Document "Dönitz-49."

Perhaps if Schweling, who died in 1975, had lived he might have given more attention to this issue. His literary executor, Erich Schwinge, former Rector of the University of Marburg and a former military judge, edited the manuscript and saw to its publication. He, too, deserves thanks for making this interesting book available to a broad readership. A scholarly treatise on an important but hitherto neglected subject, Schweling's book belongs in every library with a military law collection. For international lawyers with a historic bent, it will be rewarding reading.

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Sotsializm i Mezhdunarodnoe Pravo [Socialism and International Law]. By I. Luk. Moscow: Izdatel'stvo 'Mezhdunarodnye otnosheniia,' 1977. Pp. 96. 12 kopecks.

Sotsializm i Mezhdunarodnoe Pravo [Socialism and International Law]. By N. M. Minasian. Saratov: Izdatel'stvo Saratovskogo Universiteta, 1975. Pp. 287. 1 ruble 25 kopecks.

Have Marxists created a qualitatively new international law? "No," says I. Luk. His negative covers not only the law governing relationships between states of differing social systems but also the norms being created through interrelationships within the socialist commonwealth. For the latter he notes that some Soviet theorists have been arguing that socialists have been creating new law for themselves, but he denies that this is so, at least for now. In his view a new system of socialist international public law is a development for the future (p. 50). For the present all international relationships are governed by what he and all Soviet authors call "general international law," which is similar for all states, although humanized by socialist influences which have been brought to bear upon it since the Russian revolution (p. 49). It has been cleansed of 19th century inequities (colonialism, racism, and inequality of states), but it is still "general international law," not something qualitatively new.

For outsiders the line seems thin between quantitative and qualitative change as Marxists define it. Outsiders never know quite where the line will be drawn. In the early 1920's Soviet legal philosophers asserted that municipal law was bourgeois and remained so even when utilized by the Soviet state to keep domestic order. International law, as the creation largely of 19th century imperialist powers, was seen also as bourgeois. As the Soviet system stabilized in the 1930's, this approach was discarded in theoretical tracts on municipal law and the theory advanced officially that law in the hands of Soviet policymakers was qualitatively new. But this change of position did not reach international law until after World War II, when some authors began to claim a qualitatively new system of law had

been brought into existence to govern relationships between the members of the emerging "socialist commonwealth."

Luk now seems to want to erect a barrier to block further advance of this line of thought. Curiously, he uses a pseudonym to express his view, although it takes little imagination to guess that he has but shortened his real name to its first syllable, and is the noted professor at the University of Kiev. Although denying that qualitative change has occurred as a law is developed to govern relationships between socialist states, Luk is at pains to argue that general international law, which he sees as still governing all interstate relationships whether they be those of states of differing economic and social systems or of states all of which are now socialist, is not what it was before the socialist states came into being. In his view general international law has been cleansed of its colonialist inhuman features. The fact that the socialist community, when creating norms to govern relationships between its members, and the capitalist community, when doing the same for its members, both use general international law does not mean that the two communities are acting in the same way. Thus, as an example, he compares COMECON with relations in capitalist oriented communities and concludes that the difference between the law being applied in the two contrasting communities is to be found in the origin of the norms they create. COMECON, as he sees it, creates norms to implement a carefully thought out long range plan, while the capitalistically oriented communities are seen as spontaneously created institutions designed to meet only short range unexpected problems.

Further, contrast between socialist and nonsocialist interrelationships is provided in Luk's view by the presence of the communist parties which rule socialist states. They provide the nuclei around which policies are formulated, and their interrelationships are governed by nonlegal political and moral norms, not law. Luk expects no withering away of states in international relationships. He finds continuing need for state structures to implement communist party policy, and so long as states exist so must international law continue to exist. This law will remain "general international law," although cleansed as indicated.

To Minasian, writing from Rostov-on-Don, but publishing in Saratov, and with perhaps less reason to be adventurous, relationships between Marxist states are indeed still governed by law, although also subject to moral-political duties. His contrast to Luk lies in his finding that "The principle of proletarian (socialist) internationalism and other international legal principles and norms (fraternal friendship, *etc.*) springing from it and in force in the mutual relationships of the countries of socialism, represent qualitatively new socialist international principles, conforming to the new (socialist) type of international relationships." (p. 156)

Minasian notes further, as most of his predecessors have done, that no document in force between socialist states refers to the principles of peaceful coexistence (and none should do so), since the principles are in force only between states of differing social structures. Thus, Minasian takes the conventional position on where peaceful coexistence law applies, and on

what has transpired to replace it in the relationships between members of the "socialist commonwealth."

To the outsider who follows Soviet literature, Minasian presents no surprise. Westerners have long understood the evident psychological need some Marxists have felt to claim novelty of a qualitative sort for their municipal and international law. It is Luk's position that poses intriguing questions: (1) why does he claim that "general international law" is the only international legal system currently in force between states, whatever their economic and social structure, and (2) why does he do so with a pseudonym? One can only guess the answers. Perhaps he senses that Western diplomats are becoming increasingly nervous as the UN General Assembly passes sweepingly novel resolutions, such as that on Friendly Relations and Cooperation, and a New International Economic Order. He knows that some of his colleagues are claiming that these resolutions have become binding on all states whether members or not of the United Nations as "crystallization of custom." He may fear a backlash leading to stiff resistance to what is yet to come, and he may hope to calm fears so as to weaken resistance.

As to his pseudonym, it may be the result of a simple desire not to associate his name with a popular tract, or it may reflect the more complex desire to leave the door open to argument among the less noted members of the Soviet legal community, as might not be likely if one of his reputation were to sign his own name. He must know that his view negating the emergence of a new socialist international law is no longer generally held, as Minasian's text indicates, and he wants to reopen the issue for discussion. Whatever the reason for the pseudonym, the pamphlet invites attention as a suggestion that a new line of thought is in the making among Soviet scholars.

JOHN N. HAZARD

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Art Law: Domestic and International. By Leonard D. Duboff. South Hackensack: Fred B. Rothman & Co., 1975. Pp. x, 627. Indexes, \$27.50.

Leonard DuBoff remarks, in his foreword to this volume, that new and esoteric fields of legal specialization rarely emerge full-blown from the pens of academics; rather they achieve recognition in the legal community as legislatures and courts confront and resolve significant new issues that do not neatly fit into the prevailing classifications of case law and statutes. Such seems to be the situation with art law, a newly recognized subspecialty in which elements of contract, copyright, tax, and international law coalesce. In recent years, American artists, museum curators, and private collectors have complained increasingly about the legal labyrinths that often seem to obscure and complicate their dealings, and have repeatedly pressed for Congressional and legislative action to define and secure their respective rights.

This volume, which consists of reports and panel discussions presented at the first Law and the Visual Arts Symposium in 1974, is divided into three sections. The first section, "Counseling the Artist," acknowledges the uniqueness of the professional artist's contract and property rights, and considers the tax and copyright law of special concern to the professional artist. Noteworthy is the plea for some system by which artists would be able to receive a share of the appreciated value of their works upon resale.

The second section, "International Law and the Visual Arts," outlines the issues involved in the importation of art objects for sale to private persons or for inclusion in museum collections. Recent instances of thefts of cultural treasures from money-poor, artifact-rich Asian, African, and Latin American nations are chronicled. The importance of both internal as well as international regulations is discussed as the means of halting such pillages. The section concludes with an analysis of two countervailing philosophies: a proacquisitionist market championed by dealers versus a restricted art market advocated by the conservationists.

The final section of the volume deals with "The Authentication of Art," a topic aimed more at the art collector or investor than at the legal professional. Various sophisticated techniques utilized by appraisers and museum personnel are illustrated. These techniques can document with precision the age and origin of works whose genuineness is in dispute.

Typical of collections of symposia presentations, the essays and discussions are uneven in quality. Several articles in the volume, notably those on international movement of national art treasures, serve as lucid and informative introductions to particular facets of the field; others, particularly in the first section, are needlessly repetitive and poorly written. The essays often assume a high degree of legal knowledge on the part of the reader. Although this may appear as a weakness, such an assumption is understandable when it is remembered that the audience to which the papers were presented consisted of legal practitioners and law professors, most of whom had already evidenced great interest in art law generally and had achieved a high level of expertise in the field. With the exception of the materials which deal with the authentication process for questioned artistic works, the volume is clearly intended for the legal professional. As a handbook for the practitioner who serves artist clients or as a guide for the collector with some legal background, *Art Law* is a fine introduction to the issues confronted by those who find themselves in this new vanguard of the law.

ALBERT P. BLAUSTEIN AND EVELYNN S. CATERSON
Rutgers-Camden School of Law

Instruments of Economic Integration in Latin America and in the Caribbean. Volumes I and II. By the Inter-American Institute of International Legal Studies. Dobbs Ferry: Oceana Publications, 1975. Pp. xv, 837.

This book is an updated, expanded, and revised version of the 1968 edition, entitled *Instruments Relating to the Economic Integration of Latin*

America.¹ Both works were coordinated by F. V. García-Amador, Secretary General of the Inter-American Institute of International Legal Studies.

These two volumes are a compilation of treaties, resolutions, declarations, and other instruments relating to Latin American economic integration. No comments, criticisms, nor historical references are supplied; rather, this work offers the English-speaking Latin Americanist an extremely convenient and compact source of reference for all the relevant legal documents very well translated and edited.

That this work is primarily a reference book does not preclude its usefulness and interest as a documentation of the progress made over the past decade or two toward Latin American solidarity, and of the subtle changes in objectives that occurred as this effort unfolded. For example, a rapid survey of the opening statements of the various instruments leaves the reader with the distinct impression that the emphasis shifts from attacking the external imbalance and market deficiencies prominent in the development thinking of ECLA and the Alliance for Progress in the late fifties-early sixties to more directly overcoming the internal development problems of unemployment, malnutrition, illiteracy—in short, dire poverty.

Compare for example the following two excerpts, the first from Title III (on economic integration) of the Charter of Punta del Este (August 1961), and the second from the 1973 Treaty establishing the Caribbean Community:

The American republics consider that the broadening of present national markets in Latin America is essential to accelerate the process of economic development in the Hemisphere. It is also an appropriate means for obtaining greater productivity through specialized and complementary industrial production. . . . The broadening of markets will also make possible the better use of resources under the Alliance for Progress.

* * * * *

SHARING a common determination to fulfil the hopes and aspirations of their peoples for full employment and improved standards of work and living . . .

Economic integration remains a basic goal throughout the period covered by these documents. As the euphoria of the Alliance for Progress and the surge in growth rates in the mid-sixties subsided into history, integration as a mechanism of development was reexamined. Intraregional trade began to take second place in importance to intraregional policies. This trend is evident if the reader compares the 1958 Treaty establishing the Central American Common Market to the various instruments of the Andean Group enacted from the mid-sixties to the mid-seventies. The Central American Common Market, which gave precedence to intraregional trade and monetary unification, was probably the least successful group of all in its efforts at economic integration in Latin America, and it is now weak, outdated, and seldom heard from. The members of that group probably underestimated their almost total dependence on the United States and

¹ Reviewed in 64 AJIL 209 (1970).

their lack of viability as an autonomous region because of their size and poor resources. The Andean Pact, however, has been vigorous despite the sharp political divisions within the group since the Chilean coup. Intraregionally, they have emphasized united development efforts, such as their common policy on foreign investment, and they have successfully dealt with their internal differences, as evidenced by the preferential treatment granted to Bolivia and Ecuador. Vis-à-vis the rest of the world, this group exemplifies the new voice heard in the region as a whole: one of Third World advocacy and political and economic solidarity in foreign affairs despite intraregional political and economic disparities.

WILLIAM S. BARNES

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Netherlands Yearbook of International Law, Volume VIII, 1977. Published under the auspices of the Interuniversity Institute for International Law, T. M. C. Asser Institute. Leiden: A. W. Sijthoff, 1977. Pp. vi, 376. Index. Dfl. 60; \$22.75.

The format of this issue of the *Yearbook* is the same as in prior years. It contains leading articles, and a review of Dutch state practice, treaties, judicial decisions, and scholarly literature for the period covered as well as of municipal legislation with impact on international relations (in particular a new nationality law of September 8, 1976). The leading articles deal with local transportation on international waterways, developments from Yalta to Helsinki, tripartite structure in the ILO, and humanitarian law in armed conflicts.

Noteworthy pronouncements under state practice include a definition of "self-determination" (in the Third Committee of the UN General Assembly) as not limited to the mere creation of new sovereign states, but as including the right of the individuals involved to influence their own destiny and to realize to the greatest extent possible their own potential "within freedom and justice" (p. 160). The Dutch delegation opposed a resolution approving attainment of national sovereignty by use of "all available means, including armed struggle" (p. 161). In connection with satellite broadcasting, the Dutch position disagreed with the view that sovereignty "implies that a government must fully control the information reaching its territory from outside" (p. 172). It was also emphasized that in any new regulation of the law of the sea "international machinery for reaching decisions in concrete situations is essential" as well as provision for compulsory settlement of disputes (p. 187).

Among interesting judicial decisions was a remand for further findings of fact where an Algerian whose extradition was sought by France contended that his crime was a political offense because the proceeds of the bank robbery were to be used for an anti-French resistance movement. However, the political motives of the South Moluccans who were guilty of murder and other offenses in connection with the highjacking of a train did not excuse their resort to "inadmissible" means of furthering their objectives.

In a narrowly functional interpretation of diplomatic privileges, the Dutch Supreme Court held that the disability pension of a Dutch employee of NATO was taxable, since he was no longer performing the international functions for which the exemption was necessary (p. 258). In another interesting case it was held that neither Dutch municipal law nor international law authorizes the Dutch government to obtain reimbursement from colliding vessels for the cost of removing one of the wrecked ships, which sank outside Dutch territorial waters. The court held that warning the navigators of the dangers involved would have sufficed and that removal was not required (pp. 289-93).

EDWARD DUMBAULD
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Foreign Relations of the United States, 1949, Vol. VI, The Near East, South Asia, and Africa. Washington: U.S. Govt. Printing Office, 1977. Pp. xi, 1852. Index. \$16.50.

More than half of the documentation in this massive volume deals with problems growing out of the establishment of Israel and supplies pertinent background for issues still in the process of settlement 29 years later. The United States was much involved both through activities of the United Nations and by direct diplomacy. Considerable progress was made. The withdrawal of Israeli troops from Egyptian territory was obtained, and new cease-fire agreements between Israel and the contiguous Arab states were signed. The United States granted *de jure* recognition to Israel and sponsored its admission into the United Nations. At the initiative of the United States, the UN embargo against the sale of arms to the Near East was lifted.

No progress was made, however, in negotiating final peace treaties and the basic issues were unsettled. These involved the plight of some 700,000 Palestinian refugees, agreed boundaries, and the status of Jerusalem. The U.S. position remained essentially the same throughout the year: that Israel should allow the return of a sizeable number of refugees and pay those not returning for loss of property; that for territory retained beyond the UN allotment in its partition resolution of November 1947, Israel should compensate by releasing to the Arabs other territory if they desired it; and that Jerusalem should be internationalized in accordance with the UN partition resolution. On all of these subjects, the U.S. position was in conflict with Israeli policies.

The documents released in this volume give a rather different picture of U.S. relations with Israel than that popularly held of unquestioning one-sided support. This is especially true as to the attitude of President Truman. The sharpest disagreement between the United States and Israel was over the refugee problem. Israel disclaimed all responsibility for the refugees. The U.S. refugee plan was contingent on Israel allowing the return of a substantial number of refugees. On April 29, 1949, President Truman wrote to Mark F. Ethridge, American member of the Palestine Conciliation Commission, "I am rather disgusted with the manner in which

the Jews are approaching the refugee problem. I told the President of Israel in the presence of his Ambassador just exactly what I thought about it. It may have some effect. I hope so." (p. 957)

Stating that he was acting under instructions from President Truman, on May 29, 1949 the U.S. Ambassador in Israel delivered a note to the Israeli Prime Minister, Ben-Gurion, regarding the Israeli attitude on territorial matters and the repatriation of refugees which the U.S. Government did not regard "as being consistent with the principles upon which U.S. support has been based." The Israeli Government was warned that unless it changed its attitude regarding the UN resolution of December 11, 1948, and friendly advice by the United States "the U.S. Govt. will regretfully be forced to the conclusion that a revision of its attitude toward Israel has become unavoidable." (pp. 1072-75)

The Israeli reply of June 8 rejected the main points of the U.S. note but expressed the hope for sympathetic understanding by the U.S. Government for the problems of Israel. President Truman expressed satisfaction that the Israelis were responding well to the objectives he and the State Department were trying to achieve. He said, however, that he had let it be known to a number of Jewish leaders who had called on him that "unless they were prepared to play the game properly and conform to the rules they were probably going to lose one of their best friends." (p. 1109)

The U.S. influence on Israel was limited, however. Acting Secretary of State Webb cabled to Secretary Marshall at Paris on June 12: "Past record suggests Israel has had more influence with US than has US with Israel; this particularly true on military matters since Israeli armament has come from eastern Europe and illicit traffic over which we have had no control." (p. 1127)

Negotiations for the rest of the year continued without much progress. On October 17 the National Security Council submitted a report defining and assessing U. S. policy toward Israel and the Arab states. No substantial change of policy was advocated. President Truman approved the paper and directed its implementation.

Other sections of this volume deal with a wide range of subjects of general interest concerning the area and with relations with individual countries. A question of continuing interest was that of offshore rights in the Persian Gulf with respect to petroleum development. U. S. interests were involved with American oil company concessions from Saudi Arabia and Kuwait.

For Greece, Turkey and Iran, U.S. concern was the threat of Communist aggression. Greece, endangered by internal instability and guerrilla warfare aided from neighboring Communist countries, was the immediate danger. Fighting was brought to a successful end and the United States urged a smaller but more efficient army and concentration on problems of internal stability. Similar advice was given to Turkey and Iran. All three countries received substantial U.S. military and economic assistance.

U.S. mediation continued regarding the conflicting claims of India and Pakistan to Kashmir. A cease-fire was obtained early in the year and a plebiscite to decide the issue was agreed to in principle but disputes over

the withdrawal of armed forces before voting prevented a settlement and the issue was referred back to the UN Security Council.

E. R. PERKINS
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A Modern Introduction to International Law. Third Edition. By Michael Akehurst. London: George Allen and Unwin Ltd., 1977. Pp. 283. Index. \$23.25, cloth; \$7.75, paper.

As one of "The Minerva Series of Students' Handbooks," this volume does not pretend to contain significant new insights into the nature or content of international law, but is largely successful as an elementary manual for beginners. It is written as simply as the subject matter permits, although some familiarity with municipal (particularly British) law, comparisons with which are occasionally made, appears to be presupposed. Technical terms peculiar to international law, when not avoided, are lucidly explained. The author endeavors to point out the reasons for many of the norms he expounds. On controversial issues, he generally, though not invariably, presents the opposing views and the reasons for his own preferences. His attitude is fundamentally conservative and he is cautious in accepting claims of changes in the law, although he does not neglect the latest important precedents and developments.

The book covers the entire field of public international law and some closely related aspects of municipal law, such as the effect given by national courts to treaties and international custom and the basic features of British nationality law. The long chapter on the United Nations deals with some structural and historical as well as strictly juridical aspects of the subject. In general, the space devoted to each area of international law corresponds well to its importance and complexity.

In a short introductory survey, some simplifications and omissions are unavoidable. Akehurst's book, however, also contains a few questionable positions. The most important of these is his negative attitude toward equity in international law and his failure to distinguish with sufficient clarity decisions in which it is applied from decisions *ex aequo et bono* (pp. 44-45). In this connection, it is not surprising that he is critical of the emphasis placed by the International Court of Justice on equitable considerations in its judgment in the *North Sea Continental Shelf Cases* (p. 180). Somewhat surprising is the unqualified listing of Grotius, Gentili, and Zouche as important "naturalist" writers (p. 20).

Despite some, largely unavoidable, shortcomings, this book can be recommended to persons, particularly those of British background, with little or no prior knowledge of international law.

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BRIEFER NOTICES

A Manual of International Law. By Georg Schwarzenberger and E. D. Brown. Sixth Edition. (Milton, Oxon: Professional Books Limited; South Hackensack: Fred B. Rothman & Co., 1976. Pp. lix, 612. Indexes. Study Outline. Glossary. \$27.50.) A new edition of the *Manual* first produced by Schwarzenberger in 1947 is always welcome. As much as the volume has grown with the addition of new material, including references in the study outlines, it remains a most handy guide to the core of public international law, for the authors' capacity to tersely express the essentials is unchanged.

In reference to the second edition¹ of the *Manual*, I once wrote that it should be read against the background of Schwarzenberger's *Power Politics*.² Despite the passage of much time during which numerous events have had their impact upon international law by presenting it with new problems, that earlier recommendation is still valid. As much as ever, the *Manual* remains grounded in the interactions occurring between states, but the authors' generalizations are derived chiefly from an analysis of the jurisprudence of international tribunals, and to some extent from Anglo-American practice. For example, efforts by the United Nations to protect human rights and freedoms are treated as so embryonic as to have thus far failed to alter the status of the individual as an object, not a subject, of international law. No wishful thinking is indulged. Similarly, in discussing potential patterns of world order, the authors lay down some hard-nosed conditions as essential for world order and then, while discussing some alternative patterns, include the possibility of a third world war as being most in line with the development so far taken by international society. Willingness to contemplate the unpleasant, which is not the same thing as advocating or predicting it, offers hope that those who learn from the *Manual* will act with realistic good sense when in positions of responsibility.

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An Introduction to International Law. Eighth Edition. By J. G. Starke. (London: Butterworths, 1977. Pp. xxxii, 711 plus Index (45 pages). £15, cloth; £10, paper.) The eighth edition of this textbook is as concise as the first (1947),¹ even though it is about twice as long, owing "to the extraordinary expansion of international law both in range and quantum during . . . the past thirty years" (p. vii). The book is admirably up to date, including material about the third UN Conference on the Law of the Sea through 1976 (and thus introducing students to the Exclusive Economic Zone), as well as references to a plethora of lawmaking treaties drafted in the 70's (outer space, the environment, and even last year's conference on succession to treaties).

To include so much in one volume, Starke has obviously had to pay a price, and even some who admire his *Introduction* must concede that it is overcompressed. For one who knows a subject, Starke can, with marvelous economy of phrase, refresh the mind, but the note about *Shimoda* ("the Tokyo District Court held that attacks on Nagasaki and Hiroshima were contrary to international law" [p. 584]) hardly does justice to the rich

¹ Reviewed in 46 AJIL 371 (1952).

² Reviewed in 36 AJIL 351 (1942).

¹ Reviewed in 42 AJIL 517 (1948).

texture of that case. Similarly, despite citations to U.S. cases (insufficient perhaps for teachers in this country), not everyone will be fully satisfied that 20 lines in the text (pp. 124-5) and 20 more lines in an accompanying footnote (devoted to *Sabbatino* and two other cases involving the *Banco Nacional de Cuba*) suffice to describe the Act of State doctrine here. The neophyte will still have to read the original decisions to understand the points Starke touches on, and individual instructors must therefore decide, taking into account available time and library holdings, whether the *Introduction* is adequate to their purposes or whether cases, with or without commentary, would be preferable.

By and large, one must admire the skill with which this *Introduction* has been brought up to date every three to five years, but next time avulsion may be preferable to accretion in some places—notably in dealing with the European Community, still discussed here in terms of the original separate communities. Less important is the fact that this edition lists the *Whitman Digest* as “continuing” (p. 709) and ignores the annual digests covering United States practice since 1973.

RICHARD N. SWIFT
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The Soviet Legal System. Third Edition. By John N. Hazard, William E. Butler, and Peter B. Maggs. (Dobbs Ferry: Oceana Publications, Inc., 1977, for the Parker School of Foreign & Comparative Law, Columbia University. Pp. xvii, 621. Index. \$17.50.) With this third edition of what has been, and still is considered to be, the most comprehensive casebook on the Soviet legal system, the authors have chosen to divide their work into a two-volume set. This book is the first volume and, as such, covers the general structure of the legal system. It is composed of three parts, the first being the more basic aspects of state-citizen relations. The second is concerned with those unique laws necessary for the administration of a centrally planned economy. Lastly, the authors discuss what in Romanist terms would be referred to as “private” law. Within these three major sections, each prefaced with a short historical introduction, are numerous chapters containing excerpts from pertinent state and party documents, judicial opinions, and works by Soviet law professors which express the contemporary viewpoint.

Aside from presenting a thorough description of the mechanics of the Soviet legal system, the authors have selected, arranged and prefaced the texts in such a way as to encourage discussion of how the Soviet legal system relates to the Romanist system and its present-day descendants. Taking this comparison even further, is the presentation of a possible convergence occurring between the Western legal structures and that of the Soviets. As the West heads in the direction of a “welfare-state” and the USSR attempts to improve the quality of Soviet life, both legal systems may change accordingly and could conceivably become more like each other. However, the authors are quick to point out that traditional Marxist philosophy is far from losing influence in this area.

While the authors themselves state that this volume is primarily intended for use in teaching, it should also be of great interest and value to those involved in commercial relations with the USSR as well as the more casual observer of Soviet affairs. Due to its thoughtful and logical organization, the book would be an excellent choice for those in need of an authoritative and yet readable source of reference on the Soviet legal system.

MARY D. McVEY
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Latin America in the International Political System. By G. Pope Atkins. (New York: The Free Press; London: Collier Macmillan Publishers, 1977. Pp. xv, 448. Index.) The author of this book, an Associate Professor of Political Science at the United States Naval Academy, tackles the immensely diverse and difficult problems involved in the international politics of Latin America by using a systems approach. Atkins confesses that he faced some methodological problems, but nevertheless felt that "enough regular . . . patterns of international activities are discernible, that the definitional attributes of a political system are sufficiently fulfilled to warrant the claim that an international political system exists and that systems theory may be usefully applied to this study." (p. 7)

The strength of Atkins' analysis is his mastery of the extensive materials and evidence from various disciplines upon which his study is based. Most standard works in this field concentrate upon the obvious: the relationship between the United States and Latin America; the influence of European powers in Latin American international affairs; the role of international organizations in the affairs of the central and southern portion of the Western Hemisphere. Atkins does not ignore these, but rather uses them as a canvas upon which to paint his central theme that there are many other elements that have profound influence on Latin American international political relationships. For example, he highlights four vital nonstate entities which are internationally relevant in the Latin American milieu: the church, international business enterprises, the labor movement, guerrilla insurgency groups. He also studies the various forms and consequences of cooperative (e.g., economic, military, diplomatic and cultural) and conflictual (territorial disputes, economic nationalism, intervention, subversion, and war) interaction among Western Hemispheric nations. The final portion of his book deals with the relevant institutions and processes which play a structural and regulatory role in the maintenance of this regional subsystem.

This work greatly contributes to a better understanding of the many variables involved in Latin American foreign affairs. Atkins is to be highly commended for producing a fine study. Alas, his editor is to be reproached for permitting the placement of footnote material in the text, a practice which turns off not only the general reader, but also, often the specialist seeking more in-depth knowledge of the field.

ANN VAN WYNEN THOMAS
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Die Anglo-Amerikaner und die Vertreibung der Deutschen. By Alfred M. de Zayas. (Munich: C. H. Beck, 1977. Pp. 300. Index.¹) Hardly a country in the world does not have within its borders minority groups which cherish their own ethnic, religious, cultural or racial identity. Such minorities too often become victims of persecution and discrimination. The most barbaric example is Hitler's annihilation of Jews and gypsies and his plan to use Poles as slaves for the German "Master Race." This book deals with the retaliatory expulsion of Germans by the Soviet Union, Poland, Czechoslovakia and Yugoslavia at the end of World War II. It ends with the successful absorption of the refugees within the shrunken boundaries of the dismembered Third Reich.

Five million German ethnics fled westward in terror before the avenging

¹ Translated, with expanded bibliography, from the somewhat abbreviated English original: NEMESIS AT POTSDAM, THE ANGLO-AMERICANS AND THE EXPULSION OF THE GERMANS, BACKGROUND, EXECUTION, CONSEQUENCES; Rutledge & Kegan Paul, 1977. Pp. 268. \$9.95.

Soviet armies. Three million were expelled from the Sudetenland and nine million more became homeless by virtue of Allied decrees. Poland was compensated for the Russian seizure of its territory by being given provinces held by the former Reich. The land swap was punishment for German crimes and was justified as a means of securing the peace. The Americans and British insisted that the population transfers be made in a humane and orderly manner, with compensation for property losses, but they failed to anticipate the speed, magnitude, and ruthlessness of the forced migrations which produced human suffering and death on a vast scale.

The author, effectively using maps and photographs, traces the history of the expellees. Aided by Marshall Plan funds the millions of displaced persons, still longing for their lost homelands, recognized the futility of resort to force and turned to hard work to rebuild their lives by absorption in a democratic and peaceful society. The Helsinki Conference of 1975 in effect acknowledged that the provisional Oder-Neisse demarcation line implied *de facto* annexation.

The lesson from this well organized and moving historical record is not merely that retribution which penalizes innocent human beings becomes injustice, but that acceptance of political realities may be a better road to human fulfillment than the path of violence. Alfred de Zayas has written a persuasive commentary on the suffering which becomes inevitable when humanitarianism is subordinated to nationalism.

BENJAMIN B. FERENCZ
Of the New York Bar

Réalités du Droit International Contemporain (force obligatoire et sujets de droit). Actes des seconde et troisième rencontres de Reims. (Reims: Centre d'Etudes des Relations Internationales. Pp. 278.) For those who have had only limited exposure to a dialectical approach to law, this book may provide an instructive introduction. It discusses two difficult contemporary international legal problems, using legal philosophy, sociology, psychology and political science as analytical tools, primarily within a Hegelian/Marxist framework. The subjects considered are, first the basis of obligation in international law, and, second, the concept of people in international law.

The variety of disciplines involved stems from the format of the book. It is not the product of a single author, but rather the published proceedings of two separate two-day conferences held in 1974 and 1975. Each of the conferences was devoted to different topics discussed by different participants. The outcome is that this work is in reality two books.

Each one would have benefited greatly from editing. It appears that every comment of the participants is included, even when the contribution consists of "mais oui" or "j'essaie, j'espère. . . ." This may lead to a temptation on the part of the reader to read only the introductory essays, omitting entirely the discussion which follows, which would be unfortunate because some of the remarks are valuable additions to the prepared papers. Editing would also have eliminated some of the numerous references to earlier meetings in this series of conferences. For those who have not seen the earlier volumes of proceedings, these references add nothing to the discussion.

Being multidisciplinary, the conference at times seems lacking in focus, with vagrant questions and comments which are sometimes misunderstood. Part of this may result not only from the variety of disciplines involved, but also from the regrettable adoption of popular American jargon: concrétise,

infrastructure, avatar, psycho-sociologique, hiérarchisée. All appear with regularity in the book and seem to have caused as much difficulty for some of the participants as they do for some of the readers.

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International Commercial Arbitration. The New York Convention. Compiled and edited by Giorgio Gaja. (Dobbs Ferry: Oceana Publications, Inc., 1978. Looseleaf. Seven parts. Index. \$75.) This volume, part of the International Commercial Arbitration Series,¹ covers the application of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and reproduces the text of the Convention (in four languages). An introduction explores many aspects of the practice of international commercial arbitration in various countries and compares their court decisions and legal writings. The Preparatory Work, reprinted on no less than 228 pages, provides source material which will be most helpful for the interpretation of unsettled arbitral problems. It is followed by National Legislations implementing the Convention, some with reservations. Of greater importance, however, is Part V, National Judicial Legislation, which consists of the full original text of 33 court decisions, each with introductory summaries and English translations of the pertinent parts when the original text is in a foreign language.

The volume is a valuable contribution to the field of international commercial arbitration. The application of the Convention, in force in 43 states, will have a decisive impact on the development of international economic law.

MARTIN DOMKE

Spazi Marini e Principi di Diritto Internazionale. By Franco Florio. (Milan: Dott. A. Giuffrè Editore, 1977. Pp. xv, 300. L.7000.) Books dealing with the law of the sea have flooded the market in recent years, but this one, although treating "marine spaces," is primarily a study of the creation of legal values through the process of politics.

The author, a distinguished member of the Faculty of Jurisprudence of the University of Trieste, introduces his subject with an analysis of principles in the lawmaking and law-determining process, then proceeds to examine state practice and declarations with respect to marine spaces, including the continental shelf doctrine. He deals with equity in law-determining, as formulated by the International Court of Justice in the *North Sea Continental Shelf Cases*, and searches the field of state responsibility for general principles of law that could be used, absent specific rules for the law of the sea.

In the second major part of this study, the making of law through the labors of the Third UN Law of the Sea Conference is examined and a whole chapter is devoted to the rules that have been proposed in consequence of the philosophical concept of the "common heritage of mankind," an ancient conception of freedom of the seas often expressed as "res communis omnium."

Although tightly woven about problems of jurisdiction over marine spaces, the great value of this study is its painstaking search for norms of international law derived from custom and general principles as sources of international obligation as well as the rules established by consent or

¹ Volumes I and II reviewed in 71 AJIL 835 (1977).

implied by declarations of intergovernmental bodies. The law of the sea offers excellent illustrations of the emerging ideologies, political dynamics, and appropriate international organization behavior that fashion international law.

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La Contaminación de los Ríos en el Derecho Internacional Público. By Vincente Guillermo Arnaud. (Buenos Aires: Instituto Nacional de Ciencia y Técnica Hídricas, Centro de Tecnología del Agua, 1974. Pp. 362.) Arnaud's book is as an excellent reference work for anyone doing research on international river problems, and particularly on questions of international water quality. But its usefulness is not limited to questions of water quality, for it provides, in Spanish, a comprehensive treatment of the principal sources of international water law. It systematically examines the leading international treaties from around the world, as well as the international judicial decisions such as the *Trail Smelter* and the *Lake Lanoux* cases.

It would have been helpful if Arnaud had dealt more with decisions involving interstate disputes over water resources in nations having a federal system; those cases in Germany, Switzerland, and the U.S. provide helpful insight into dealing with such questions. The book on the whole, however, is quite comprehensive in discussing the treaties, international decisions, and the work of various international bodies including the Council of Europe, the Organization of American States, the International Law Commission, and the UN Conference on the Human Environment. It also has an extremely useful set of appendices in which the texts of most of the pertinent materials are set out in full (in Spanish).

Of particular interest is the discussion of the legal position of Argentina in regard to international river systems, the problems peculiar to Argentinian rivers, and the development of Argentina's position in regard to those rivers. Arnaud provides a complete chronology of the various treaties, agreements, declarations, and policy statements of Argentina in regard to her rivers. In addition, he discusses the position that Argentina has taken at various international meetings relating to international water resources. Of particular interest is the treaty relating to the Río de la Plata, the examination of which provides a useful insight to any student of international water law in regard to Argentina in particular and, to some considerable extent, to that part of Latin America which neighbors Argentina. The book generally traces the development of limited territorial sovereignty and demonstrates its development through the relevant international treaties and statements of international authorities and respected learned bodies.

The author does not attempt extensive analysis, and the book's usefulness is in providing a good research resource in Spanish for anyone dealing with questions related to international water law and management.

ALBERT E. UTTON
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School of Law*

Cumulative List and Index of Treaties and International Agreements Registered or Filed and Recorded with the Secretariat of the United Nations December 1969–December 1974. Volume I of a two-volume series. By Joseph T. and Rose V. Vambery. (Dobbs Ferry: Oceana Publications, Inc., 1977. Pp. xv, 461. \$50.00 per volume.) While awaiting the results of the computerization of UN treaty data (it had been scheduled for com-

pletion in 1977) the United Nations is falling more and more behind in publishing the dramatically increasing number of treaties in its UNTS volumes, as well as in making available the UNTS Cumulative Indexes and current information on treaties registered or filed and recorded with the UN Secretariat.

The compilers of the *Cumulative List* (the International Law Librarian emeritus at Columbia and a former professor of business administration) intend to "bridge the gap" between the presently available UN publications and the UN computerization project. Information published in the UN monthly statements is usefully cumulated for the period indicated, incorporating under individual treaty numbers basic information and all subsequent actions following registration. That is its main feature, thus enabling the user to save research time, provided he knows the UN treaty number. Since the *Cumulative List* simply reproduces entries from the UN monthly statements which do not and cannot have references to UNTS volumes, no such references are included. The proposed index for Volume II (in preparation) does not include a chronological listing of treaties by date, one of the essential elements of the UNTS Cumulative Indexes; only indexes by subjects and parties are announced. A list of treaty numbers with references to UNTS volumes, where their texts have been published, should definitely be considered for Volume II.

The usefulness of the completed work will very much depend on the quality and ingenuity of the indexes in Volume II, as well as the legibility of the main body of entries (too much reduced in size in the second part of Volume I).

ADOLF SPRUDZS

University of Chicago Law School Library

Compendium of Case Law Relating to the European Communities, 1975. By H. J. Eversen, H. Sperl, and J. A. Usher. (Amsterdam, New York, Oxford: North-Holland Publishing Co., 1977. Pp. xv, 431. Index. Dfl. 160.00; \$65.50.) This work is the third¹ in the series of compendia published in the English language, following the enlargement of the European Communities. Like its predecessors, this volume presents extracts from judgments of the Court of Justice of the European Communities and of the national courts dealing with applications of the treaties establishing the three European Communities and of the secondary Community law, consisting of Council and Commission regulations. The extracts are arranged on an article-by-article basis for each of the three treaties, followed by cases involving sources of secondary community law in chronological sequence. Decisions dealing with the Convention of September 27, 1968, on jurisdiction and the enforcement of civil and commercial judgments, and with the Common Customs Tariffs, form two separate segments of the book. In addition, the *Compendium* contains summaries of all judgments of the Court of Justice rendered during 1975 in numerical order and of the relevant national cases, arranged by member-states.

As was to be expected, this volume comes up to the high standards set by its predecessors and will be a most useful research tool for the busy practitioner. The two-step index is detailed and careful. Perhaps, to help American readers, "undertakings" should be cross-referenced with "enterprises."

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¹ The first was reviewed in 70 AJIL 883 (1976).

Public International Law. A Current Bibliography of Articles. By the Max Planck Institute for Comparative Public Law and International Law. Volume 1, Nos. 1 and 2, 1975; Volume 2, Nos. 1 and 2, 1976; Volume 3, Nos. 1 and 2, 1977. (Berlin, Heidelberg, New York: Springer-Verlag.) This bibliography, compiled by collaborators of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, under the direction of Werner Morway and Lothar Günling and with the assistance of the Institute for Documentation Affairs in Frankfurt, began in 1975. In their introductory remarks, the editors, Hermann Mosler and Rudolf Bernhardt, stated that the purpose of the bibliography was to "make available to scholars and practitioners current information on a part of the literature on public international law—that which is contained in articles," *i.e.*, contributions to journals and other collected works, such as *festschriften* and the like.

In order to provide a convenient guide for research and other studies in the field of international law, the editors have tried to establish the widest possible compilation of articles dealing with this subject, surveying more than 1,000 journals and other serials issued throughout the world. Moreover, the work is based on a broad concept of international law and includes not only articles but also case notes and book reviews; however, no official documents and opinions or judicial decisions without commentaries are covered or listed.

Printed twice a year and totalling about 232 pages, the bibliography consists of five parts: 1) the System of Bibliography, in four languages (English, German, French, and Spanish) with 27 subjects and a great number of subdivisions; 2) a List of Literature and Abbreviations, *i.e.*, over 1,000 periodicals and other serial titles inspected by the editors; 3) the Bibliography itself; 4) an Index of Persons; and 5) an Index of Subjects. The last two facilitate the use of the compilation in a most effective manner since both indexes are cumulated in the second issue, thus permitting a convenient approach for consultation in regard to authors, titles, and subjects.

This bibliography is the first of its kind and a significant contribution to the legal literature on public international law, combining in its organization sound scholarship with a vast amount of information. One might only wish, perhaps, for some attention to official documents and other similar materials.

IVAN SIPKOV

Law Library, Library of Congress

Major Issues of the Law of the Sea. Edited by David L. Larson. (Durham, N.H.: University of New Hampshire, 1976. Pp. iv, 221. Maps and bibliography.) David Larson and some of his students, both undergraduate and graduate, at the University of New Hampshire have prepared an excellent teaching aid for those interested in international law generally and the law of the sea specifically. Larson prepared the work in 1976 to meet a need for useable materials on the law of the sea for beginning students, interested laymen and even experts. The edition reviewed here was prepared after the third session of The Third United Nations Conference on the Law of the Sea at Geneva, Switzerland in May 1975 which produced "The Informal Single Negotiating Text" and a "Text on The Settlement of Disputes." The work is therefore dated but not disablingly so. A revision is planned for January 1980.

The present edition will be useful until then because it deals with the principal issues under consideration in the continuing, seemingly endless,

Third Law Of The Sea Conference. These include matters that are generally agreed upon such as the economic zone, territorial waters, fisheries, navigational rights, islands and archipelagoes. Also considered are the more difficult matters such as marine scientific research and seabed mining. The next edition will reflect the changes made in the Composite Negotiating Text negotiated during the sixth and seventh sessions. It might even be based on an "agreed" text.

This reviewer has used *Major Issues* twice in an upper-level undergraduate course (including first-year graduate students) in a concluding exercise simulating the political process of The Law Of The Sea Conference. Students negotiated on the basis of country or interest group position papers. They responded well to the material in *Major Issues* which can be easily supplemented by the many monographs and documents now available, and by using *Major Issues* they managed to learn a good deal about the political foundations of international law and the nature of treaty-making.

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Igualdad de Derechos y Libre Determinación de los Pueblos Principio eje del Derecho Internacional Contemporáneo. By Angustias Moreno López. (Granada: Universidad de Granada, 1977. Pp. 412.) Angustias Moreno López presents the thesis that there has been since 1945 a complete reversal in the foundations of international law. As the title of her work indicates, it is claimed that the principles of equal rights and self-determination are now the basic foundations or "axes" of international law.

The author first discusses how these basic principles were treated in the era of the League of Nations. Then she carefully analyzes how these principles were developed and accentuated through actions by the United Nations. In general, López's point of view is that sometimes described as "third world"; e.g., in her discussion of what legal obligations, if any, remain when there is state succession ("it is a fallen idol" p. 239) and in her discussion of decolonization and the rights of the inhabitants of dependent territories. Along with many other writers, who may not share her third world persuasion, she finds that human rights are a factor of independent international legal significance, denying the older distinction made between the subjects of international law (states) and its objects (people).

Much of the support for López's conclusions is found in resolutions passed by the General Assembly and other agencies of the United Nations. The extent to which General Assembly resolutions create substantive rules of international law has been extensively debated, and the author seems aware of their limitations, even while relying on many of them.

Readers interested in diplomatic interposition will find much stimulating material in that part of Chapter 2 which is concerned with equal rights and self-determination in the economic field. Her point of view is similar to that found in the writings of many representatives of less developed countries; it is seen in her discussion of natural resources, expropriations and the problems of valuation and compensation.

Although López's principal thesis is not entirely convincing to the reviewer, she is to be commended for the careful planning and meticulous research which are evident in this work.

FREDERIC A. WEED
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* Mention here neither assures nor precludes later review.

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STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION

(Act of August 12, 1970; Sec. 3685, Title 39, U.S. Code)

ber 1978. *American Journal of International Law* (issued quarterly, January, October), Prince & Lemon Streets, Lancaster, Pennsylvania 17604. Publisher, American Society of International Law, 2223 Massachusetts Avenue, N.W., D.C. 20008. Editors-in-Chief, Louis Henkin and Oscar Schachter, Columbia School of Law, New York, N.Y. 10027. Owner, American Society of Law. Average number of copies per issue, last 12 months: total printed, circulation, 8,619; mail subscriptions, 8,619; total paid circulation, 8,619; ion, 128; total distribution, 8,747; office use, left over, unaccounted, spoiled, 1,475. For single issue nearest to filing date: total printed, 10,311; paid, 1,179; mail subscriptions, 8,179; total paid circulation, 8,179; free distribution, 8,307; office use, left over, unaccounted, spoiled after 4.

INTERNATIONAL LEGAL MATERIALS *

CONTENTS

VOL. XVII, No. 4 (July 1978)

TREATIES AND AGREEMENTS

- Argentina-Chile: Minute Concerning the *Beagle Channel* Region
- Council of Europe:
 - Additional Protocol to the European Convention on *Information on Law*
 - Additional Protocol to the European Convention on *Mutual Assistance in Criminal Matters*
 - European Convention on the *Obtaining Abroad of Information and Evidence in Administrative Matters*
 - Second Additional Protocol to the European Convention on *Extradition*
- Panama-United States: Protocol of Exchange of Instruments of Ratification of the *Panama Canal Treaties*
- Instruments of Ratification with Reservations and Understandings of the *Panama Canal Treaty*
- Instruments of Ratification with Amendments, Conditions and Reservations to the Treaty Concerning the Permanent Neutrality and Operation of the *Panama Canal*
- United Kingdom-United States: *Tax Convention* and Related Documents

JUDICIAL AND SIMILAR PROCEEDINGS

- United Kingdom: House of Lords Decision in *Owners of Cargo on Board Vessel Siskina, et al. v. Distos Compania Naviera S.A.* (*Jurisdiction; Judgment of Insurance Proceeds of Foreign Defendant*)
- United States:
 - District Court for the District of Columbia Notice of Plea Agreeing to the *United States v. Control Data Corporation (Illegal Foreign Payments and Foreign Transactions)*
 - District Court for the Northern District of California Opinion in *Power & Light Company v. URANEX (Jurisdiction; Prejudgment Attachment of Foreign Defendant; Convention on the Recognition and Enforcement of Foreign Arbitral Awards)*
 - Supreme Court Decision in *Zenith Radio Corp. v. United States (Subsidies; Countervailing Duties)*

LEGISLATION AND REGULATIONS

- Australia: Act Relating to *Incursions into Foreign Countries and Recruitment of Service in Armed Forces in Foreign Countries*
- United States: *Trigger Price Mechanism* for Imported Steel Products
 - Introductory Note
 - Report to the President
 - Department of the Treasury Notice on the Initial Trigger Prices ..
 - Department of the Treasury Final Regulations on the Special Steel Invoice
 - Notice of Revisions to Trigger Prices
 - U.S. District Court Opinion in *Davis Walker Corporation, et al. v. United States, et al. (Antidumping Act; Administrative Procedure Act Requirements)*

OTHER DOCUMENTS

- United Nations: Final Document of the Special Session of the General Assembly on *Disarmament*
- United States: Presidential Message to Congress on the *Legislative Veto*

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OFFICIAL DOCUMENTS

A CONVENTION ON SUCCESSION OF STATES IN RESPECT OF TREATIES *

Parties to the present Convention,

the profound transformation of the international community
by the decolonization process,
also that other factors may lead to cases of succession of
future,

in these circumstances, of the need for the codification and
development of the rules relating to succession of States in
relation as a means for ensuring greater juridical security in
relations,

the principles of free consent, good faith and *pacta sunt
universally recognized,*

that the consistent observance of general multilateral
deal with the codification and progressive development of
law and those the object and purpose of which are of interest
international community as a whole is of special importance for the
of peace and international co-operation,

in mind the principles of international law embodied in the
United Nations, such as the principles of the equal rights
of peoples, of the sovereign equality and indepen-
dence, of non-interference in the domestic affairs of States, of
the threat or use of force, and of universal respect for,
of human rights and fundamental freedoms for all,
at respect for the territorial integrity and political indepen-
dence is required by the Charter of the United Nations,
and the provisions of the Vienna Convention on the Law of
1978,

in mind article 73 of that Convention,
that questions of the law of treaties other than those that may
of succession of States are governed by the relevant rules of
law, including those rules of customary international law
embodied in the Vienna Convention on the Law of Treaties of

that the rules of customary international law will continue to
be not regulated by the provisions of the present Convention,
as follows:

PART I

GENERAL PROVISIONS

Parties to the present Convention

the Convention applies to the effects of a succession of States
between States.

31. This convention was adopted on August 23, 1978 by
2 abstentions (France and Switzerland) at the United Na-
tion of States in Respect of Treaties, Vienna. The Final
Doc. A/CONF. 80/32.

Article 2—Use of terms

1. For the purposes of the present Convention:

(a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(b) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(c) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(d) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(e) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

(f) "newly independent State" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible;

(g) "notification of succession" means in relation to a multilateral treaty any notification, however phrased or named, made by a successor State expressing its consent to be considered as bound by the treaty;

(h) "full powers" means in relation to a notification of succession any other notification under the present Convention a document emanating from the competent authority of a State designating a person or persons to represent the State for communicating the notification of succession or, as the case may be, the notification;

(i) "ratification," "acceptance" and "approval" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(j) "reservation" means a unilateral statement, however phrased or made by a State when signing, ratifying, accepting, approving or acceding to a treaty or when making a notification of succession to a treaty, which purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

(k) "contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force for that State;

(l) "party" means a State which has consented to be bound by the treaty and for which the treaty is in force;

(m) "other State party" means in relation to a successor State other than the predecessor State, to a treaty in force at the date of the succession of States in respect of the territory to which that treaty relates;

(n) "international organization" means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms of the Convention are without prejudice to the use of those terms in the internal law of any State.

Article 3—Cases not within the scope of the present Convention

The fact that the present Convention does not apply to the succession of States in respect of international agreements concluded before the date of its entry into force does not affect the validity of such agreements.

tween States and other subjects of international law or in respect of international agreements not in written form shall not affect:

(a) the application to such cases of any of the rules set forth in the present Convention to which they are subject under international law independently of the Convention;

(b) the application as between States of the present Convention to the effects of a succession of States in respect of international agreements to which other subjects of international law are also parties.

Article 4—Treaties constituting international organizations and treaties adopted within an international organization

The present Convention applies to the effects of a succession of States in respect of:

(a) any treaty which is the constituent instrument of an international organization without prejudice to the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization;

(b) any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

Article 5—Obligations imposed by international law independently of a treaty

The fact that a treaty is not considered to be in force in respect of a State by virtue of the application of the present Convention shall not in any way impair the duty of that State to fulfil any obligation embodied in the treaty to which it is subject under international law independently of the treaty.

Article 6—Cases of succession of States covered by the present Convention

The present Convention applies only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

Article 7—Temporal application of the present Convention

1. Without prejudice to the application of any of the rules set forth in the present Convention to which the effects of a succession of States would be subject under international law independently of the Convention, the Convention applies only in respect of a succession of States which has occurred after the entry into force of the Convention except as may be otherwise agreed.

2. A successor State may, at the time of expressing its consent to be bound by the present convention or at any time thereafter, make a declaration that it will apply the provisions of the Convention in respect of its own succession of States which has occurred before the entry into force of the Convention in relation to any other contracting State or State Party to the Convention which makes a declaration accepting the declaration of the successor State. Upon the entry into force of the Convention as between the States making the declarations or upon the making of the declaration of acceptance, whichever occurs later, the provisions of the Convention shall apply to the effects of the succession of States as from the date of that succession of States.

3. A successor State may at the time of signing or of expressing its consent to be bound by the present Convention make a declaration that it will apply the provisions of the Convention provisionally in respect of its own succession of States which has occurred before the entry into force of the Convention in relation to any other signatory or contracting State which makes a declaration accepting the declaration of the successor State; upon the making of the declaration of acceptance, those provisions shall apply provisionally to the effects of the succession of States as between those two States as from the date of that succession of States.

4. Any declaration made in accordance with paragraph 2 or 3 shall be contained in a written notification communicated to the depositary, who shall inform the Parties and the States entitled to become Parties to the present Convention of the communication to him of that notification and of its terms.

Article 8—Agreements for the devolution of treaty obligations or rights from a predecessor State to a successor State

1. The obligations or rights of a predecessor State under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State towards other States parties to those treaties by reason only of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations or rights shall devolve upon the successor State.

2. Notwithstanding the conclusion of such an agreement, the effects of a succession of States on treaties which, at the date of that succession of States, were in force in respect of the territory in question are governed by the present Convention.

Article 9—Unilateral declaration by a successor State regarding treaties of the predecessor State

1. Obligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State or of other States parties to those treaties by reason only of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory.

2. In such a case, the effects of the succession of States on treaties which, at the date of that succession of States, were in force in respect of the territory in question are governed by the present Convention.

Article 10—Treaties providing for the participation of a successor State

1. When a treaty provides that, on the occurrence of a succession of States, a successor State shall have the option to consider itself a party to the treaty, it may notify its succession in respect of the treaty in conformity with the provisions of the treaty or, failing any such provisions, in conformity with the provisions of the present Convention.

2. If a treaty provides that, on the occurrence of a succession of States, a successor State shall be considered as a party to the treaty, that provision takes effect as such only if the successor State expressly accepts in writing to be so considered.

3. In cases falling under paragraph 1 or 2, a successor State which establishes its consent to be a party to the treaty is considered as a party from

the date of the succession of States unless the treaty otherwise provides or it is otherwise agreed.

Article 11—Boundary régimes

A succession of States does not as such affect:

- (a) a boundary established by a treaty; or
- (b) obligations and rights established by a treaty and relating to the régime of a boundary.

Article 12—Other territorial régimes

1. A succession of States does not as such affect:

(a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of any territory of a foreign State and considered as attaching to the territories in question;

(b) rights established by a treaty for the benefit of any territory and relating to the use, or to restrictions upon the use, of any territory of a foreign State and considered as attaching to the territories in question.

2. A succession of States does not as such affect:

(a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory;

(b) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory.

3. The provisions of the present article do not apply to treaty obligations of the predecessor State providing for the establishment of foreign military bases on the territory to which the succession of States relates.

Article 13—The present Convention and permanent sovereignty over natural wealth and resources

Nothing in the present Convention shall affect the principles of international law affirming the permanent sovereignty of every people and every State over its natural wealth and resources.

Article 14—Questions relating to the validity of a treaty

Nothing in the present Convention shall be considered as prejudging in any respect any question relating to the validity of a treaty.

PART II

SUCCESSION IN RESPECT OF PART OF TERRITORY

Article 15—Succession in respect of part of territory

When part of the territory of a State, or when any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another State:

(a) treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates from the date of the succession of States; and

(b) treaties of the successor State are in force in respect of the territory to which the succession of States relates from the date of the succession

of States, unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

PART III

NEWLY INDEPENDENT STATES

SECTION 1. GENERAL RULE

Article 16—Position in respect of the treaties of the predecessor State

A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates.

SECTION 2. MULTILATERAL TREATIES

Article 17—Participation in treaties in force at the date of the succession of States

1. Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates.

2. Paragraph 1 does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

3. When, under the terms of the treaty or by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the parties, the newly independent State may establish its status as a party to the treaty only with such consent.

Article 18—Participation in treaties not in force at the date of the succession of States

1. Subject to paragraphs 3 and 4, a newly independent State may, by a notification of succession, establish its status as a contracting State to a multilateral treaty which is not in force if at the date of the succession of States the predecessor State was a contracting State in respect of the territory to which that succession of States relates.

2. Subject to paragraphs 3 and 4, a newly independent State may, by a notification of succession, establish its status as a party to a multilateral treaty which enters into force after the date of the succession of States if at the date of the succession of States the predecessor State was a contracting State in respect of the territory to which that succession of States relates.

3. Paragraphs 1 and 2 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

4. When, under the terms of the treaty or by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the parties or of all the contracting States, the newly independent State may establish its status as a party or as a contracting State to the treaty only with such consent.

5. When a treaty provides that a specified number of contracting States shall be necessary for its entry into force, a newly independent State which establishes its status as a contracting State to the treaty under paragraph 1 shall be counted as a contracting State for the purpose of that provision unless a different intention appears from the treaty or is otherwise established.

Article 19—Participation in treaties signed by the predecessor State subject to ratification, acceptance or approval

1. Subject to paragraphs 3 and 4, if before the date of the succession of States the predecessor State signed a multilateral treaty subject to ratification, acceptance or approval and by the signature intended that the treaty should extend to the territory to which the succession of States relates, the newly independent State may ratify, accept or approve the treaty as if it had signed that treaty and may thereby become a party or a contracting State to it.

2. For the purpose of paragraph 1, unless a different intention appears from the treaty or is otherwise established, the signature by the predecessor State of a treaty is considered to express the intention that the treaty should extend to the entire territory for the international relations of which the predecessor State was responsible.

3. Paragraph 1 does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

4. When, under the terms of the treaty or by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the parties or of all the contracting States, the newly independent State may become a party or a contracting State to the treaty only with such consent.

Article 20—Reservations

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession under article 17 or 18, it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject-matter as that reservation.

2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty under article 17 or 18, a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of sub-paragraph (a), (b) or (c) of article 19 of the Vienna Convention on the Law of Treaties.

3. When a newly independent State formulates a reservation in conformity with paragraph 2, the rules set out in articles 20 to 23 of the Vienna Convention on the Law of Treaties apply in respect of that reservation.

Article 21—Consent to be bound by part of a treaty and choice between differing provisions

1. When making a notification of succession under article 17 or 18 establishing its status as a party or contracting State to a multilateral treaty, a newly independent State may, if the treaty so permits, express its consent to be bound by part of the treaty or make a choice between differing provisions under the conditions laid down in the treaty for expressing such consent or making such choice.

2. A newly independent State may also exercise, under the same conditions as the other parties or contracting States, any right provided for in the treaty to withdraw or modify any consent expressed or choice made by itself or by the predecessor State in respect of the territory to which the succession of States relates.

3. If the newly independent State does not in conformity with paragraph 1 express its consent or make a choice, or in conformity with paragraph 2 withdraw or modify the consent or choice of the predecessor State, it shall be considered as maintaining:

(a) the consent of the predecessor State, in conformity with the treaty, to be bound, in respect of the territory to which the succession of States relates, by part of that treaty; or

(b) the choice of the predecessor State, in conformity with the treaty, between differing provisions in the application of the treaty in respect of the territory to which the succession of States relates.

Article 22—Notification of succession

1. A notification of succession in respect of a multilateral treaty under article 17 or 18 shall be made in writing.

2. If the notification of succession is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

3. Unless the treaty otherwise provides, the notification of succession shall:

(a) be transmitted by the newly independent State to the depositary, or, if there is no depositary, to the parties or the contracting States;

(b) be considered to be made by the newly independent State on the date on which it is received by the depositary or, if there is no depositary, on the date on which it is received by all the parties or, as the case may be, by all the contracting States.

4. Paragraph 3 does not affect any duty that the depositary may have, in accordance with the treaty or otherwise, to inform the parties or the contracting States of the notification of succession or any communication made in connection therewith by the newly independent State.

5. Subject to the provisions of the treaty, the notification of succession or the communication made in connection therewith shall be considered as received by the State for which it is intended only when the latter State has been informed by the depositary.

Article 23—Effects of a notification of succession

1. Unless the treaty otherwise provides or it is otherwise agreed, a newly independent State which makes a notification of succession under article 17 or article 18, paragraph 2, shall be considered a party to the treaty from the date of the succession of States or from the date of entry into force of the treaty, whichever is the later date.
2. Nevertheless, the operation of the treaty shall be considered as suspended as between the newly independent State and the other parties to the treaty until the date of making of the notification of succession except in so far as that treaty may be applied provisionally in accordance with article 27 or as may be otherwise agreed.
3. Unless the treaty otherwise provides or it is otherwise agreed, a newly independent State which makes a notification of succession under article 18, paragraph 1, shall be considered a contracting State to the treaty from the date on which the notification of succession is made.

SECTION 3. BILATERAL TREATIES

Article 24—Conditions under which a treaty is considered as being in force in the case of a succession of States

1. A bilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as being in force between a newly independent State and the other State party when:
 - (a) they expressly so agree; or
 - (b) by reason of their conduct they are to be considered as having so agreed.

2. A treaty considered as being in force under paragraph 1 applies in the relations between the newly independent State and the other State party from the date of the succession of States, unless a different intention appears from their agreement or is otherwise established.

Article 25—The position as between the predecessor State and the newly independent State

A treaty which under article 24 is considered as being in force between a newly independent State and the other State party is not by reason only of that fact to be considered as being in force also in the relations between the predecessor State and the newly independent State.

Article 26—Termination, suspension of operation or amendment of the treaty as between the predecessor State and the other State party

1. When under article 24 a treaty is considered as being in force between a newly independent State and the other State party, the treaty:
 - (a) does not cease to be in force between them by reason only of the fact that it has subsequently been terminated as between the predecessor State and the other State party;
 - (b) is not suspended in operation as between them by reason only of the fact that it has subsequently been suspended in operation as between the predecessor State and the other State party;
 - (c) is not amended as between them by reason only of the fact that it has subsequently been amended as between the predecessor State and the other State party.

2. The fact that a treaty has been terminated or, as the case may be, suspended in operation as between the predecessor State and the other State party after the date of the succession of States does not prevent the treaty from being considered to be in force or, as the case may be, in operation as between the newly independent State and the other State party if it is established in accordance with article 24 that they so agreed.

3. The fact that a treaty has been amended as between the predecessor State and the other State party after the date of the succession of States does not prevent the unamended treaty from being considered to be in force under article 24 as between the newly independent State and the other State party, unless it is established that they intended the treaty as amended to apply between them.

SECTION 4. PROVISIONAL APPLICATION

Article 27—Multilateral treaties

1. If, at the date of the succession of States, a multilateral treaty was in force in respect of the territory to which the succession of States relates and the newly independent State gives notice of its intention that the treaty should be applied provisionally in respect of its territory, that treaty shall apply provisionally between the newly independent State and any party which expressly so agrees or by reason of its conduct is to be considered as having so agreed.

2. Nevertheless, in the case of a treaty which falls within the category mentioned in article 14, paragraph 3, the consent of all the parties to such provisional application is required.

3. If at the date of the succession of States, a multilateral treaty not yet in force was being applied provisionally in respect of the territory to which the succession of States relates and the newly independent State gives notice of its intention that the treaty should continue to be applied provisionally in respect of its territory, that treaty shall apply provisionally between the newly independent State and any contracting State which expressly so agrees or by reason of its conduct is to be considered as having so agreed.

4. Nevertheless, in the case of a treaty which falls within the category mentioned in article 17, paragraph 3, the consent of all the contracting States to such continued provisional application is required.

5. Paragraphs 1 to 4 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

Article 28—Bilateral treaties

A bilateral treaty which at the date of a succession of States was in force or was being provisionally applied in respect of the territory to which the succession of States relates is considered as applying provisionally between the newly independent State and the other State concerned when:

- (a) they expressly so agree; or
- (b) by reason of their conduct they are to be considered as having so agreed.

Article 29—Termination of provisional application

1. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a multilateral treaty under article 27 may be terminated:

(a) by reasonable notice of termination given by the newly independent State or the party or contracting State provisionally applying the treaty and the expiration of the notice; or

(b) in the case of a treaty which falls within the category mentioned in article 17, paragraph 3, by reasonable notice of termination given by the newly independent State or all of the parties or, as the case may be, all of the contracting States and the expiration of the notice.

2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a bilateral treaty under article 28 may be terminated by reasonable notice of termination given by the newly independent State or the other State concerned and the expiration of the notice.

3. Unless the treaty provides for a shorter period for its termination or it is otherwise agreed, reasonable notice of termination shall be twelve months' notice from the date on which it is received by the other State or States provisionally applying the treaty.

4. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a multilateral treaty under article 27 shall be terminated if the newly independent State gives notice of its intention not to become a party to the treaty.

SECTION 5. NEWLY INDEPENDENT STATES FORMED FROM TWO
OR MORE TERRITORIES

Article 30—Newly independent States formed from two or more territories

1. Articles 16 to 29 apply in the case of a newly independent State formed from two or more territories.

2. When a newly independent State formed from two or more territories is considered as or becomes a party to a treaty by virtue of article 17, 18, or 24 and at the date of the succession of States the treaty was in force, or consent to be bound had been given, in respect of one or more, but not all, of those territories, the treaty shall apply in respect of the entire territory of that State unless:

(a) it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation;

(b) in the case of a multilateral treaty not falling under article 17, paragraph 3, or under article 18, paragraph 4, the notification of succession is restricted to the territory in respect of which the treaty was in force at the date of the succession of States, or in respect of which consent to be bound by the treaty had been given prior to that date;

(c) in the case of a multilateral treaty falling under article 17, paragraph 3, or under article 18, paragraph 4, the newly independent State and the other States parties or, as the case may be, the other contracting States otherwise agree; or

(d) in the case of a bilateral treaty, the newly independent State and the other State concerned otherwise agree.

3. When a newly independent State formed from two or more territories becomes a party to a multilateral treaty under article 19 and by the signa-

ture or signatures of the predecessor State or States it had been intended that the treaty should extend to one or more, but not all, of those territories, the treaty shall apply in respect of the entire territory of the newly independent State unless:

(a) it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation;

(b) in the case of a multilateral treaty not falling under article 19, paragraph 4, the ratification, acceptance or approval of the treaty is restricted to the territory or territories to which it was intended that the treaty should extend; or

(c) in the case of a multilateral treaty falling under article 19, paragraph 4, the newly independent State and the other States parties or, as the case may be, the other contracting States otherwise agree.

PART IV

UNITING AND SEPARATION OF STATES

Article 31—Effects of a uniting of States in respect of treaties in force at the date of the succession of States

1. When two or more States unite and so form one successor State, any treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the successor State unless:

(a) the successor State and the other State party or States parties otherwise agree; or

(b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

2. Any treaty continuing in force in conformity with paragraph 1 shall apply only in respect of the part of the territory of the successor State in respect of which the treaty was in force at the date of the succession of States unless:

(a) in the case of a multilateral treaty not falling within the category mentioned in article 17, paragraph 3, the successor State makes a notification that the treaty shall apply in respect of its entire territory;

(b) in the case of a multilateral treaty falling within the category mentioned in article 17, paragraph 3, the successor State and the other States parties otherwise agree; or

(c) in the case of a bilateral treaty, the successor State and the other State party otherwise agree.

3. Paragraph 2(a) does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

Article 32—Effects of a uniting of States in respect of treaties not in force at the date of the succession of States

1. Subject to paragraphs 3 and 4, a successor State falling under article 31 may, by making a notification, establish its status as a contracting State

to a multilateral treaty which is not in force if, at the date of the succession of States, any of the predecessor States was a contracting State to the treaty.

2. Subject to paragraphs 3 and 4, a successor State falling under article 31 may, by making a notification, establish its status as a party to a multilateral treaty which enters into force after the date of the succession of States if, at that date, any of the predecessor States was a contracting State to the treaty.

3. Paragraphs 1 and 2 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

4. If the treaty is one falling within the category mentioned in article 17, paragraph 3, the successor State may establish its status as a party or as a contracting State to the treaty only with the consent of all the parties or of all the contracting States.

5. Any treaty to which the successor State becomes a contracting State or a party in conformity with paragraph 1 or 2 shall apply only in respect of the part of the territory of the successor State in respect of which consent to be bound by the treaty had been given prior to the date of the succession of States unless:

(a) in the case of a multilateral treaty not falling within the category mentioned in article 17, paragraph 3, the successor State indicates in its notification made under paragraph 1 or 2 that the treaty shall apply in respect of its entire territory; or

(b) in the case of a multilateral treaty falling within the category mentioned in article 17, paragraph 3, the successor State and all the parties or, as the case may be, all the contracting States otherwise agree.

6. Paragraph 5(a) does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

Article 33—Effects of a uniting of States in respect of treaties signed by a predecessor State subject to ratification, acceptance or approval

1. Subject to paragraphs 2 and 3, if before the date of the succession of States one of the predecessor States had signed a multilateral treaty subject to ratification, acceptance or approval, a successor State falling under article 31 may ratify, accept or approve the treaty as if it had signed that treaty and may thereby become a party or a contracting State to it.

2. Paragraph 1 does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

3. If the treaty is one falling within the category mentioned in article 17, paragraph 3, the successor State may become a party or a contracting State to the treaty only with the consent of all the parties or of all the contracting States.

4. Any treaty to which the successor State becomes a party or a contracting State in conformity with paragraph 1 shall apply only in respect of the part

of the territory of the successor State in respect of which the treaty was signed by one of the predecessor States unless:

(a) in the case of a multilateral treaty not falling within the category mentioned in article 17, paragraph 3, the successor State when ratifying, accepting or approving the treaty gives notice that the treaty shall apply in respect of its entire territory; or

(b) in the case of a multilateral treaty falling within the category mentioned in article 17, paragraph 3, the successor State and all the parties or, as the case may be, all the contracting States otherwise agree.

5. Paragraph 4(a) does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

Article 34—Succession of States in cases of separation of parts of a State

1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:

(a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;

(b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.

2. Paragraph 1 does not apply if:

(a) the States concerned otherwise agree; or

(b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

Article 35—Position if a State continues after separation of part of its territory

When, after separation of any part of the territory of a State, the predecessor State continues to exist, any treaty which at the date of the succession of States was in force in respect of the predecessor State continues in force in respect of its remaining territory unless:

(a) the States concerned otherwise agree;

(b) it is established that the treaty related only to the territory which has separated from the predecessor State; or

(c) it appears from the treaty or is otherwise established that the application of the treaty in respect of the predecessor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

Article 36—Participation in treaties not in force at the date of the succession of States in cases of separation of parts of a State

1. Subject to paragraphs 3 and 4, a successor State falling under article 34, paragraph 1, may, by making a notification, establish its status as a contracting State to a multilateral treaty which is not in force if, at the date of the succession of States, the predecessor State was a contracting State

to the treaty in respect of the territory to which the succession of States relates.

2. Subject to paragraphs 3 and 4, a successor State falling under article 34, paragraph 1, may, by making a notification, establish its status as a party to a multilateral treaty which enters into force after the date of the succession of States if at that date the predecessor State was a contracting State to the treaty in respect of the territory to which the succession of States relates.

3. Paragraphs 1 and 2 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

4. If the treaty is one falling within the category mentioned in article 17, paragraph 3, the successor State may establish its status as a party or as a contracting State to the treaty only with the consent of all the parties or of all the contracting States.

Article 37—Participation in cases of separation of parts of a State in treaties signed by the predecessor State subject to ratification, acceptance or approval

1. Subject to paragraphs 2 and 3, if before the date of the succession of States the predecessor State had signed a multilateral treaty subject to ratification, acceptance or approval and the treaty, if it had been in force at that date, would have applied in respect of the territory to which the succession of States relates, a successor State falling under article 34, paragraph 1, may ratify, accept or approve the treaty as if it had signed that treaty and may thereby become a party or a contracting State to it.

2. Paragraph 1 does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

3. If the treaty is one falling within the category mentioned in article 17, paragraph 3, the successor State may become a party or a contracting State to the treaty only with the consent of all the parties or of all the contracting States.

Article 38—Notifications

1. Any notification under articles 31, 32 or 36 shall be made in writing.

2. If the notification is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

3. Unless the treaty otherwise provides, the notification shall:

(a) be transmitted by the successor State to the depositary, or, if there is no depositary, to the parties or the contracting States;

(b) be considered to be made by the successor State on the date on which it is received by the depositary or, if there is no depositary, on the date on which it is received by all the parties or, as the case may be, by all the contracting States.

4. Paragraph 3 does not affect any duty that the depositary may have, in accordance with the treaty or otherwise, to inform the parties or the con-

tracting States of the notification or any communication made in connection therewith by the successor State.

5. Subject to the provisions of the treaty, such notification or communication shall be considered as received by the State for which it is intended only when the latter State has been informed by the depositary.

PART V

MISCELLANEOUS PROVISIONS

Article 39—Cases of State responsibility and outbreak of hostilities

The provisions of the present Convention shall not prejudice any question that may arise in regard to the effects of a succession of States in respect of a treaty from the international responsibility of a State or from the outbreak of hostilities between States.

Article 40—Cases of military occupation

The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from the military occupation of a territory.

PART VI

SETTLEMENT OF DISPUTES

Article 41—Consultation and negotiation

If a dispute regarding the interpretation or application of the present Convention arises between two or more Parties to the Convention, they shall, upon the request of any of them, seek to resolve it by a process of consultation and negotiation.

Article 42—Conciliation

If the dispute is not resolved within six months of the date on which the request referred to in article 41 has been made, any party to the dispute may submit it to the conciliation procedure specified in the Annex to the present Convention by submitting a request to that effect to the Secretary-General of the United Nations and informing the other party or parties to the dispute of the request.

Article 43—Judicial settlement and arbitration

Any State at the time of signature or ratification of the present Convention or accession thereto or at any time thereafter, may, by notification to the depositary, declare that, where a dispute has not been resolved by the application of the procedures referred to in articles 41 and 42, that dispute may be submitted for a decision to the International Court of Justice by a written application of any party to the dispute, or in the alternative to arbitration, provided that the other party to the dispute has made a like declaration.

Article 44—Settlement by common consent

Notwithstanding articles 41, 42, and 43, if a dispute regarding the interpretation or application of the present Convention arises between two or more Parties to the Convention, they may by common consent agree to submit it to the International Court of Justice, or to arbitration, or to any other appropriate procedure for the settlement of disputes.

Article 45—Other provisions in force for the settlement of disputes

Nothing in articles 41 to 44 shall affect the rights or obligations of the Parties to the present Convention under any provisions in force binding them with regard to the settlement of disputes.

PART VII

FINAL PROVISIONS

Article 46—Signature

The present Convention shall be open for signature by all States until 28 February 1979 at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 31 August 1979, at United Nations Headquarters in New York.

Article 47—Ratification

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 48—Accession

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 49—Entry into force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the fifteenth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the fifteenth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 50—Authentic texts

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at Vienna, this twenty-third day of August, one thousand nine hundred and seventy-eight.

ANNEX

I. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term

expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 42, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(a) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the appointment of the last of them, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any Party to the present Convention to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

TABLE OF CASES

[*Italicized* page numbers indicate where decisions are excerpted or cases discussed at length. Abbreviations: ICJ, International Court of Justice; PCIJ, Permanent Court of International Justice]

- Aerial Incident (Israel v. Bulgaria) case (ICJ), 845-7
- Afroyim v. Rusk, 414, 674
- Alfred Dunhill of London, Inc. v. The Republic of Cuba, 398, 400, 419
- Amies v. Inner London Education Authority, 420
- Antypas v. Cia. Maritima San Basilio, S.A., 159
- B. V. Bureau Wijsmuller v. United States, 411
- Baker v. Carr, 666
- Banco Nacional de Cuba v. Farr, 400
- Banco Nacional de Cuba v. First National City Bank, 400
- Banco Nacional de Cuba v. Sabbatino, 400, 411
- Barcelona Traction case (ICJ), 845-7
- Barton v. National Life Assurance Company of Canada, 416
- Beaulieu v. Hartigan, 158
- Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 22, 400
- Bernstein v. van Heyghen Freres, SA, 22
- Bethlehem Steel Corp. v. Board of Commissioners of Department of Water & Power, 416
- Bethlehem Steel Co. v. United States, 33
- C.D.R. Enterprises, Ltd. v. Board of Education of the City of New York, 159
- Canadian Transport Co. v. United States, 156
- Certain Expenses of the United Nations (ICJ), 878
- Chinese American Civic Council v. Attorney General of the United States, 672
- Christian Society for the Holy Places v. Minister of Defence (of Israel), 548
- Channel Islands arbitration. *See* Continental Shelf arbitration
- Cisternas-Estay v. Immigration and Naturalization Service, 159
- Continental Shelf arbitration (UK/France), 95
- Corfu Channel case (ICJ), 844
- Coriolan v. Immigration & Naturalization Service, 924
- Customs Régime between Germany and Austria case (PCIJ), 842
- Danzig Legislative Decrees case (PCIJ), 841
- De Frenne v. Sabena, 421
- DeMauro Construction Corp. v. United States, 927
- De Tenorio v. McGowan, 159
- Diggs v. Richardson, 152
- Dole v. Carter, 665
- Dreyfus v. Von Finck, 159
- DuPree v. United States, 151
- Eastern Carelia case (PCIJ), 835, 841, 853
- Evangelinos v. Trans World Airlines, Inc., 159
- Exchange of Greek and Turkish Populations case (PCIJ), 566
- Factory at Chorzów case (PCIJ), 840, 843
- First National City Bank v. Banco Nacional de Cuba, 400
- Fisheries Jurisdiction cases (ICJ), 845, 849, 850
- Foley v. Connelie, 923
- 40 D 6262 Realty Corp. v. United Arab Emirates Government, 927
- Foster & Elam v. Neilson, 125
- French v. Banco Nacional de Cuba, 411
- Fund for Animals v. Frizzell, 159
- Galanis v. Pallanck, 671
- Geofroy v. Riggs, 124
- Georgia v. Evans, 663
- German Interests in Polish Upper Silesia case (PCIJ), 836
- Grevas v. *M/V Olympic Pegasus*, 157
- Henry v. Immigration & Naturalization Service, 925
- Holden v. Joy, 126
- Hooker v. Klein, 926
- Hunt v. Mobil Oil Corp., 411
- ICAO Council Jurisdiction case (ICJ), 844
- ILO and Conditions of Agricultural Labour case (PCIJ), 837
- International Shoe Co. v. Washington, 154, 157

- Jhirad v. Ferrandina, 160
 K.S.B. Technical Sales Corp. v. North Jersey District Water Supply Commission of the State of New Jersey, 415
 [In re] Krupp, 582, 584
 Kulkarni v. Nyquist, 923
 Martineau v. Immigration & Naturalization Service, 158, 925
 Mathews v. Diaz, 160
 Mavrommatis Jerusalem Concessions case (PCIJ), 840, 842
 Melong v. Micronesian Claims Commission, 668
 Menendez v. Saks & Co., 398, 400
 [The] Muslim Commercial Bank Limited v. M. Golodetz & Co. and Waterman Steamship Corp., 398
 N.V. de Bataafsche Petroleum Maatschappij v. The War Damage Commission, 563
 National Organization for Reform of Marijuana Laws (NORML) v. Drug Enforcement Administration, U.S. Department of Justice, 147
 National Organization for Reform of Marijuana Laws (NORML) v. Ingersoll, 149
 New Hampshire v. Maine, 160
 North Sea Continental Shelf cases (ICJ), 95
 Nuclear Tests case (Australia v. France) (ICJ), 850
 Occidental of Umm Al Qaywayn Inc. v. A Certain Cargo of Petroleum Laden aboard the Tanker *Dauntless Colocotronis*, 895
 Occidental of Umm Al Qay, Inc. v. Cities Service Oil Co., 398
 Pajzs, Csáky, Esterházy case (PCIJ), 842
 Peroff v. Hylton, 160, 412
 Pfizer, Inc. v. Government of India, 160, 662
 [The] *Philippine Admiral* (Owners) v. Wallem Shipping (Hong Kong), Ltd., 419
 Polish Nationality case (PCIJ), 836, 843
 Polish Nationals in Danzig case (PCIJ), 841
 Pubali Bank, Rupali Bank, Sonali Bank and Adamjee Jute Mills, Ltd. v. M. Golodetz & Co. and Waterman Steamship Corp., 398
 Ralpho v. Bell, 667, 670
 Ramos-Hernandez v. Immigration & Naturalization Service, 673
 Reavis v. Exxon Corporation, 410
 Reed v. Wiser, 147
 Republic of Vietnam v. Pfizer, Inc., 152
 Right of Passage case (ICJ), 837
 Rogers v. Bellei, 674
 Rosenberg v. Yee Chien Woo, 673
 Rucker v. Saxbe, 674
 Schneider v. Rusk, 414
 Shapiro v. Farrandina, 672
 Shingleton v. Bussey, 383
 Statute of Memel Territory case (PCIJ), 841
 Sneaker Circus, Inc. v. Carter, 670
 South-West Africa cases (ICJ), 328, 566-7, 845
 Stevens v. Warden, U.S. Penitentiary, Leavenworth, Kansas, 160
 Temple of Preah Vihear case (ICJ), 845-7
 Territorial Jurisdiction of the International Commission of the River Oder case (PCIJ), 837
 Texas v. Louisiana, 160
 Thai-Europe Tapioca Service, Ltd. v. Government of Pakistan, 419
 Timberland Lumber Co. v. Bank of America, N.T. & S.A., 155-6
 Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 664
 Trendtex Trading Corp., Ltd. v. Central Bank of Nigeria, 417
 Union Pacific Railroad v. Public Service Commission, 32
 United States v. Cooper Corp., 662
 United States v. Field, 159
 United States v. Lucienne d'Hotelle de Benitez Rexach, 413
 United States v. Maine, 665
 United States v. Matheson, 160
 United States v. Percheman, 125
 United States v. Rossi, 160
 Underhill v. Hernandez, 401
 Vardy v. United States, 160
 Warsaw v. Trans World Airlines, Inc., 666
 Watson v. Employers Liability Corp., 385
 Wells Fargo & Company v. Wells Fargo Express Company, 153
 Western Samoa case (ICJ), 845
 Wright v. Henkel, 158
 Zwack v. Krauss, 23

INDEX

[The following abbreviations refer to sections of the *Journal*: *BN*, Briefer Notices; *BR*, Book Reviews and Notes, *Corr.*, Correspondence; *CP*, Contemporary Practice of the US Relating to International Law; *Ed.*, Editorial Comment; *JD*, Judicial Decisions; *LA*, Leading Article; *NC*, Notes and Comments; *OD*, Official Documents. Other abbreviations include: *EEC*, European Economic Community; *GATT*, General Agreement on Tariffs and Trade; *ICAO*, International Civil Aviation Organization; *ICJ*, International Court of Justice; *ICRC*, International Committee of the Red Cross; *IMCO*, Inter-governmental Maritime Consultative Organization; *OECD*, Organisation for Economic Co-operation and Development; *UK*, United Kingdom; *UNCLOS III*, Third United Nations Conference on the Law of the Sea; *UNGA*, United Nations General Assembly; *UNSC*, United Nations Security Council; *US*, United States.]

- Abandoned ships, jurisdiction over, *JD*, 664-5
- Act of state doctrine: and expropriation, *CP*, 398-401; and nationalization, *JD*, 410-1; UK and, 262-3; US and, 262-3; US courts and boundary disputes under, *CP*, 896; US State Dept. and, 22
- Adede, A. O. *BN*, Anand, 448; Law of the Sea—The Integration of the System of Settlement of Disputes under the Draft Convention as a Whole, *NC*, 84
- Aden, applicability of Geneva Conventions to conflict in, 276
- Admiralty: and salvage claims, *JD*, 411-2; and territorial jurisdiction, *JD*, 664-5. *See also* United States: Suits in Admiralty Act
- Aegean continental shelf, *Corr.* concerning delimitation of, 617-9
- Afghanistan, US recognition of government of, 879
- African Development Fund, human rights and foreign assistance under, 887
- African states, constitutions of, 351. *See also* Organization of African Unity
- Aggression: economic, 346; *UNGA* definition of, 43, 342-6
- Air transport, carrier liability and, *JD*, 147-9, 666-7. *See also* Montreal (*IATA*) Agreement; Warsaw Convention
- Aircraft: Convention for the Suppression of Unlawful Acts against the Security of (Montreal, 1971), 884; Convention for the Suppression of Unlawful Seizure of (Hague, 1970), 844; Convention on Offenses and Certain Other Acts Committed on Board (Tokyo, 1970), 844
- Airspace, Chicago Convention and sovereignty over, 554
- Akehurst, Michael. A Modern Introduction to International Law, *BR*, 956
- Alexander, Lewis M. *BR*, Knight, Nyhart, & Stein, 934
- Algeria, applicability of Geneva Conventions to conflict in, 274, 275-6, 277, 292
- Algiers, Charter of, 518, 540
- Aliens: deportation of, *JD*, 158-9; eligibility for admission to licensed professions of, *JD*, 923; exclusion from public employment of, *JD*, 159; noneligibility for appointment to state police of, *JD*, 923-4; political asylum and, *JD*, 924-5; state responsibility for injuries to, 876
- Allied Military Government Law No. 59, Court of Restitution Appeals under, 23-4
- Almond, Jr., Harry H. *BN*, Ringear, 208; *BR*, Rosas, 176
- American Convention on Human Rights: freedom of speech and, 630; non-self-executing nature of, 621, 630; proposed US reservations, understandings, and declarations on, *CP*, 630-1; submission to US Senate of, *CP*, 620; US intent to recognize competence of Inter-American Commission on Human Rights under Art. 45 of, 621
- American Law Institute, and new Restatement of the Foreign Relations Law of the United States, *NC*, 875
- American Society of International Law, Report on the Research and Study Activities of, *NC*, 356
- Amnesty International, report on conditions in Haiti by, 925
- Amoco Cadiz* oil spill, 782

- Anand, R. P. Legal Regime of the Sea-Bed and the Developing Countries, *BN*, 448
- Andean Pact: rulemaking functions of, 269; supervisory powers under, 258-9, 261
- Angola: applicability of Geneva Conventions to conflict in, 276; Cuban forces in, 38; use of mercenaries in, 37, 38, 48, 51
- Anti-Ballistic Missile Systems, US-Soviet Treaty on Limitation of, 394
- Antitrust: ECOSOC code on, 261; EEC laws on, 255, 258, 259, 271; extraterritoriality of US laws on, 259; Germany and, 271; Japan and, 271; qualification of foreign states for treble damages under US laws on, *JD*, 662-3; sovereign immunity and, *JD*, 663; US laws on, 255, 258, 259, 271, 662-3
- Apartheid: China and, 331-2; and Convention on racial discrimination, 622; Lagos Declaration for Action against, 408
- Arab boycott of Israel, 29
- Arab League. *See* League of Arab States
- Arab Liberation Army, 568, 592
- Arab oil embargo, 29
- Arab-Israeli conflict: 1949 armistice agreements on, 908; 1967 disengagement agreements concerning, 908. *See also* Middle East
- Arbitration: of Anaconda claims against OPIC, 18; of foreign investment disputes, 264-5; under Hague Convention on the Pacific Settlement of International Disputes (1899), 833-4, 836; under IAEA agreement, 916; under 1973 IMCO and 1974 Paris conventions, 810; under LOS treaty, 88, 92; of salvage claims, *JD*, 411-2; of UK-France dispute over continental shelf, *NC*, 95. *See also* Foreign Arbitral Awards, Convention on the Recognition and Enforcement of
- Archipelagoes, and UNCLOS III negotiations, 65-6
- Arctic. *See* Wrangell Island
- Armed conflicts: Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in, *LA*, 272, 282, 285, 292, *CP*, 390-1, 415-7; Hague Convention for the Protection of Cultural Property in Event of (1954), 543; Protocols to Geneva Conventions (1949) for the Protection of Victims of, *LA*, 272, *CP*, 405-7; UNGA res. on respect for human rights in, 336
- Armed force, definition of aggression and first use of, 342, 345
- Arms transfers: and human rights, *CP*, 892; US regulations on, *CP*, 144-6
- Arnaud, V. G. La Contaminacion de las Rios en el Derecho Internacional Publico, *BN*, 962
- Arndt, Claus. Die Verträge von Moskau und Warschau, *BR*, 194
- Asia-Pacific Telecommunity, Constitution of, 323
- Asian Development Bank, human rights and foreign assistance through, 887
- Asylum, *JD*, 158-9, 924-5
- Atkins, G. Pope. Latin America in the International Political System, *BN*, 959
- Atomic energy; US-Canadian agreements for cooperation on civil uses of, *CP*, 402-4. *See also* International Atomic Energy Agency; Nuclear weapons
- Australia: and compulsory jurisdiction of ICJ, 321; GATT dispute between Chile and, 754-5; and legislation on control of mercenaries, 53; limited preference system of, 516
- Austria: and generalized system of preferences, 520; permanent neutrality in constitutional law of, 351; proposed Customs Union between Germany and, 842; reports on practice of international law by, 374
- Bahamas, and archipelago concept, 65
- Bailey, Sydney. The Procedure of the UN Security Council, *BN*, 698
- Ball, George W. Global Companies, *BN*, 706
- Baltic Sea: causes of pollution of, 786-92; Convention on Fishing and Conservation of Living Resources of (1973), 783, 800, 809; geographic, hydrological, and ecological features of, 783-6; international protection against the pollution of the environment of, *LA*, 782; national legislation and policies of marine pollution control in, 792-4, 804, 813; regional cooperation for control of pollution of, 796-814; as a

- semi-enclosed sea, 783, 798; as a "special area" under 1973 IMCO convention, 785, 802, 806
- Baltic Sea Area, Convention on the Protection of the Marine Environment of (1974), *LA*, 782: background to, 798-801; enforcement of, 810-1; geographic scope of, 801-3; institutional framework under, 800, 802, 808-10, 812; land-based pollution control measures under, 804-6, 811, 812; liability and dispute settlement under, 810, 811; participation in, 803-4; vessel-source pollution control measures under, 806-8, 811, 812
- Bangladesh: Chinese veto of membership in UN of, 331, 332; expropriations by, 398-9
- Bank for International Settlements, trustee functions of, 862
- Barile, Giuseppe. *Lezioni di Diritto Internazionale*, *BN*, 443
- Barnes, William S. *BR*, Instruments of Economic Integration in Latin America and in the Caribbean, 951
- Baxter, Richard R. A New Restatement of the Foreign Relations Law of the United States, *NC*, 875; *BR*, British Yearbook of International Law, 1974-1975, 695; *Ed.* on Brunson MacChesney, 615
- Belize, Guatemalan claims to, 351
- Belgium: assistance to Zaire by, 917; US complaint to GATT over tax practices of, 761, 774-8; and use of mercenaries in the Congo, 48-9
- Belligerent occupation, rights of, 562, 581, *CP*, 909-11. *See also* Occupied territories
- Berber, Friedrich. *Lehrbuch des Völkerrechts. Band III: Streiterledigung, Kriegsverhütung, Integration*, *BN*, 442
- Bergsten, Eric. *BN*, Hermann & Jones, 707
- Beyer, Sigurd. *Der diplomatische Schutz der Aktionäre im Völkerrecht*, *BN*, 447
- Black Sea, as a "special area" under 1973 IMCO convention, 795, 802, 806
- Blake, Michael J. & Igor I. Kavass. United States Legislation on Foreign Relations and International Commerce. A Chronological and Subject Index of Public Laws and Joint Resolutions of the Congress of the United States, *BR*, 200
- Blaustein, Albert P. & Evelyn S. Catenson, *BR*, Duboff, 950
- Blaustein, Albert P., J. Paust, and Adele Higgins. The Arab Oil Weapon, *BR*, 685
- Bloomfield, Louis M. & Gerald F. FitzGerald. Crimes against Internationally Protected Persons: Prevention and Punishment—An Analysis of the UN Convention, *BR*, 183
- Boczek, Boleslaw A. *BN*, Gelberg, 448; International Protection of the Baltic Sea Environment against Pollution: A Study in Marine Regionalism, *LA*, 782
- Bolivia, applicability of Geneva Conventions to conflict in, 276
- Book Reviews and Notes, 161, 422, 675, 929
- Bossuyt, Marc. *L'interdiction de la Discrimination dans le Droit International des Droits de l'Homme*, *BN*, 212
- Botelho, Bruce M. *BN*, Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights. Vol. III: Committee of Experts, 438
- Boundary Waters treaty (US-Canada), 654
- Bowett, D. W. Blaustein, Paust, & Higgins, *BR*, 685
- Boycotts: US Commerce Dept. regulations concerning, *CP*, 898-905; US Export Administration Regulations concerning, *CP*, 898-905; US. Treasury regulations on, *CP*, 905. *See also* Arab boycott of Israel
- Boyd, John A. Contemporary Practice of the United States Relating to International Law, 119, 375
- Bozeman, Adda B. *BR*, Preiser, 432
- Bray, Wayne D. The Common Law Zone in Panama: A Case Study in Reception, *BR*, 195; The Controversy Over a New Canal Treaty Between the United States and Panama. A Selective Annotated Bibliography of United States, Panamanian, Colombian, French, and International Organization Sources, *BR*, 195
- Brazil, seizure of US-owned property by, 19
- Bribery, codes of conduct for, 250
- British Yearbook of International Law 1974-1975, *BR*, 695

- Brown, E. D. & Georg Schwarzenberger. *A Manual of International Law* (6th Ed.), BN, 957
- Brussels Conference on the Laws and Customs of War (1874), and concept of usufruct, 565-6, 572-3
- Buehrig, Edward H. BN, Kay, 452
- Buergenthal, Thomas and Judith V. Torney. *International Human Rights and International Education*, BN, 444
- Bulgaria: and compulsory jurisdiction of ICJ, 845-6; cultural, educational, and scientific cooperation agreement between US and, 121
- Burmester, H. C. *The Recruitment and Use of Mercenaries in Armed Conflict*, LA, 37
- Burundi, applicability of Geneva Conventions to conflict in, 276
- Butler, William E. BN, Shinkaretskaia, 699; Szabo & Peteri, 451
- Butler, William E., John N. Hazard, & Peter B. Maggs. *The Soviet Legal System* (3rd ed.), BN, 958
- Calvo Doctrine, 2-3, 5-7, 10-11, 27, 265, 410
- Cambodia: legality of US actions in, 113; and US generalized system of preferences, 532-3, 539
- Canada: agreement on civil uses of atomic energy between US and, CP, 402-4; extradition treaties between US and, JD, 671-2, 926; and GATT, 760, 773; and IAEA safeguards, 914; and transfrontier pollution, CP, 653-5; and Wrangell Island claims, 894-5
- Caribbean Sea, arrangements for protection of marine environment of, 812
- Caroline Islands. *See* Micronesia
- Cartels: Council of Europe draft convention on, 267; US and, 259
- Cassese, Antonio. BR, Conforti, 179; Guiliano, 178
- Castel, J.-G. *Canadian Conflict of Laws*, Vol. II, BN, 440
- Catenson, Evelyn S., & Alfred P. Blaustein, BR, Duboff, 940
- Cavers, David F. BR, Ehrenzweig & Jayne, 681
- Cease-fires and armistice agreements, and application of 1907 Hague Regulations, 561
- Central American States, General Treaty of Peace and Amity (1923), nonintervention under, 42
- Central American Union, and constitutions of Central American states, 351
- Centre d'Etudes des Relations Internationales. *Realités du Droit International Contemporain*, BN, 860
- Channel Islands, arbitration of British-French claims concerning, 79, NC, 95
- Charter of Algiers, 518, 540
- Chayes, Abram & W. Bennett Lewis. *International Arrangements for Nuclear Fuel Reprocessing*, BN, 705
- Cheever, Daniel S. BN, Larson, 964
- Chile: applicability of Geneva Conventions to conflict in, 275; GATT dispute between Australia and, 754-5; maritime claims of, 872; nationalization of copper properties by, 1-2, 18-9
- Chiles, Lisa & Joel Davidow. *The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices*, LA, 247
- China, People's Republic of: attitude toward ICJ of, 319-21; and Charter-based international legal order, LA, 317; Compilation of Treaties by, BR, 202; continental shelf claims of, 870-1; exclusion from UN of, 317, 329; foreign policy in constitution of, 352; and legal effect of UNGA resolutions, 328-36, 349; military warning zone of, 870, 871; and North Korean military boundary zone, 867, 870-1; treaty relations between the Soviet Union and, 118; and succession to multilateral treaties, 322-6, 347; and UN Charter review, 336-41; UNGA res. on restoration of rights of, 324, 331-2; and UNSC veto, 339-41
- China, Republic of, orderly marketing agreements between US and, JD, 670
- Chiu, Hungdah. BR, *Compilation of Treaties of the People's Republic of China*, 202
- Christol, Carl Q. BR, Piradov (ed.), 433

- Churchill, Robin, Myron Nordquist, & S. Houston Lay (comp. and ed.). *New Directions in the Law of the Sea*. Vol. V: Documents; Vol. VI: Documents and Index to Volumes I-VI, *BR*, 185
- Citizenship: acquisition and loss of, *JD*, 413-5, 673-4; under Northern Mariana Islands Constitution, *CP*, 380-1; voluntary renunciation of, 32
- Civil and Political Rights, International Covenant on: federal-state relationships and, 629; freedom of speech and Art. 5 of, 621, 626-7; non-self-executing nature of, 621, 629; Optional Protocol to, 629; and permanent sovereignty over natural resources, 377; proposed US understandings, reservations, and declarations on, *CP*, 626-9; right to leave under Art. 12(2) of, 46; submission to US Senate of, 620; US intent to recognize competence of UN Human Rights Committee under Art. 41 of, 621, 628-9
- Clagett, Brice M. & O. Thomas Johnson, Jr. *May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?*, *LA*, 558
- Claude, Richard P. (ed.). *Comparative Human Rights*, *BN*, 214
- Codding, George A., Jr. *BR*, Wallenstein, 689
- Coercion: Declaration of Vienna Conference on Law of Treaties on, 118; and foreign investment rearrangements, *LA*, 17; UN Declaration on Friendly Relations and, 18, 28
- Collier, John C. & Elihu Lauterpacht (eds.). *Individual Rights and the State in Foreign Affairs*, *BR*, 929
- Colonial Countries and Peoples, UNGA res. on the Implementation of the Declaration on the Granting of Independence to, 54, 604
- Colson, David A. *The United Kingdom-France Continental Shelf Arbitration*, *NC*, 95
- Conference on Security and Cooperation in Europe (CSCE). *See Helsinki Final Act*
- Conforti, Benedetto. *La Nazioni Unite. Lezioni di Organizzazione internazionale*, *BR*, 179
- Congo: applicability of Geneva Conventions to conflict in, 275; use of mercenaries in, 40, 48-9. *See also* Zaire
- Congo, Democratic Republic of, UNSC res. on use of mercenaries in, 49
- Consular Convention between US and Mexico (1942), powers of consuls under, *JD*, 152
- Consular Relations, Vienna Convention on (1963): powers of consuls under Art. 5(1) of, *JD*, 152; protection of detainees under, *CP*, 387-8
- Consuls, functions of, *CP*, 387-8; standing to intervene in suit by, *JD*, 151-2
- Contemporary Practice of the United States Relating to International Law, 119, 375, 620, 879
- Continental shelf: in Aegean Sea, 617-9; arbitration of UK-French dispute over, *NC*, 95; of Baltic Sea, 784; definition of, 81; and dispute over boundaries in East China Sea, 345, 870-1; ICJ principles governing delimitation of, 95-6; and revenue sharing, 80-1; sovereignty over, *CP*, 895-6; UNCLOS III and, 101-3, 111
- Continental Shelf, Geneva Convention on (1958): application to wrecked ships of Art. 2(1) of, *JD*, 665; delimitation under Art. 6 of, 79, *NC*, 95; French reservations to Art. 6 of, 98-9, 100; protection of living resources under Art. 5(7) of, 795; reservations under Art. 12 of, 101
- Council of Europe: Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights. Vol. III: Committee of Experts, *BN*, 438; draft convention on control of cartels, 267
- Criminal jurisdiction, and extraterritoriality, 47
- Crotti, Alfred F. *Trading under EEC and US Antitrust Laws*, *BN*, 708
- Cuba: applicability of Geneva Conventions to conflict in, 274, 275, 292; claims against US of, 12-3; forces in Angola of, 38; seizure of US-owned property by, I, 11-4; US embargo of, 12-3
- Cultural Property in the Event of Armed Conflict, Hague Convention for the Protection of (1954), 543

- Cyprus, applicability of Geneva Conventions to conflict in, 276; and US generalized system of preferences, 532-3, 539
- Czechoslovakia: cultural, educational, and scientific agreement between US and, 121; Soviet intervention in (1968), 341, 346
- D'Amato, Anthony. *BR*, Kavass & Blake, 200
- Davidow, Joel & Lisa Chiles. The United States and the issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices, *LA*, 247
- Davis, Calvin DeArmond. The United States and the Second Hague Peace Conference. American Diplomacy and International Organization 1899-1914, *BN*, 215
- De Vries, Margaret Garritsen. The International Monetary Fund, 1966-1971; The System Under Stress, *BR*, 181
- De Zayas, Alfred M. *BR*, Neuhold, 946; Schweling, 946; Die Anglo-Amerikaner und die Vertreibung der Deutschen, *BN*, 959
- Deep seabeds. *See* Seabed beyond national jurisdiction
- Delessert, Christiane Shields. Release and Repatriation of Prisoners of War at the End of Active Hostilities. A Study of Article 118, Paragraph 1 of the Third Geneva Convention Relative to the Treatment of Prisoners of War, *BR*, 429
- Denmark, and generalized system of preferences, 520. *See also* Baltic Sea
- DeSaussure, Hamilton. *BR*, The Conduct of Armed Conflict and Air Operations, 174
- Developing countries: and GATT, 755; generalized systems of preferences (GSP) for, *LA*, 513; tax-sparing credits in US treaties with, *LA*, 296; and transnational corporations, 248, 256-7; and UN Charter review, 337
- Dilley, Charles A. *BR*, Plouvier, 193
- Discrimination, on grounds of sex, *JD*, 420-1. *See also* Racial discrimination
- DISC (domestic international sales corporation): case before GATT concerning, *LA*, 747; US Congress and 751, 763, 777
- Dispute settlement: under Baltic Sea convention, 810; under GATT, *LA*, 747; under IAEA agreement, 916; under LOS treaty, 78, 79, 83, *NC*, 84; UNGA res. on, 335, 336. *See also* Arbitration; Hague Convention on Pacific Settlement of International Disputes; International Centre for Settlement of Investment Disputes
- Diplomatic protection, and Calvo doctrine, 27
- Diplomatic privileges and immunities: and expulsion of representatives of UN members, *CP*, 880-2; and liability insurance, *CP*, 631-3; and observance of local traffic laws, *CP*, 631-3; US legislation on liability and, *CP*, 383-7
- Diplomatic Relations, Vienna Convention on (1961): categories of personnel under, 386, 632; Chinese accession to, 325; UNGA res. on implementation of, 336
- Doi, Teruo & Warren L. Shattuck (eds.). Patent and Know-how Licensing in Japan and the United States, *BR*, 434
- Dölle, Hans. Kommentar zum Einheitlichen Kaufrecht. Die Haager Kaufrechtsübereinkommen vom 1. Juli 1964, *BR*, 436
- Dominican Republic, applicability of Geneva Conventions to conflict in, 275
- Domke, Martin. *BN*, Gaja, 961
- Drago doctrine, and use of force, 28
- Duboff, Leonard D. Art Law: Domestic and International, *BR*, 950
- Dumbauld, Edward. *BR*, Netherlands Yearbook of International Law, Vol. VIII, 1977, 953; *BN*, Praesidium Libertatis, 446
- Dupuy, René-Jean. Le Pétrole et la Mer, *BN*, 703
- East China Sea, dispute over continental shelf boundaries of, 345, 870-1
- Eastern European states: foreign policy in constitutions of, 350, 352; and most-favored-nation treatment, 523, 526; treaty relations between Soviet Union and, 118; US claims against, 12; and US generalized system of preferences, 522-3, 525-6, 532
- Eaton, Anthony M. *BN*, Crotti, 708
- Economic Rights and Duties of States, UN Charter on (CERDS, 1974): 9, 11; nationalization and sovereignty over resources in Art. 2 of, 5-6, 13; and observance

- of international agreements, 28; permanent sovereignty over natural resources under Art. 15 of, *CP*, 377-8; UNCTAD Working Group on, 319, 327
- Economic sanctions, against South Africa, 330, 346, *CP*, 407-9, 897
- Economic, Social, and Cultural Rights, International Covenant on: federal-state relations and, 625; freedom of speech and, 625; non-self-executing nature of, 621, 623, 625-6; and permanent sovereignty over natural resources, 377; proposed US understandings, declarations, and reservations to, *CP*, 623-6; submission to US Senate of, *CP*, 520
- Economic zones: and boundary disputes, 111; definition of, 79, 82; and fisheries zones, 78-9; marine scientific research in, 75-8; and semi-enclosed and enclosed seas, 79-80; settlement of disputes concerning, 78-9
- Ecuador, maritime claims of, 872
- Edwards, Richard W., Jr. *BR*, de Vries, 181
- Egypt: ancient treaty practice of, 820-2; disengagement agreement between Israel and, 558, 908; oil concessions by, 559, 562, 578-80; return of Abu Rhodeis oil fields to, 558; state ownership of oil and gas properties under laws of, 562, 578; tax treaty between US and, 296. *See also* Arab-Israel conflict; Middle East
- Ehrenzweig, Albert A. & Erik Jayne. *Private International Law: A Comparative Treatise on American Conflicts of Law*, *BR*, 681
- Embargoes, under International Emergency Economic Powers Act (1978), *CP*, 646, 648. *See also* Arab oil embargo
- Emerson, Rupert. *BN*, Ofuatey-Kodjoe, 696
- Environment: (Nordic) Convention for the Protection of (1974), 797; UN Conference and Declaration on (1972), 327, 797, 799; UN Programme on, 797, 812. *See also* Baltic Sea Area, Convention on the Protection of the Marine Environment of; Marine pollution; Oil pollution damages; Transfrontier pollution
- Escobar, Helga & Don Wallace, Jr. *The Future of International Economic Organizations*, *BN*, 446
- Ethiopia, applicability of Geneva Conventions to conflict in, 276, 295
- European Convention on Compulsory Insurance against Civil Liability in Respect of Motor Vehicles, 383, 385
- European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), and sex discrimination, 420
- European Court of Human Rights, and "enforceable Community rights" under Art. 119 of EEC Treaty, 421
- European Court of Justice, and implementation of prohibitions against restrictive business practices, 258
- European Economic Community (EEC): antitrust laws of, 255, 258, 259, 271; and border tax adjustments, 750-1; and GATT, 755, 760, 761-3; "enforceable Community rights" under Art. 119 of treaty establishing, *JD*, 420-1; and equal rights for men and women, *JD*, 420-1; preferential arrangements under, 517, 518, 520-1, 532, 537, 539; and restrictive business practices, 258-9; rulemaking functions of, 269; UK entry into, *JD*, 420-1
- European Free Trade Association (EFTA), bilateral consultations under, 267
- European tax cases before GATT, 761, 774-7, 778
- Evans, Alona E. *Judicial Decisions*, 147, 410, 662, 923
- Eversen, H. J., H. Sperl, & J. A. Usher. *Compendium of Case Law Relating to the European Communities*, 1975, *BN*, 963
- Evidence Abroad, Convention on the Taking of (1970): Central Authority for US under Art. 2 of, 133; number of requests under, 134; parties to, 134; US implementation of, *CP*, 133-4
- Executive agreements, distinction between treaties and, *JD*, 666
- Expropriation: and act of state doctrine, *CP*, 398-401; by Bangladesh, 398-9; of Chilean copper industry, 1-2, 18-9; and concept of "creeping" expropriation, 25-6; and foreign investment rearrangements, *LA*, 17; in Latin America, *LA*, 1, 410-1; Overseas Private Investment Corporation and, 26; US State Dept. guidelines and, 35;

- US State Dept. policy of waivers to claims concerning, 26-7; of US-owned property by Brazil, 19; by Chile, 1-2, 18-9; by Cuba, 1, 11-4; by Mexico, 1; by Peru, 2; by Venezuela, 7-9, 15, 410-1. *See also* Nationalization
- Extradition: application of US-Canadian treaty (1971) to, *JD*, 671-2, 926-7; double jeopardy and, *JD*, 671-2; granting of bail and, *JD*, 158; new evidence and hearings on, *JD*, 412-3; reciprocity and, *JD*, 413; renewal of request for, *JD*, 926-7; US-Swedish treaty on (1961), *JD*, 421-3
- Extraterritoriality: Anglo-American tradition concerning, 47; of Arab boycott, 29; export regulation and, 646; of Lanham Act, 155; of US antitrust laws, 259; of US tax laws, 749-50
- Ferencz, Benjamin B. *BN*, de Zayas, 959
- Fiji, and archipelago concept, 65
- Finger, Seymour M. *BN*, Annual Review of United Nations Affairs, 1976, 699; *Corr.* on great power assessments, 878
- Finland, and generalized system of preferences, 520. *See also* Baltic Sea
- Fischer, Georges & Daniel Vignes. *L'Inspection Internationale. Quinze Etudes de la Pratique des Etats et des Organisations Internationales*, *BN*, 216
- Fisheries: access of landlocked and geographically disadvantaged states to, 67, 70, 78-9; Baltic convention on conservation of (1973), 783, 800, 809
- FitzGerald, Gerald F. *BN*, Fischer & Vignes, 216; Freymond & Galvani, 218
- FitzGerald, Gerald F. & Louis M. Bloomfield. Crimes against Internationally Protected Persons: Prevention and Punishment—An Analysis of the UN Convention, *BR*, 183
- Flachsmann, Anton. Völkerrechtlicher Schutz gefährdeter Tiere und Pflanzen vor übermassiger Ausbeutung durch den internationalen Handel, *BN*, 703
- Flag ships, and shipping discrimination, *CP*, 648-53
- Fliess, Peter J., *BN*, Chayes & Lewis, 705
- Florio, Franco. Spazi Marini e Principi di Diritto Internazionale, *BN*, 961
- Food and Agriculture Organization (FAO), administration of trust funds by, 859
- Force, use or threat of: and collection of debts, 18; and conclusion of treaties, 28, 118; and Vienna Conference on the Law of Treaties, 118; and UN Charter, 28. *See also* Coercion
- Foreign agents, US legislation on registration of, *CP*, 388-9
- Foreign Arbitral Awards, Convention on the Recognition and Enforcement of (1958), sovereign immunity and, *JD*, 412
- Foreign assets control, under International Emergency Economic Powers Act, *CP*, 645-8
- Foreign boycotts. *See* Boycotts
- Foreign corporations, service of process on, *JD*, 153-6, 157
- Foreign investment, coercion and rearrangements of, *LA*, 17
- Foreign Relations Law of the United States, new Restatement of, *NC*, 875
- Foreign Relations of the United States, *BR*, 1949, Vol. VI, The Near East, South Asia, and Africa, 954; 1950, Vol. III, Western Europe, 691; Vol. VI, East Asia and the Pacific, 692
- Foreign ships: exclusion from ports for national security reasons of, *JD*, 156-7; suits by crewmen of, *JD*, 157-8
- Forsythe, David P. Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflict, *LA*, 272
- Forum non conveniens, *JD*, 154, 410
- France: arbitration of continental shelf dispute between UK and, *NC*, 95; assistance to Zaire by, 917; and compulsory jurisdiction of ICJ, 321; *laesio enormis* under 1804 Civil Code of, 31; and lump sum settlement of World II and postwar claims, 23; mandate over Syria by, 908; and recruitment of mercenaries for the Congo, 48; reservations to Continental Shelf Convention by, 98, 100; and UN Charter review, 338-9; US complaint to GATT over tax practices of, 761, 774-8; use of UNSC veto by, 341

- Franck, Thomas M. *BR*, Raman (ed.), 425
- French-Algerian war, applicability of Geneva Conventions to, 274, 275-6, 277, 292
- Friendly Relations and Co-operation among States, UN Declaration on the Principles of International Law concerning: coercion under, 19; status of, 377; and use of force, 18, 29, 43, 342
- Frieson, Connie M. *The Political Economy of East-West Trade*, *BN*, 219
- Freymond, Jacques & Nadine Galvani. *La Suisse et la diplomatie multilaterale*, *BN*, 218
- Frowein, J. A. *BN*, Klemm, 207
- Gaja, Giorgio (ed.), *International Commercial Arbitration. The New York Convention*, *BN*, 961
- Galvani, Nadine & Jacques Freymond. *La Suisse et la diplomatie multilaterale*, *BN*, 218
- Garbuny, Siegfried. *BN*, Flachsmann, 703; *BR*, *Foreign Relations of the United States*, 1950, Vol. III, Western Europe, 691
- Gaza: legality of Israeli settlements in, 908-11; refugees from, 586; status of, 907
- Gelberg, Ludwik. *Problemy Prawne Współpracy Państw Baltyckich*, *BN*, 450; *Układ PRL-NRF z 7 grudnia 1970 r.: Analiza prawna* (The Treaty between the Polish People's Republic and the Federal Republic of Germany of 7 December 1970: Legal Analysis), *BN*, 448
- General Agreement on Tariffs and Trade (GATT): and bilevel pricing, 768-71; breaches of, 748, 754, 765, 771; constitutionality of "Buy American" statutes and, *JD*, 415-6; consultations on restrictive business practices under, 267; Council of, 756, 760, 762-3, 777, 779; and countervailing duties, 758-9, 760, 763-4; *DISC* case before, *LA*, 747; dispute settlement mechanism of, 753-7, 761; European tax cases before, 761, 774-8; and free trade or customs areas, 530; grandfather clauses in, 775-7; membership in, 526, 748; and most-favored-nation principle, 513, 519; national treatment under Art. 3 (2) of, *JD*, 415-6; Protocol of Provisional Application of, 775-6; treatment of subsidies by, 758, 764-8; voting in, 755, 763
- Generalized system of preferences (GSP), *LA*, 513; beneficiary countries under, 523, 524-6, 527-30, 532, 537, 539; Congress and, 523-6; countervailing duties and, 522, 526; eligibility of articles under, 518, 525, 530-3; evolution of, 514-26; implementation of, 526-41
- Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949): dispersed families under Art. 26 of, 596; forcible transfers under Arts. 45 & 49 of, 596-8; illegality of Israeli settlements in occupied territories under Art. 49 of, *CP*, 139, 910-1; minimum standards under Art. 3 of, 599; protection of population of occupied territories under, 550, 552-3; refugees under Art. 44 of, 596
- Geneva Convention on Treatment of Prisoners of War (1929, 1949): communist reservations to Art. 85 of, 405; nonobservance during Spanish Civil War of, 277; protecting powers and, 405; treatment of mercenaries under, 54-5; war crimes and, 405
- Geneva Conventions on the Laws of War (1949)
- Chinese invocation of, 326
- Common Art. 3 of: applicability to noninternational conflicts of, 273-7, 295; *ICRC* and, 274-7, 297-8, 405; Indian attitude toward, 281; relation to Protocol II of, 286-7
- Protocol I relating to the Protection of Victims of International Armed Conflicts (1977): inclusion of national liberation movements under, 279; and treatment of mercenaries, 54-6, 391, 406; *US* Delegation report on, *CP*, 405-6; *US* "understanding" concerning, 407
- Protocol II relating to the Protection of Victims of Non-International Armed Conflicts (1977): *LA*, 272, background to, 273-7; dissident groups under, 285; *ICRC* and, 277-8, 280, 282-4, 287-8, 291, 405-6; negotiation of, 277-82; nonintervention under, 289-90; scope of, 283, 406-7; third party rights and duties under, 286-91; threshold for application of, 284-5, 294; *US* Delegation report on, *CP*, 406-7; *US* "understanding" concerning, 407

German Democratic Republic: recognition by Federal Republic of Germany of, 799; renunciation of aggressive war under constitution of, 351; status of, 116-7. *See also* Baltic Sea

Germany: 1900 Civil Code of, 31; proposed Customs Union between Austria and, 842; status of, *Corr.* 116-7; World War II private claims against, 23-5

Germany, Federal Republic of: continental shelf of, 100; court case on sovereign immunity in, 420; ratification of Non-Proliferation Treaty by, 914; relations between German Democratic Republic and, 116-7; renunciation of aggressive war under constitution of, 351. *See also* Baltic Sea

Ghana: international law under constitution of, 351

Gièse, Hannes: Staatsangehörigkeitsrechtliche Bestimmungen in völkerrechtlichen Vereinbarungen Grossbritanniens, *BN*, 213

Ginsburgs, George. *BN*, Kavass & Sprudz, 709; Kokot & Skubiszewski, 700

Giuliano, Mario. *Diritto internazionale*, *BR*, 178

Golan Heights, status of, 908-9

Gold, Joseph. Trust Funds in International Law: The Contribution of the International Monetary Fund to a Code of Principles, *NC*, 856

Goldie, L. F. E. *BR*, *Annuaire de l'Institut de Droit International*, 1973, 935; *Institut de Droit International*, *Livre du Centenaire*, 935

Goodrich, Leland, *BN*, Bailey, 698; Davis, 215; *BR*, Meron, 426

Gordenker, Leon. International Aid and National Decisions. Development Programs in Malawi, Tanzania, and Zambia, *BN*, 220

Gormley, W. Paul. *BR*, Lauterpacht & Collier, 929; Human Rights and Environment: The Need for International Co-operation, *BN*, 445

Gorove, Stephen. Studies in Space Law: Its Challenges and Prospects, *BR*, 187

Gould, Wesley. *BN*, Schwarzenberger & Brown, 957

Grafton, Thomas Graham. The U.S. Generalized System of Preferences for Developing Countries: International Innovation and the Art of the Possible, *LA*, 513

Greece, international law under constitution of, 351. *See also* Aegean continental shelf

Green, Andrew Wilson. *BR*, Lazarus, Leben, Lyon-Caen, & Verdier, 690

Green, L. C. *BN*, Melzer, 204

Gross, Ernest A. *BN*, Kugel & Gruenberg, 706

Gross, Leo. Book Reviews and Notes, 161, 422, 675, 929; *BN*, Oda, 206; *BR*, Churchill, Nordquist, & Lay, 185; The Future of the International Court of Justice, *BR*, 422

Gruenberg, Gladys W. & Yerachmiel Kugel. International Payoffs, *BN*, 706

Guatemala: applicability of Geneva Conventions to conflict in, 275; claims to Belize by, 351; and shipping discrimination, *CP*, 648-53

Guggenheim, Paul (comp.). *Répertoire suisse de droit international public*. Documentaire concernant la Confédération en matière de droit international public 1914-1939. Vols. I, II, III, IV, *BR*, 197

Guilhaudis, Jean-François. Le Droit des Peuples à Disposer d'Eux-mêmes, *BN*, 440

Guinea Bissau, applicability of Geneva Conventions to conflict in, 276

Gulf of Suez. *See* Suez, Gulf of

Gunter, Michael M. *BN*, Plischke, 210

Gutzwiller, Max. Geschichte des Internationalprivatrechts, *BR*, 682

Habana Convention on Maritime Neutrality (1928), 42

Hadji-Mihaloglou, Serge B. *Corr.* on delimitation of Aegean continental shelf, 617-8; Karl reply, 619

Hafner, Gerhard. *Corr.* on Austrian practice of international law, 374

Hague Academy. *Recueil des Cours*, 1974, *BR*, 170

Hague Convention on the Pacific Settlement of International Disputes (1899), individual opinions under, 833-4, 836

Hague Conventions regarding the Rights and Duties of Neutral Powers in Case of War (1907): and recruitment and use of mercenaries, 42-3, 53; supplying war materials under, 44-5

- Hague Covenant Respecting the Limitation of the Employment of Force for the Recovery of Debts (1907), 28
- Hague Regulations Respecting the Laws and Customs of War (1907): applicability to Israeli occupied territories of, *LA*, 558; binding nature of, 560; concept of usufruct under Art. 55 of, 562-5, 574-5, 578-9, 584; recognition by Nuremberg Tribunal of, 560; protection of population of occupied territories under Art. 43 of, 550; rights and duties of belligerent occupant under, 562, 581
- Haiti, Amnesty International report on conditions in, 925
- Hallgarten, Katherine Drew. *BR*, Gorove, 187
- Hargrove, John Lawrence. The Research and Study Activities of the American Society of International Law: Report of the Director of Studies, *NC*, 356
- Hauser, Rita E. *BN*, Uganda & Human Rights, 438
- Havana Charter (1948), restrictive business practices under Chap. 5 of, 267, 271
- Hay, Peter. *BR*, Dölle, 436
- Hay, Peter, Eric Stein, & Michel Waelbroeck. European Community Law and Institutions in Perspective, Text, Cases and Readings; Documents for European Community Law and Institutions in Perspective, *BR*, 678
- Hazard, John N. *BR*, Luk, 948; Minasian, 948; Foreign Policy and the 1977 Soviet Constitution, *Ed.*, 350
- Hazard, John N., William E. Butler, & Peter B. Maggs. The Soviet Legal System (3rd ed.), *BN*, 958
- Helsinki Final Act: Belgrade meeting on implementation of, *CP*, 120-3; human rights provisions in, *CP*, 120-3; nature of, 270
- Henderson, Dan Fenno. *BR*, Doi & Shattuck, 434
- Hermann, A. H. & Colin Jones. Fair Trading in Europe, *BN*, 707
- Higgins, Adele, Jordan J. Paust, & Albert P. Blaustein. The Arab Oil Weapon, *BR*, 685
- Higgins, Rosalyn. *BN*, Tekoah, 697; *BR*, Kirgis, 676
- High seas: claims to sovereignty over, 72; definition of, 71, 73; freedom of, 69, 71-2, 873. *See also* Maritime security zones
- High Seas, Convention relating to Intervention in Cases of Oil Pollution Casualties on (1976), 796
- High Seas, Geneva Convention on (1958): freedom of navigation under Art. 2 of, 69, 873; immunity of warships under Art. 8(1) of, 873; prevention of oil pollution under Arts. 24 & 25 of, 795
- Holy See, and funds administered by Inter-American Development Bank, 860
- Honduras, and sovereignty over Swan Islands, 127
- Hong Kong: categories of residents in, *JD*, 673; and US generalized system of preferences, 522, 532, 539
- Hull, Roger H. *Corr.* on torture in Northern Ireland, 373-4
- Human rights: and commercial weapons sales, *CP*, 885-90; and economic and security assistance to Nicaragua, *CP*, 890-2; and export of crime control and detection equipment, *CP*, 906; under Helsinki Final Act, *CP*, 120-3; individuals before tribunals concerning, 254; and New International Economic Order, *CP*, 381-2; and state responsibility for injuries to aliens, 876; UN Charter and, 330; UNGA res. on respect in armed conflict of, 336; US Constitution and covenants on, 620, 621-3, 625, 627, 630-1; US Interagency Group on Foreign Assistance and, *CP*, 887-90. *See also* American Convention on Human Rights; Civil and Political Rights, UN Covenant on; Economic, Social and Cultural Rights, UN Covenant on; Racial Discrimination, UN Covenant on the Elimination of All Forms of; Universal Declaration of Human Rights
- Hungary: and application of Geneva Conventions, 276; confiscation of property by, 23; cultural, educational, and scientific agreement between US and, 121; return of Crown of St. Stephen to, *JD*, 665-6; Treaty of Peace with (1947), *JD*, 666
- India: antitrust suit by, *JD*, 662; attitude toward Art. 3 of Geneva Conventions of, 281; and compulsory jurisdiction of ICJ, 321; constitution of, 351; tax treaty between US and, 296

- Indo-Pakistani war (1971): Soviet veto and, 333, 341; Uniting for Peace res. and, 333
- Indonesia: applicability of Geneva Conventions to conflict in, 276; and archipelago concept, 65; constitution of, 351; population projects in, 859-60
- Indus Basin Development Fund, 859
- Innocent passage: under Baltic Sea convention, 804; through international straits, 62, 63-6; and maritime security zones, 872
- Institut de Droit International, *Annuaire*, 1973, Vol. 55, *BR*, 935; *Livre du Centenaire 1873-1973*, *BR*, 935
- Institut Universitaire de Hautes Etudes Internationales, *International Relations in a Changing World*, *BR*, 675
- Inter-Allied Declaration Against Acts of Dispossession (1943), 23
- Inter-American Commission on Human Rights, US intent to recognize competence of, 621
- Inter-American Development Bank (IDB): administration of trust funds by, 859, 860; human rights and foreign assistance through, 887
- Inter-American Human Rights Committee, and Nicaragua, 892
- Inter-American Institute of International Legal Studies. *Instruments of Economic Integration in Latin America and in the Caribbean*, *BR*, 951
- Inter-American Treaty of Reciprocal Assistance (Rio Treaty, 1947), sea defense zone under, 872
- Inter-governmental Maritime Consultative Organization (IMCO): amendments to Arts. 10, 16, 17, 18, 20, 28, 31 and 32 of Convention of, 323; and protection of marine environment, 790, 795-6, 802-4, 806, 808-12; traffic separation schemes of, 65
- Internal war, legal management of, *LA*, 272
- International Air Services Transit Agreement, application to occupied territories of, 556
- International Atomic Energy Agency (IAEA): application to US of safeguards of, 403, *CP*, 655-61, 913-7; Licensing and Regulatory Control of Nuclear Installations, *BN*, 704
- International Baltic Sea Fisheries Commission, 809
- International Bank for Reconstruction and Development (IBRD, World Bank): administration of Indus Basin Development Fund by, 859; human rights and foreign assistance through, 887
- International Centre for Settlement of Investment Disputes (ICSID): Latin American attitude toward, 3-4; US support for, 264
- International Chamber of Commerce: code of conduct of, 250-1; statement on double taxation by, 777
- International Civil Aviation, (Chicago) Convention on: application to Israeli occupied territories of, *LA*, 551; definition of "territory" under Art. 2 of, 554-6; exclusive sovereignty over airspace under Art. 1 of, 554; suspension of privileges under Art. 89 of, 553, 556
- International Civil Aviation Organization (ICAO): Air Navigation Plan for Middle East and South East Asia, 552-3; and improvement of airport security standards, 884
- International Commission of Jurists. *Uganda & Human Rights*, *BN*, 438
- International Committee of the Red Cross (ICRC): and Art. 3 of Geneva Conventions, 274-7, 297-8, 405; and Protocol II, 277-8, 280, 287-8, 291, 405-6
- International Council for the Exploration of the Sea (ICES), Working Group on Pollution of the Baltic of, 787, 800, 810
- International Council of Scientific Unions, 800
- International Court of Justice (ICJ): advisory opinion on Art. 17 by, 878; Chinese attitudes of, *LA*, 830; and delimitation of continental shelf, *NC*, 95; dispute settlement under LOS treaty by, 92; and new international legal order, 348; preliminary objections to jurisdiction of, 848; procedural questions and declarations in, 844; Recommendation of the Committee for the Revision of the Rules concerning Declarations, 840, 852, 854; Resolution concerning the Internal Judicial Practice of,

- 840; secrecy of deliberations of, 850, 851; submission of disputes under Baltic Convention to, 810; and UN membership, 846; voting in, 854
- , Rules of: circulation of opinions under Art. 7 of, 840; declarations by judges under Arts. 95 and 107 of, 830, 852; individual opinions under Art. 74(2) of, 839; revision of, 830-1, 840, 851-2, 854
- , Statute of: Chinese attitude toward Art. 25(2) of, 320; declarations by judges and art. 57 of, 830, 837-9, 849; drafting of, 838-9, 845-7; interpretation of Art. 38(1)(b) of, 328; jurisdiction under Art. 36 of, 845-7; preservation clause in Arts. 36(5) and 37 of, 846-7
- International Development Association (IDA), administration of population projects in Indonesia by, 860
- International Humanitarian Law Applicable in Armed Conflicts, Diplomatic Conference on the Reaffirmation and Development of: Chinese participation in, 319, 327; consensus procedure in, 282, 285, *CP*, 390-1; participation in, 292, 391; US Delegation report on, *CP*, 405-7. *See also* Geneva Conventions on the Laws of War: Protocol I; Protocol II
- International Joint Commission (US-Canada), and transfrontier pollution, 653-4
- International Labor Conference, Committee on the Application of Conventions and Recommendations, 542, 546
- International labor conventions, applicability to Israeli occupied territories of, *LA*, 544
- International Labor Organization (ILO): administration of trust funds by, 859; application of conventions under Art. 35 of, 550; application to nonmetropolitan territories of Constitution of, 544; application of standards by, 375; Committee of Experts on the Application of Conventions and Recommendations of, 546; Convention No. 87 on freedom of associations, 544; Convention No. 111 on discrimination in employment, 544-7, 551; procedures of, 544, 551; rulemaking functions of, 269; termination of US membership in, *CP*, 375-6, 542, 878; tripartitism in, 376
- International law: in ancient Near East, 815-6, 823, 829; Austrian practice of, 374; Contemporary Practice of the United States Relating to, 119, 375, 620, 879; People's Republic of China and, 318, 325-6, 347-8; teaching in US National War College of, *NC*, 112; UNGA resolutions and development of, *CP*, 377-8
- International Law Commission: Chinese nonparticipation in, 320, 321; and jurisdiction over abandoned ships, *JD*, 665; and maritime security zones, 873; and succession of states in respect to matters other than treaties, 377; UNGA res. on Report of, 336
- International Legal Materials (Contents), 243, 510, 743, 970
- International Maritime Traffic, Convention on Facilitation of (1965), 156-7
- International Military Tribunal (Nuremberg): recognition of 1907 Hague Regulations by, 560; and rights of belligerent occupant, 580-4
- International Monetary Fund (IMF): amendment of Articles of Agreement of, 860; and code of principles for administration of trust funds by, *NC*, 856; establishment of Trust Fund by, 859; and fixed exchange rates, 750, 752; sales of gold by, 860-1; Subsidiary Account of, 857; voting power in, 861
- International Nuclear Fuel Cycle Evaluation (INFCE), 656, 658-60
- International organizations: code of principles for administration of trust funds by, *NC*, 856; privileges and immunities of representatives of members of, *CP*, 880-2; trend from consent to consensus in decisionmaking process of, 328
- International Seabed Authority: Assembly of, 86-7, 93; Council of, 86-7, 93; Enterprise of, 60-1, 93; judicial review of actions of, 89-90; Seabed Dispute Chamber of, *NC*, 84
- International terrorism. *See* Terrorism
- International trade: jurisprudence of, *LA*, 747; multilateral negotiations on, 516, 540-1, 747, 749, 760, 780; problem of subsidies in, 749, 757-60, 764-8. *See also* General Agreement on Tariffs and Trade
- International Trade Organization. *See* Havana Charter

Internationally Protected Persons, including Diplomatic Agents, Convention on the Prevention and Punishment of Crimes against, 326

Investment disputes, in Latin America, *LA*, 1

Investment Disputes between States and Nationals of Other States, Convention on the Settlement of, 3. *See also* International Centre for Settlement of Investment Disputes

Investment, guarantee agreements, 35

Iran: antitrust suit by, *JD*, 662; territorial claims over Persian Gulf seabed by, *CP*, 895-6

Iraq, applicability of Geneva Conventions to conflict in, 276, 289, 295

Ireland: continental shelf of, 100; and generalized system of preferences, 520. *See also* Northern Ireland

Israel: ancient treaty practice of, 824-8; application of multilateral conventions in territories occupied by, *LA*, 542; Arab boycott of, 19, 29; disengagement agreements between Egypt and Syria and, 908; and generalized system of preferences, 532-3, 539; legality of exploitation of Gulf of Suez resources by, *LA*, 558; military operations in Lebanon by, *CP*, 911, 920; Mutual Defense Assistance Agreement between US and, *CP*, 920; proclamation of state of, 590, 593; raid on Entebbe by, 884; suspension under Chicago Convention of privileges of, 553; tax treaty between US and, 296; US views on illegality of settlements in occupied territories by, *CP*, 138-9, 908-11; violation of Arms Export Control Act by, *CP*, 920-2; withdrawal from occupied territories of, *CP*, 140, 907. *See also* Arab-Israeli conflict; Middle East

Italy, agreement on settlement of World War II claims between France and, 24

Jackson, John H. The Jurisprudence of International Trade: The DISC Case in GATT, *LA*, 747

Jamaica, currency control law of, *JD*, 416-7

Japan: and application of IAEA safeguards, 917; arbitration provisions in agreements between Peru and, 5; and GATT, 760; and generalized system of preferences, 518, 519-21; industrial structure of, 271; and mandate over Micronesia, 667; and North Korean military boundary zone, 867-9; ratification of Non-Proliferation Treaty by, 914; renunciation of use of force under Constitution of, 351; return of Ryukyu and Daito Islands to, 127, 128, 927; settlement of Micronesian claims under Art. 4(a) of Treaty of Peace with, *JD*, 667, 669

Jayne, Erik & Albert A. Ehrenzweig. Private International Law. A Comparative Treatise on American International Conflicts of Law, *BR*, 681

Jhabvala, Farrokh. Declarations by Judges of the International Court of Justice, *LA*, 830

Jones, Colin & A. H. Hermann. Fair Trading in Europe, *BN*, 707

Johnson, O. Thomas, Jr. & Brice M. Claggett. May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?, *LA*, 558

Johnston, Charles R., Jr. *BN*, Gormley, 445; Loeber, 218; *BR*, Walsh, 933

Jordan: application to Israeli occupied territories of labor laws of, 547-8; complaint against Israel to ICAO by, 552-3, 556; and Geneva Middle East Peace Conference, 148. *See also* West Bank

Joyner, Christopher C. *BN*, Kay, 452

Judicial Decisions, 147, 410, 662, 923

Kahn-Freund, Otto. General Problems of Private International Law, *BR*, 196

Karl, Donald E. *Corr.* on Aegean continental shelf, 619

Kavass, Igor I. & Michael J. Blake. United States Legislation on Foreign Relations and International Commerce. A Chronological and Subject Index of Public Laws and Joint Resolutions of the Congress of the United States, *BR*, 200

Kavass, Igor I. & Adolpf Sprudz. United States Treaties and Other International Agreements. UST Cumulative Supplement 1971-1975, *BN*, 709

- Kay, David A. The International Regulation of Pesticides in Food, *BN*, 452; The International Regulation of Pharmaceutical Drugs, *BN*, 452
- Keeton, George W. & Georg Schwarzenberger (eds.). The Year Book of World Affairs, 1977, *BN*, 222
- Kellogg-Briand Pact, use of force under, 28
- Kenya, applicability of Geneva Conventions to conflict in, 276
- Kim, Samuel S. The People's Republic of China and the Charter-Based International Legal Order, *LA*, 317; reply by S. M. Finger, *Corr.*, 878
- Kirgis, Frederic L., Jr. *BR*, Meijers & Vierdag, 189; International Organizations in Their Legal Setting, *BR*, 676
- Klemm, Ulf-Dieter. Die seewärtige Grenze des Festlandssockels, *BN*, 207
- Knight, H. Gary. *BN*, Leipziger & Mudge, 701; Managing the Sea's Living Resources. Legal and Political Aspects of High Seas Fisheries, *BR*, 931
- Knight, H. Gary, J. D. Nyhart, & Robert E. Stein (eds.). Ocean Thermal Energy Conversion, *BR*, 934
- Kokot, Józef & Krzysztof Skubiszewski. Staatsangehörigkeit, Soziale Grundrechte, Wirtschaftliche Zusammenarbeit nach dem Recht der Bundesrepublik Deutschland und der Volksrepublik Polen, *BN*, 700
- Korea, (North) Democratic People's Republic of: condemnation by UN of, 329; economic zone of, 866; military boundary zone of, *NC*, 866
- Korea (South), Republic of: and North Korean military boundary zone, 867-9; orderly marketing agreements with, *JD*, 670; special maritime zones of, 874-5
- Korean Armistice Agreements (1953): dispute settlement under, 875; marine boundaries under, 867, 868
- Korean War: sea defense zones during, 872-3; UN condemnation of Chinese intervention in, 329, 342
- Kugel, Yerachmiel & Gladys W. Gruenberg. International Payoffs, *BN*, 706
- Kulski, W. W. *BN*, Gelberg, 450
- Landlocked and geographically disadvantaged states: access to fisheries for, 67, 70, 78-9; Baltic states as, 784
- Landskron, William A. (comp. and ed.). Annual Review of United Nations Affairs 1976, *BN*, 699
- Laos: applicability of Geneva Conventions to hostilities in, 276; and US generalized system of preferences, 537, 539
- Law of the Sea, United Nations (Third) Conference on (UNCLOS III): Chinese participation in, 319, 320, 327, 332-3; and compulsory jurisdiction, 320; and continental shelf, 80-2, 101-3, 111; and dispute settlement, 78, 79, 83, *NC*, 84; and economic zone, 67-80; landlocked and geographically disadvantaged states in, 784; and marine regionalism, 813; and maritime security zones; New York (1977) session of, *LA*, 865; and seabed exploitation, 58-61; and straits, 63-7; and territorial sea and contiguous zone, 61-3. *See also* International Seabed Authority
- Lapidoth, Ruth. Freedom of Navigation, with Special Reference to International Waterways in the Middle East, *BR*, 184
- Larson, David L. (ed.). Major Issues of the Law of the Sea, *BN*, 964
- Lasswell, Harold D. *BN*, Claude, 214
- Latin American Free Trade Area (LAFTA), and US generalized system of preferences, 530
- Latin American states: good neighbor policies and constitutions of, 351; investment disputes in, *LA*, 1; and regional preference system, 516; and sea defense zones, 872. *See also* Calvo Doctrine; Inter-American Commission on Human Rights; Organization of American States
- Lauterpacht, E. *BR*, Gross, 422; McDowell, 427
- Lauterpacht, Elihu & John C. Collier (eds.). Individual Human Rights and the State in Foreign Affairs, *BR*, 929
- Lay, S. Houston. *BR*, Lapidoth, 184

- Lay, S. Houston, Robin Churchill, & Myron Nordquist (comp. & ed.). *New Directions in the Law of the Sea*. Vol. V: Documents; Vol. VI: Documents and Index to Volumes I-VI, *BR*, 185
- Laylin, John G. *BR*, LeMarquand, 686
- Lazurus, Claude, Charles Leben, Antoine Lyon-Caen, & Bernard Verdier, *L'entreprise multinationale face au droit*, *BR*, 690
- League of Arab States, opposition to Israel of, 591, 600
- League of Nations: and Japanese mandate, 667; and PCIJ Statute, 833
- Lebanon, applicability of Geneva Conventions to conflict in, 275, 286; Israeli military operations in, *CP*, 911-2, 920-2; Palestinian forces in, 912-3; UN Interim Force in, *CP*, 911-3; UNSC res. on Israeli attack on, *CP*, 911-2, 920
- Leben, Charles, et al. *L'entreprise multinationale face au droit*, *BR*, 690
- Leiden, University of. *Praesidium Libertatis*, *BN*, 446
- Leipziger, Danny M. & James L. Mudge. *Seabed Mineral Resources and the Economic Interests of Developing Countries*, *BN*, 701
- LeMarquand, David G. *International Rivers: The Politics of Cooperation*, *BR*, 686
- Levin, Aida Luisa. *The OAS and the UN: Relations in the Peace and Security Field*, *BN*, 217
- Lewis, W. Bennett & Abram Chayes. *International Arrangements for Nuclear Fuel Reprocessing*, *BN*, 705
- Liability: under Baltic Sea Convention, 810; of diplomatic personnel, *CP*, 383-7; IMCO convention on, 796; under Montreal Agreement and Warsaw Convention, *JD*, 147-9, 666-7
- Liebman, Howard M. *A Formula for Tax-Sparing Credits in the U.S. Tax Treaties with Developing Countries*, *LA*, 296
- Liner Conferences, Convention on a Code of Conduct for, 268
- Lissitzyn, O. J. *BR*, Akehurst, 956
- Lock, Reinier. *BN*, Papadakis, 206
- Loeber, Dietrich André. *East-West Trade. A Sourcebook on the International Economic Relations of the Socialist Countries and Their Legal Aspects*, *BN*, 218
- Lombardi, Aldo Virgilio. *Bürgerkrieg und Völkerrecht. Die Anwendbarkeit völkerrechtlicher Normen in nicht-zwischenstaatlichen bewaffneten Konflikten*, *BN*, 439
- Lomé Convention, EEC preferences under, 539
- Long-arm statutes, service of process and, *JD*, 154, 157
- Luard, Evan. *Types of International Society*, *BR*, 430
- Luk, I. *Sotsializm i Mezhdunarodnoe Pravo*, *BR*, 948
- Lyon-Caen, Antoine, et al. *L'entreprise multinationale face au droit*, *BR*, 690
- MacChesney, Brunson. *Ed. on*, 615
- Maggs, Peter B., John N. Hazard, & William E. Butler. *The Soviet Legal System* (3rd ed.), *BN*, 958
- Magnetti, Donald L. *The Function of the Oath in the Ancient Near Eastern International Treaty*, *LA*, 815
- Malawar, Stuart S. *BR*, Schermers, 191; *Corr. on Soviet view of unequal treaties*, 117-8
- Malaysia, applicability of Geneva Conventions to conflict in, 276
- Manero, Alejandro Gertz. *La defensa jurídica y social del patrimonio cultural*, *BN*, 701
- Mangone, Gerard J. *BN*, Florio, 961
- Marcoff, Marco G. *Traité de Droit international public de l'espace*, *BR*, 687
- Marcona dispute, 2, 7, 11, 15
- Marek, Krystyna. *BR*, Rousseau, 163
- Maritime boundaries, delimitation of, *NC*, 95
- Marine pollution: coastal states rights and duties concerning, 62-3, 74, 75-8; and international straits, 64-5; by Dumping from Ships and Aircraft, (Oslo) Convention on Prevention of (1972), 796; by Dumping Wastes and Other Matter, (IMCO) Convention for the Prevention of (1972), 790, 796, 808; from Land-Based Sources, (Paris) Convention for the Prevention of (1974), 796, 802, 810;

- from Ships, International Convention for the Prevention of (1973), 810. *See also* Baltic Sea Area, Convention on the Protection of the Marine Environment of; Oil pollution damages
- Marine regionalism: programs of the UN Environmental Programme concerning, 812; protection of the Baltic sea environment as an example of, *LA*, 782; UNCLOS III recognition of concept of, 813
- Marine scientific research, coastal state jurisdiction over, *LA*, 70, 75-8
- Maritime defense and security zones: extent of claims under, 871-2; International Law Commission and, 873; during Korean War, 872-3; of North Korea, *NC*, 866; of People's Republic of China, 870, 872; during Russo-Japanese War, 873; of South Korea, 874-5; UNCLOS III and, 872; in Western hemisphere, 872; during World Wars I and II, 873
- Marshall Islands. *See* Micronesia
- Marwah, Onkar & Ann Schulz (eds.). Nuclear Proliferation and the Near-Nuclear Countries, *BN*, 208
- Matte, Nicolas Mateesco (ed.). International Air Transport: Law, Organization and Policies for the Future. Proceedings of the Air and Space Law Institute 25th Anniversary Conference, November 17-19, 1976, *BN*, 443
- Max Planck Institute for Comparative Public Law and International Law. Public International Law. A Current Bibliography of Articles, Vols. I, II, and III, *BN*, 964
- McDiarmid, Alice Morrissey. *BN*, Dupuy, 703
- McDowell, Eleanor C. (ed.). Digest of United States Practice in International Law, 1975, *BR*, 427
- McVey, Mary D. *BN*, Hazard, Butler, & Maggs, 958
- McWhinney, Edward. *BN*, Matte, 443
- Mediterranean Sea, agreements for protection of marine environment of, 812
- Meijers, H. & E. W. Vierdag. Essays on International Law and Relations in Honour of A. J. P. Tammes, *BR*, 189
- Meissner, Friedrich. Die Menschenrechtsbeschwerde vor den Vereinten Nationen, *BN*, 211
- Melzer, Yehuda. Concepts of Just War, *BN*, 204
- Mercenaries: Australian legislation concerning, 53; British legislation concerning, 50-1; definition of, 37-41; under Hague and Geneva Conventions, 42, 44-5, 53-4; international community reaction to use of, 47-50; under Protocol I to Geneva Conventions, 39, 55-6, 391, 406; recruitment and use of, *LA*, 37; under traditional international law, 41-7; treatment under laws of war of, 53-6; UNGA res. on, 54; US legislation concerning, 52-3
- Meron, Theodor. Applicability of Multilateral Conventions to Occupied Territories, *LA*, 542; The United Nations Secretariat. The Rules and the Practice, *BR*, 426
- Metzger, Stanley D. *BN*, Wallace & Escobar, 446
- Mexico: agreement on distribution of Rio Grande waters between US and, *CP*, 644; Consular Convention between US and (1942), *JD*, 152; expropriation of US-owned property by, 1; transfers of territory under agreements between US and, 127; and transfrontier pollution, *CP*, 655; treaty on utilization of river waters between US and, (1944), 655; and US generalized system of preferences, 539
- Micronesia: "agreed principles" on free association between the US and, *CP*, 882-3; settlement of World War II claims in, *JD*, 667-70
- Middle East: representation of Palestinian Arabs in Geneva Peace Conference on, *CP*, 143-4; UNSC res. on, *CP*, 140-3, 906-7; US diplomatic efforts concerning, *CP*, 906-8; US-Israeli joint statement on, *CP*, 142-3; US-Soviet joint statement on, *CP*, 140-1; working paper on procedures for Geneva Peace Conference on, *CP*, 143. *See also* Near East
- Minasian, N. M. Sotsializm i Mezhdunarodnoe Pravo, *BR*, 948
- Montreal (IATA) Agreement (1966), carrier liability under, *JD*, 147; 666
- Montreux Convention, "closed sea" doctrine under, 80
- Moore, John Norton. *BR*, Knight, 931

- Moreno López, Augustias. Igualdad de Derechos y Libre Determinación de los Pueblos Principio eje del Derecho Internacional Contemporáneo, *BN*, 965
- Most-favored-nation principle: application to Communist countries of, 523, 526; under GATT, 513, 519; and tariff reductions, 516, 517, 519, 540
- Mozambique, applicability of Geneva Conventions to conflict in, 276
- Mudge, James L. & Danny M. Leipziger. Seabed Mineral Resources and the Economic Interests of Developing Countries, *BN*, 701
- Multilateral conventions, applicability to occupied territories of, *LA*, 542
- Multilateral trade negotiations: Kennedy Round of, 516; Tokyo Round of, 540-1, 747, 749, 760, 780
- Multinational corporations and enterprises. *See* Transnational corporations and enterprises
- Münch, F. *BN*, Platzöder, 702
- Murphy, John F. *BR*, Bloomfield & FitzGerald, 183
- Mutharika, Peter R. The Regulation of Statelessness under International and National Law, *BR*, 680
- Nadelmann, Kurt H. *BN*, Volken, 441; *BR*, Gutzwiller, 682
- Nafziger, James A. R. *BN*, Manero, 701
- Namibia: role of UN Secretary-General in, *CP*, 119; UN as Administrative Authority for, 332; UNSC and nonrecognition of South African control over, *JD*, 152; US embargo of shipments of military or police commodities to, *CP*, 897
- Narcotic Drugs, Single Convention on (1961), classification of marijuana under, *JD*, 149-51
- Nash, Marion. Contemporary Practice of the United States Relating to International Law, 620, 879
- National liberation movements: and Art. 2(7), 330; and definition of aggression, 345; and Protocol I to Geneva Conventions, 279; and use of mercenaries, 40, 54, 56
- Nationality: acquisition of, *CP*, 380-1; loss of, 52, *JD*, 413-5
- Nationalization: and eligibility for US general system of preferences, 524-5, 526-8; of oil concessions by Venezuela, 7-9, 15, *JD*, 410-1. *See also* Expropriation
- Natural resources, permanent sovereignty over: and UN Charter on Economic Rights and Duties of States, *CP*, 377-8; and UN human rights covenants, 624-5, 629; UNGA res. on, 18, 27
- Naturalization, and residence abroad, *JD*, 413-5
- Near East, Function of the Oath in Ancient International Treaties in, *LA*, 815
- Netherlands, US complaint to GATT over tax practices of, 761, 774-8
- Netherlands Yearbook of International Law, Vol. VIII, 1977, *BR*, 953
- Neuhold, Hanspeter. Internationale Konflikte—verbotene und erlaubte Mittel ihrer Austragung, *BR*, 945
- Neutrality: Austrian constitutional law concerning, 351; Hague Conventions on (1907), 42-5, 53; and recruitment of mercenaries, 42-3
- New International Economic Order (NIEO); China and, 327, 332, 348; and human rights, *CP*, 381-2; and permanent sovereignty over natural resources, *CP*, 377; US attitude toward, 247-8
- New Zealand, and generalized system of preferences, 520
- Nicaragua, human rights and economic and security assistance to, *CP*, 890-2
- Nigeria: applicability of Geneva Conventions in, 275, 285, 294; claim of sovereign immunity for Central Bank of, *JD*, 417; use of mercenaries in civil war in, 48
- Non-Proliferation Treaty. *See* Nuclear Weapons, Treaty for the Non-Proliferation of
- Nordic agreements on environmental protection, 783, 797. *See also* Baltic Sea
- Nordquist, Myron, Robin Churchill, & S. Houston Lay (comp. and ed.). New Directions in the Law of the Sea. Vol. V: Documents; Vol. VI: Documents and Index to Volumes I-VI, *BR*, 185
- Northern Ireland: applicability of Geneva Conventions to hostilities in, 276; use of torture in, 373-4

- Northern Mariana Islands: Constitution of, *CP*, 378-80; Covenant on, *CP*, 378-9
- Norway: and Baltic Sea convention, 803; and generalized system of preferences, 520
- Nuclear facilities, application of IAEA safeguards to, *CP*, 913-7
- Nuclear weapons: nonproliferation of, *CP*, 655-61; and Protocols to Geneva Conventions, 407; and US Nuclear Nonproliferation Act, 655, *OD*, 712
- Nuclear Weapons, Treaty on the Non-Proliferation of: 655-6; application of IAEA safeguards under, *CP*, 913-4; ratification by Japan and Federal Republic of Germany of, 917
- Nuremberg Tribunal. *See* International Military Tribunal (Nuremberg)
- Nyhart, J. D., H. Gary Knight, & Robert E. Stein (eds.). Ocean Thermal Energy Conversion, *BR*, 934
- Ocean transport, shipping discrimination and, *CP*, 648-53
- Occupied territories: applicability of multilateral conventions to, *LA*, 542; application of Chicago Convention on International Civil Aviation to, *LA*, 551; application of the Geneva Conventions (1949) to, 550, 552-3, 910-1; application of Hague Regulations to, 550, *LA*, 558; Israeli withdrawal from, *CP*, 140, 906-7; legality of belligerent occupant's exploiting resources of, *LA*, 558; practices concerning civil aviation in, 555; sovereignty over, *CP*, 909; US views on illegality of Israeli settlements in, *CP*, 138-9, 908-11
- Oda, Shigeru. The Law of the Sea in Our Time, *BN*, 206
- Oil pollution damages: Convention on Civil Liability for (1969), 796; Convention on International Fund for Compensation for (1969), 796; Convention relating to Intervention on the High Seas in Cases of (1969), 796; Convention for the Prevention of (1954), 795. *See also* Marine pollution
- Okutey-Kodjoe, W. The Principle of Self-Determination in International Law, *BN*, 696
- Oliver, Covey T. *BN*, Ball, 706; *BR*, Stein, Hay, & Waelbroeck, 678
- Oman, use of mercenaries in, 48
- Oppler, Alfred C. Legal Reform in Occupied Japan, *BR*, 683
- Orderly marketing agreements, under Trade Act of 1974, *JD*, 670
- Organisation for Economic Co-operation and Development (OECD): code of conduct on restrictive business practices of, 251, 266; consultations under Committee on International Investment and Multinational Enterprises of, 251, 266; and guidelines for multinational enterprises, 35-6; rulemaking functions of, 269
- Organization of African Unity, condemnation of use of mercenaries by, 50
- Organization of American States (OAS): and collective economic security plan, 15-6; reform of the Charter of, 15
- Organization of Petroleum Exporting Countries (OPEC): and 1974 Trade Act, 263; and US generalized system of preferences, 524-6, 528-9, 539
- Orrego-Vicuña, Francisco (ed.). Preservación del Medio Ambiente Marino, *BN*, 447
- Overseas Private Investment Corporation (OPIC): and arbitration of Anaconda claims, 18; expropriation insurance forms of, 26; human rights and assistance through, 888
- Padelford, Norman J. *BR*, Bray, 195
- Pakistan: Income Tax Act, 312, 315; and Indus Basin Development Fund, 859; tax treaty between the US and, 296, 310-5; war between India and, 333, 341
- Palau. *See* Micronesia
- Palestine: British mandatory government in, 588-90, 908; exodus of Arabs from (1947-48), 587-95; partition of, 587, 592, 603, 604
- Palestine Liberation Organization (PLO): participation in Diplomatic Conference on International Humanitarian Law by, 391; representation in Geneva Peace Conference of, *CP*, 141
- Palestinian refugees: and right of return, *LA*, 586; and self-determination, 604-6; UNGA res. on, 587, 599-608
- Palestinians: and conflict in Lebanon, 912-3; homeland for, 907; representation in Geneva Peace Conference of, *CP*, 141, 143-4; rights and status of, *CP*, 140

- Panama, transfer of US property to, *CP*, 123-9
- Panama, Declaration of, 872
- Panama Canal, Treaty Concerning the Permanent Neutrality and Operation of (1978): amendments, conditions, reservations, and understandings concerning, *CP*, 129, 138, 636-41; entry into force of, *CP*, 893; joint US-Panamanian statements concerning, *CP*, 138, 636, 638; negotiating history of, *CP*, 135-6; nonintervention under, 138, 636, 639-40, 641, 643; Protocol of Exchange of Instruments of Ratification Regarding, *CP*, 894; right of defense under, 138, 636, 638-41; submission to Senate of, *CP*, 134-8; text of, *OD*, 238; treatment of US vessels under, 138, 636, 638
- Panama Canal Treaty (1978): entry into force of, *CP*, 893; negotiating history of, *CP*, 135-7; Protocol of Exchange of Instruments of Ratification concerning, *CP*, 894; reservations and understandings concerning, *CP*, 129, 641-3 (text), 893; submission to Senate of, *CP*, 134-8; supplemental agreements concerning, 137-8; text of, *OD*, 225; transfer of property under, *CP*, 123-9
- Papadakis, Nikos. The International Legal Regime of Artificial Islands, *BN*, 206
- Papua-New Guinea, and archipelago concept, 65
- Park, Choon-ho. The 50-Mile Military Boundary Zone of North Korea, *NC*, 866
- Patent Cooperation Treaty: entry into force of, *CP*, 401-2; parties to, 401
- Paust, Jordan J., Albert P. Blaustein, and Adele Higgins. The Arab Oil Weapon, *BR*, 685
- Perkins, E. R. *BR*, Foreign Relations of the United States, 1949, Vol. VI, The Near East, South Asia and Africa, 954; 1950, Vol. VI, East Asia and the Pacific, 692
- Permanent Court of International Justice (PCIJ): constitutional basis for declarations by judges of, 832-7; continuity between ICJ and, 838, 845-7; declarations by judges of, 831-7, 840-3, 851; revision of Rules of, 834-6
- Permanent Court of International Justice (PCIJ), Statute of: Art. 57 of, 830, 832-3, 835; Art. 62 of, 837; Art. 71 of, 837; drafting of, 833
- Persian Gulf: protection of marine environment of, 812; seabed claims in, *CP*, 895-6; as a "special area" under 1973 IMCO Convention, 795
- Peru: arbitration provisions in agreements between Japan and, 5; nationalization of US-owned property by, 2. *See also* Marcona dispute
- Peteri, Z. & I. Szabo. A Socialist Approach to Comparative Law, *BN*, 451
- Philippines: antitrust suit by, *JD*, 662; applicability of Geneva Conventions to conflict in, 276; and archipelago concept, 65; and compulsory jurisdiction of ICJ, 321; and economic aggression, 346
- Picone, Paolo & Wilhelm Wengler (eds.). Internationales Privatrecht, *BN*, 221
- Piradov, A. S. (ed.). International Space Law, *BR*, 433
- Platzöder, Renate. Politische Konzeptionen zur Neuordnung des Meeresvölkerrechts, *BN*, 702
- Plebiscite, for Micronesia, *CP*, 882-3
- Plischke, Elmer. Microstates in World Affairs: Policy Problems and Options, *BN*, 210
- Plouvier, Liliane. Les Décisions de la Cour de Justice des Communautés Européennes et Leurs Effets Juridiques, *BR*, 193
- Pollution of the Sea by Oil, International Convention for the Prevention of (1954), prohibited zones under, 795
- Pollution from Ships, International Convention for the Prevention of (1973): arbitration under, 810; "special areas" under, 795, 802, 806
- Ports, exclusion of ships for national security reasons from, *JD*, 156-7
- Portugal: and application of Geneva Conventions, 276; UN sanctions against, 330; and US generalized system of preferences, 537; and use of mercenaries, 49-50. *See also* Angola
- Preiser, Wolfgang. Frühe Völkerrechtliche Ordnungen der Aussereuropäischen Welt. Ein Beitrag zur Geschichte des Völkerrechts, *BR*, 432
- Private International Law, Hague Conference on, *CP*, 633-4
- Pueblo incident, 869

- Racial discrimination: ILO resolution on Israeli policies in occupied territories and, 544. *See also* Apartheid
- Racial Discrimination, UN Convention on the Elimination of All Forms of: federal-state relations and, 623; freedom of speech and Art. 4 of, 621-2; non-self-executing nature of, 621, 623; Optional Protocol to, 629; proposed US understandings, reservations and declarations to, *CP*, 622-3; submission to the US Senate of, *CP*, 620; US intent to recognize the competence of the Committee on Racial Discrimination under Art. 14 of, 621
- Radley, Kurt René. *The Palestinian Refugees: The Right to Return in International Law*, *LA*, 586
- Raman, K. Venkata (ed.). *Dispute Settlement through the United Nations*, *BR*, 425
- Recognition: Estrada Doctrine on, 876; as prerequisite to maintain suits in US courts, *JD*, 152-3; US policy on, *CP*, 876, 879-80
- Red Sea: protection of marine environment of, 812; as a "special area" under 1973 IMCO convention, 795
- Reddick, John R. *BN*, Marwah & Schulz, 208
- Reese, Willis L. M. *BN*, Castel, 440
- Refugees: conditional entry under US Immigration and Naturalization Act of, *JD*, 672-3; Convention on the Status of (1951), 609-11; definition of, 609-10; and refoulement, 611; protection of, 611; Protocol Relating to the Status of (1967), 925. *See also* Palestinian refugees
- Reisman, W. Michael. *BN*, Orrego-Vicuña (ed.), 447
- Reisman, W. Michael & Burns H. Weston. *Toward World Order and Human Dignity. Essays in Honor of Myres S. McDougal*, *BR*, 161
- Rendell, Robert S. *BN*, Friesen, 219
- Reprisals, right of, and Protocols to Geneva Conventions, 406
- Restatement of the Foreign Relations Law of the United States. *See* Foreign Relations Law of the United States
- Restrictive business practices, codes of conduct for, *LA*, 247: applicability of, 253-4; arbitration and, 264-5; developed countries and, 248, 254-5; developing countries and, 248, 256-7; ECOSOC and, 261, 271; EEC and, 258-9; effects of, 255-6; forms of, 257-8; GATT and, 267; Havana Charter and, 267, 271; International Chamber of Commerce and, 250-1; multilateral convention on, 263-4; OECD and, 35, 251, 266, 268; and UN Commission on Transnational Corporations, 35, 251, 254; and UN Group of Eminent Persons, 251; US attitude on binding or voluntary nature of, *LA*, 247
- Rhodesia: applicability of Geneva Conventions to conflict in, 276; involvement of Americans in hostilities in, 53; role of UN Secretary-General in, *CP*, 119; UN sanctions against, *CP*, 119-20, 329-30, 332; use of mercenaries in, 37
- Right of return: under Geneva Convention No. IV (1949), 595-9; and Palestinian refugees, *LA*, 586; under Universal Declaration of Human Rights, 605, 612-4
- Ringear, Gisele. *Les Astronomes et le Droit de l'Espace*, *BN*, 208
- Rio Grande, US-Mexican Convention Providing for the Equitable Distribution of the Waters of (1906), *CP*, 644
- Riesenfeld, Stefan A. *BN*, Eversen, Sperl, & Usher, 963
- Rode, Zvonko R. *BN*, Barile, 443; Tesauro, 209
- Rogers, William D. *Of Missionaries, Fanatics, and Lawyers: Some Thoughts on Investment Disputes in the Americas*, *LA*, 1; *Corr.* on, 616-7
- Roman law, concept of "trust" under, 858
- Romania, and US generalized system of preferences, 532, 539
- Rosas, Allan. *The Legal Status of Prisoners of War. A Study in International Humanitarian Law Applicable in Armed Conflicts*, *BR*, 176
- Rousseau, Charles. *Droit international public. Tome III. Les compétences*, *BR*, 163
- Rubin, Alfred P. *BN*, Zivier, 449; *BR*, Luard, 430; *Recueil des Cours*, 1974, 170
- Rubin, Seymour. *Corr.* on lawyers and diplomacy, 616-7
- Russel, Ruth B. *BN*, Gordenker, 220

Ryukyu and Daito Islands, return to Japan of, 127, 128; *JD*, 927

Salvage: abandoned property and, *JD*, 664-5; arbitration under Lloyd's Standard Form of Agreement on, *JD*, 411-2

Sarup, Amrit & Kenneth R. Simmonds (comp. & ed.). *Cases on the Law of the Sea*. Vol. I, *BN*, 205

Schachter, Oscar. *BR*, Reisman & Weston, 161

Schermers, Henry G. *International Institutional Law*, *BR*, 168; *Judicial Protection in the European Communities*, *BR*, 191

Schindler, Diétrich, *BR*, *International Relations in a Changing World*, 675; Verdross & Simma, 167

Schoch, M. Magdelana. *BR*, Oppler, 683

Schreuer, Christoph. *Die Behandlung internationaler Organakte durch staatlich Gerichte*, *BR*, 944

Schulz, Ann & Onkar Marwah (eds.). *Nuclear Proliferation and the Near-Nuclear Countries*, *BN*, 208

Schulz, Eberhard (ed.). *Die Ostbeziehungen der Europäischen Gemeinschaft. Von nationalstaatlicher Politik zu gemeinsamer Verantwortung*, *BN*, 450

Schwarzenberger, Georg. *BN*, Lombardi, 439

Schwarzenberger, Georg & E. D. Brown. *A Manual of International Law* (6th ed.), *BN*, 957

Schwarzenberger, Georg & George W. Keeton (eds.). *The Year Book of World Affairs*, 1977, *BN*, 222

Schwelb, Egon. *BN*, Meissner, 211

Schweling, Otto. *Die deutsche Militärjustiz in der Zeit des Nationalsozialismus*, *BR*, 946

Scientific Committee for Oceanographic Research (SCOR), 800

Seabed beyond national jurisdiction, *LA*, 57; exploitation of resources of, 61, 83; settlement of disputes concerning, 85; UNGA declaration of principles concerning, 333; US attitude on, 58. *See also* *International Seabed Authority*

Seas. *See* High seas; Semi-enclosed and enclosed seas

Seidl-Hohenveldern, I. *BN*, Beyer, 447; *BR*, Schreuer, 944

Self-defense, and definition of aggression, 342, 345

Self-determination: and definition of aggression, 342; for Palestinians, 604-6; and UN Charter, 330; and UN Human Rights Covenants, 624, 626

Semi-enclosed seas: Baltic as, 783, 798; definition of, 79-80

Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Convention on (1965): Central Authority for US under Art. 2 of, *CP*, 130-2; implementation of, *CP*, 130-2, 633-5; interpretation of *CP*, 633-5; number of requests under, 131; parties to, 130-1; reservations to, 133; US regulations concerning, *CP*, 132-3; US report on interpretation and implementation of, *CP*, 633-4

Service of process, sovereign immunity and, 927

Shaker, Mohamed Ibrahim. *The Treaty on the Non-Proliferation of Nuclear Weapons*, *BR*, 943

Shattuck, Warren L. & Teruo Doi (eds.). *Patent and Know-how Licensing in Japan and the United States*, *BR*, 434

Shelton, Dinah. *BN*, Bossuyt, 212; Guilhaudis, 439; *Realités du Droit International Contemporain*, 860

Shinkaretskaia, G. G. *Gosudarstva na arkipelagakh*, *BN*, 699

Shipping, and flag carrier discrimination, *CP*, 648-53

Simma, Bruno & Alfred Verdross. *Universelles Völkerrecht. Theorie und Praxis*, *BR*, 167

Simmonds, Kenneth R. & Amrit Sarup (comp. & ed.). *Cases on the Law of the Sea*. Vol. I., *BN*, 205

Sipkov, Ivan. *BN*, *Public International Law, A Current Bibliography of Articles*, 964; Schulz, 450; Sundberg-Weitman, 212

- Skubiszewski, Krzysztof & Józef Kokot. Staatsangehörigkeit Soziale Grundrechte, Wirtschaftliche Zusammenarbeit nach dem Recht Bundesrepublik Deutschland und der Volksrepublik Polen, *BN*, 700
- Sohn, Louis B. *BR*, Schermers, 168
- Solf, Waldemar A. *BR*, Delessert, 429
- Somalia: maritime claims of, 872; and US generalized system of preferences, 532-3
- South Africa: UN sanctions against, 330, 346, *CP*, 407-9, 897; UNSC and nonrecognition of control over Namibia by, *JD*, 152; US embargo of shipments of military or police commodities to, *CP*, 897-8; US sale of civilian aircraft to, 892; US veto and, 341.
- South West Africa. *See* Namibia
- Sovereign immunity: and commercial transactions, *JD*, 419; and Convention on Recognition and Enforcement of Foreign Arbitral Awards, *JD*, 412; and exclusion of ships from ports for national security reasons, *JD*, 156-7; Federal Republic of Germany and, 420; restrictive v. absolute theory of, *JD*, 418-20; service of process and, *JD*, 927; trends in UK concerning, *JD*, 418-9; and US antitrust laws, *JD*, 663; and US Public Vessels Act, *JD*, 412; US policy concerning, 876
- Sovereignty: acquisition of, *CP*, 895-6; over occupied territory, *CP*, 909. *See also* Natural resources, permanent sovereignty over
- Soviet Yearbook of International Law 1974, *BR*, 199
- Spain: and ICJ jurisdiction, 847; transfer of territory under Treaty of Amity between US and (1819), 126-7
- Spanish Civil War: foreign volunteers in, 40, 48; treatment of prisoners of war in, 277
- Spencer, John H. *BN*, Buergenthal & Torney, 444
- Sperl, H., H. J. Eversen, & J. A. Usher. Compendium of Case Law Relating to the European Communities, 1975, *BN*, 963
- Sprudz, Adolph. *BN*, Vambery & Vambery, 962
- Sprudz, Adolf & Igor I. Kavass. United States Treaties and Other International Agreements. UST Cumulative Supplement 1971-1975, *BN*, 709
- Starke, J. G. An Introduction to International Law (8th ed.), *BN*, 957
- State responsibility: for injuries to aliens and protection of human rights, 876; and recruitment of mercenaries, 45-6; Sohn-Baxter draft convention on expropriation and, 25
- State succession: in respect of matters other than treaties, 377; to treaties, *JD*, 417, *OD*, 971
- Statelessness, 609-10
- Stein, Eric. *BR*, Weber, 192
- Stein, Eric, Peter Hay, & Michel Waelbroeck. European Community Law and Institutions in Perspective, Text, Cases and Readings; Documents for European Community Law and Institutions in Perspective, *BR*, 678
- Stein, Robert E., H. Gary Knight, & J. D. Nyhart (eds.). Ocean Thermal Energy Conversion, *BR*, 934
- Straits, innocent and transit passage through, 62, 63-6, 82
- Straits of Malacca, passage of tankers through, 65
- Strategic Offensive Arms, Interim Agreement Between the United States and the Union of Soviet Socialist Republic on Certain Measures with Respect to the Limitation of: nonbinding and nonobligatory nature of presidential declaration to continue to abide by, *CP*, 391-8; US-Soviet joint statement on, *CP*, 394
- Suez, Gulf of, legality of Israeli exploitation of resources of, *LA*, 558
- Sundberg-Weitman, Brita. Discrimination on Grounds of Nationality. Free Movement of Workers and Freedom of Establishment under the EEC Treaty, *BN*, 212
- Swan Islands, US recognition of Honduran sovereignty over, 127
- Sweden: extradition treaty between US and, *JD*, 412-3; and generalized system of preferences, 520. *See also* Baltic Sea
- Swift, Richard N. *BN*, Starke, 957
- Switzerland, and generalized system of preferences, 520
- Syria: disengagement agreement between Israel and, 908; French Mandate over, 908

- Szabo, I. & Z. Peteri. A Socialist Approach to Comparative Law, *BN*, 451
- Szasz, Paul C. *BN*, Licensing and Regulatory Control of Nuclear Installations, 704;
BR, Shaker, 943
- Tanzania, maritime claims of, 872
- Technology transfer, UNCTAD and, 249, 252, 254-5, 259, 263
- Tekoa, Yosef. In the Face of the Nations: Israel's Struggle for Peace, *BN*, 697
- Territorial Sea and Contiguous Zone, Convention on (1958): coastal state jurisdiction under Art. 24(1) of, 873; definition under Art. 24(2) of, 873; innocent passage under Art. 16(4) of, 63; interpretation of "high tide" under Art. 10 of, 105
- Territorial seas: Baltic states claims to, 802; UNCLOS III negotiations and, 61-3
- Territory: acquisition of sovereignty over, *CP*, 895; US Constitution and transfer of, *CP*, 123-9
- Terrorism: and Protocol II to Geneva Conventions, 293; and sanctions against, 885; UNCA res. on measures to prevent, 336, 884; US policies on, *CP*, 883-5
- Tesauro, Giuseppe. Nazionalizzazioni e diritto internazionale, *BN*, 209
- Thailand: applicability of Geneva Conventions to conflict in, 276; and ICJ jurisdiction, 846
- Thomas, Ann Van Wynen. *BN*, Atkins, 959; Levin, 217
- Thürer, Daniel. Das Selbstbestimmungsrecht der Völker Mit einem Exkurs zur Jurafrage, *BN*, 215
- Torney, Judith V. and Thomas Buergenthal. International Human Rights and International Education, *BN*, 444
- Torrey Canyon oil spill, 782
- Torture, and Protocol II to Geneva Conventions, 293
- Trade. *See* International trade
- Trade union freedoms: ILO Convention No. 87 on, 544; ILO resolutions on Israeli practices in occupied territories and, 544
- Trademarks, protection of, *JD*, 153-6
- Transfrontier pollution: US complaint against Canada concerning, *CP*, 653-5; US complaint against Mexico concerning, *CP*, 655
- Transnational corporations and enterprises, codes of conduct for, 35-6, *LA*, 247; UN Commission on, 35-6, 251, 252-4, 257, 261; UN Information and Research Centre on, 251, 268, 269. *See also* Restrictive business practices, Technology transfer
- Treaties: in ancient Near East, function of the oath in, *LA*, 815; applicability to occupied territories of, *LA*, 542; China and succession to, 322-6, 347; concept of parity and, 818; distinction between executive agreements and, *JD*, 666; entry into force of, *CP*, 893-4; exchange of ratifications of, *CP*, 893-4; retroactive provisions of, *JD*, 672; state succession to, *JD*, 324, 417, *OD*, 971; use of force and invalidity of, 28, 118. *See also* Vienna Convention on the Law of Treaties
- Treaty of Saint-Germain (1919), and Austro-German Customs Union, 842
- Trust funds, code of principles for administration by international organizations of, *NC*, 856
- Trust Territory of the Pacific Islands (TTPI): Agreement concerning (1969), *JD*, 667; respect for laws of, *JD*, 669-70; settlement of World War II claims in, *JD*, 667-70; Trusteeship Agreement for (1947), 378, 380, *JD*, 667; *CP*, 882-3. *See also* Micronesia; Northern Mariana Islands
- Trusteeship agreements, termination of, 378, 380, 667, 882-3
- Turkey: and compulsory jurisdiction of ICJ, 321; and US generalized system of preferences, 532-3, 539. *See also* Aegean continental shelf
- Unequal treaties, Soviet views on, *Corr.*, 118-9
- Union of Soviet Socialist Republics (USSR): arms control agreements between US and, 394, *CP*, 391-8; attitude toward unequal treaties of, *Corr.*, 117-8; and claims to Wrangell Island, *CP*, 895; closed sea doctrine of, 799, 873; and definition of aggression, 342; foreign policy and 1977 Constitution of, *Ed.*, 350; intervention in Czechoslovakia by, 341, 346; maritime claims of, 868; and North Korean mili-

- tary boundary zone, 867, 870; opposition to UN Charter review by, 338; scientific cooperation between US and, 121; use of UNSC veto by, 333, 341, 346. *See also* Baltic Sea
- United Arab Emirates, territorial claims over Persian Gulf seabed by, *CP*, 895-6
- United Kingdom: and act of state doctrine, 262-3; arbitration of continental shelf dispute between France and, *NC*, 95; Diplock Report on use of mercenaries, 37-8, 47, 51; and "enforceable Community rights" under European Communities Act (1972), *JD*, 420-1; Foreign Enlistment Act (1870) and recruitment of mercenaries, 50; and lump sum settlement of World War II and postwar claims, 23; and Palestine mandate, 588-90, 908; rights of belligerent occupant under military manual of, 576, 581; Sex Discrimination Act (1975), *JD*, 420-1; torture in Northern Ireland by, 373-4; tax treaties between developing countries and, 313; transfer of territory under agreements between US and, 126; trend in doctrine of sovereign immunity in, *JD*, 418-9; and UN Charter review, 339; use of UNSC veto by, 341; and Wrangell Island claims, 894
- United Kingdom-US, Convention Relating to the Tenure and Disposition of Real and Personal Property between (1899), 417
- United Nations: administration of trust funds by, 859-60; observation of Micronesian plebiscite by, 882-3; privileges and immunities of representatives of members of, *CP*, 880-2. *See also* International Court of Justice and separate entries *infra* for UN organs
- United Nations Charter: Ad Hoc Committee on, 327, 337; amendments to Arts. 23, 27, 61, and 109 of, 323, 326; application to South Africa of Chapter VII of, *CP*, 346, 408-9; Art. 19 of, 335, 878; Chinese attitude toward review and revisions of, 336-41; development of international law under Art. 13 of, 378; French position on review of, 338; human rights and, 330; ICJ opinion on Art. 17 of, 878; intervention and Art. 2(7) of, 330; nature of UNGA resolutions under Arts. 17 and 19 of, 328; prohibition of use of force under, 28; review under Art. 109(3) of, 336; self-determination and, 330; and sex discrimination, 420; sovereign equality under Art. 2(1) of, 606-7; Soviet opposition to review of, 338, 341; Special Committee on, 327, 337; UK position on review of, 339; US position on review of, 339
- United Nations Charter on the Economic Rights and Duties of States. *See* Economic Rights and Duties of States, UN Charter on
- United Nations Command: and North Korean military boundary zone, 867, 869; and sea defense zones, 872-3
- United Nations Committee on the Exercise of the Inalienable Rights of the Palestinian People, 586
- United Nations Committee on the Peaceful Uses of Outer Space, Chinese participation in, 321
- United Nations Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond National Jurisdiction, Chinese participation in, 327, 333
- United Nations Committee on Racial Discrimination, US intent to recognize the competence of, 621
- United Nations Committee on Relations with the Host Country, discussion of Sect. 13(b) of UN Headquarters Agreement in, *CP*, 880-2
- United National Commission on International Trade Law (UNCITRAL): and activities of multinational enterprises, 269; Chinese nonparticipation in, 321
- United Nations Commission on Transnational Corporations: establishment of, 251; and guidelines for multinational enterprises, 35-6; Intergovernmental Working Group on a Code of Conduct of, 252-4, 257, 261
- United Nations Conciliation Commission for Palestine, 600, 602-3
- United Nations (Stockholm) Conference on the Human Environment (1972), 327, 797, 799
- United Nations Conference on International Organization (UNCIO) (San Francisco, 1945), and ICJ Statute, 838

- United Nations Conference on the Law of the Sea (UNCLOS III). *See* Law of the Sea, United Nations Conference on
- United Nations Conference on Trade and Development (UNCTAD): Ad Hoc Group of Experts on Restrictive Business Practices of, 252, 254, 257, 268; and generalized system of preferences, 514-6, 536; Intergovernmental Group on Transfer of Technology of, 249, 252, 254-5, 257, 263; 1976 plan of action of, 247; Special Committee on Preferences of, 518
- United Nations Development Programme (UNDP): China and, 331; US contributions to, 376
- United Nations Disengagement Observer Force (UNDOF), Chinese attitude toward, 334-5, 878
- United Nations Economic and Social Council (ECOSOC), and international antitrust code, 261, 271
- United Nations Education, Scientific and Cultural Organization (UNESCO), US assessments in, 878
- United Nations Emergency Force: (UNEF I), Soviet nonpayment of assessment to, 878; (UNEF II), Chinese attitude toward, 333-5, 878
- United Nations Environmental Programme (UNEP): establishment of, 797; marine protection projects of, 812
- United Nations Fund for Population Activities (UNFPA), project in Indonesia of, 859-60
- United Nations General Assembly: assessment and appropriations by, 334-5, 878; Declaration of Principles Governing the Sea-bed by, 332-3; definition of aggression by, 43, 342-6; development of international law through resolutions of, CP, 377-8; and human rights, CP, 381-2, 336; and ICJ opinion on Art. 17, 878; and Israeli occupied territories, 552; legal force of resolutions of, 328-36; partition of Palestine by, 587, 592, 603, 604; and Palestine refugees, 587, 599-605; and People's Republic of China, 324, 331-2; and permanent sovereignty over natural resources, 18, 27, 377-8; and terrorism, 884; Uniting for Peace resolution, 333; and use of mercenaries, 54; "Zionism" resolution of, 533
- United Nations Group of Eminent Persons, study on impact of multinational corporations by, 251
- United Nations Headquarters Agreement, "consultation" under Sect. 13(b) of, CP, 881-2
- United Nations High Commissioner for Refugees (UNHCR), and definition of refugee, 609-10
- United Nations Human Rights Committee, US intent to recognize competence of, 621, 628-9
- United Nations Industrial Development Organization (UNIDO), Constitution of, 327
- United Nations Information and Research Centre on Transnational Corporations, 251, 268, 269
- United Nations Interim Force in Lebanon (UNFIL), CP, 911-3
- United Nations Secretary-General: and Namibian settlement, CP, 119; report on UN Interim Force in Lebanon by, CP, 912; and Rhodesian settlement, CP, 119-20
- United Nations Security Council: arms embargo against South Africa by, CP, 407-9, 897; and definition of aggression, 344-6; and establishment of UNEF II, 333; and Lebanese conflict, CP, 911-2, 920; Middle East resolutions of, CP, 140-3, 608, 906-7; and Namibia, 152, 897; non-self-executing character of resolutions of, JD, 152; and sanctions against Rhodesia, 119-20, 329-30, 332; and use of mercenaries, 40, 46, 48-9; use of veto in, 339-41, 345-6
- United Nations Special Committee on Palestine, 591
- United States
- Abandoned Property Act, application to ships of, JD, 664-5
- and act of state doctrine, 22, 262-3
- Administrative Procedure Act, 156
- Antiquities Act, and abandoned ships, JD, 664-5

- antitrust laws of, 255, 258-60, 662-3
- application of IAEA safeguards to nuclear facilities of, *CP*, 913-7
- Arms Control and Disarmament Act, Sect. 33 of, *CP*, 394-7
- Arms Export Control Act: "internal security" under Sect. 4 of, 886-7; Israeli violation of Sect. 3(c) of, *CP*, 920-2
- Atomic Energy Act, 655
- Clayton Act, qualification of foreign states for treble damages under Sect. 4 of, *JD*, 662-3
- Controlled Substances Act, classification of marijuana under, *JD*, 149-51
- Diplomatic Immunities Act, 383
- DISC (domestic international sales corporation) case before GATT, *LA*, 747
- Export Administration Act: amendment to, 647; and regulations on foreign boycotts, *CP*, 898; revocation of privileges under, 146; and weapons sales, 886
- Export Administration Regulations: and foreign boycotts, *CP*, 898-905; prohibition on export of crime control and detection equipment under, *CP*, 906; and sanctions against South Africa, *CP*, 897-8
- Federal Tort Claims Act, and sovereign immunity waivers, *JD*, 156
- Fisheries conservation zone, 868
- Foreign Agents Registration Act: effectiveness of, *CP*, 388-9; and recruitment of mercenaries, 52
- Foreign Assistance Act: and arms exports, *CP*, 886; Hickenlooper Amendment to, 2, 6, 14-16, 20, 263, *CP*, 398-401; and human rights, *CP*, 887, 891
- Foreign Sovereign Immunities Act: and antitrust laws, *JD*, 663; service under, *JD*, 926; supplemental legislation to, *CP*, 383-7
- Freedom of Information Act, exemption of commercial and financial information under, 886
- generalized system of preferences for developing countries, *LA*, 513
- human rights and assistance under PL 480, 888
- Immigration and Naturalization Act: conditional entry of refugees under, *JD*, 672-3; deportation under, *JD*, 924
- Inter-American Development Bank Act, Gonzales Amendment to, 2, 14-6, 20
- International Development Association Act, Gonzales Amendment to, 2, 14-6, 20
- Internal Revenue Code, and taxation of foreign-source income, 297-301, 749-53
- International Claims Settlement Act, Cuban expropriations and, 11-2
- International Emergency Economic Powers Act, foreign assets control under, *CP*, 645-8
- Lanham Act: extraterritoriality of, 155; protection of trademarks under, *JD*, 153-6
- legislation on mercenaries by, 52-3
- Merchant Marine Act (1920), and shipping discrimination, *CP*, 649-52
- Micronesia Claims Act, settlements under, *JD*, 668
- military manual, and rights of belligerent occupant, 576, 581
- Nationality Act of 1940, loss of citizenship under, *JD*, 413-5
- "New Economic Policy," 752, 760-1
- Nuclear Non-Proliferation Act, *CP*, 655-61, *OD*, 712
- Omnibus Antiterrorism Act, 883
- Outer Continental Shelf Land Act, jurisdiction under, *JD*, 664
- Public Vessels Act: adjudication of salvage claims under, *JD*, 411-2; sovereign immunity under, *JD*, 412
- regulations on international traffic in arms, *CP*, 144-6
- and removal of travel and visa restrictions, *CP*, 121
- Sherman Act, qualification of foreign states for treble damages under Sect. 7 of, *JD*, 662-3
- Shipping Act, 651
- Special Interests Security program, and exclusion of foreign ships, *JD*, 156-7
- Suits in Admiralty Act, and sovereign immunity, *JD*, 156
- Tariff Act, jurisdiction of US Customs Court under, *JD*, 670

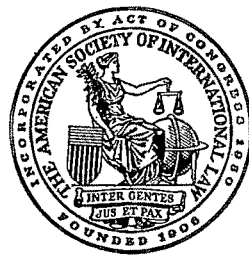
- Tax Reform Act, and boycott regulations, *CP*, 905
- tax-sparing provisions in treaties between developing countries and, *LA*, 296
- Trade Act of 1974: anti-OPEC amendments to, 263; and generalized system of preferences, 524, 526-531, 532, 539; import controls under, *CP*, 645; orderly marketing agreements under, *JD*, 670; and shipping discrimination, 649
- Trading with the Enemy Act, amendment of, *CP*, 646-7
- treaties of friendship, commerce and navigation, consultations on restrictive business practices under, 266
- treaty power, and transfer of territory of, *CP*, 123-9
- and UN Charter review, 339
- use of UNSC veto by, 341
- War Powers Resolution, and US assistance to Zaire, *CP*, 917-20
- United States Agency for International Development (AID), and human rights, 892-3
- United States Air Force. International Law—The Conduct of Armed Conflict and Air Operations, *BR*, 174
- United States Commission on Security and Cooperation in Europe, 123
- United States Congress: and compensation for taking of US-owned property, 17; and domestic international sales corporation (DISC), 751, 763, 777; and GATT, 748; legislative vetoes by, *CP*, 646; and making of international agreements, 876; presidential reports under Arms Export Control Act to, *CP*, 920-2; presidential reports under War Powers resolution to, *CP*, 920-2; and sanctions against Rhodesia, 329; and transfer of US property, *CP*, 123-9
- United States Constitution: citizenship and Fourteenth Amendment to, *JD*, 674; executive agreements and Art. II, Sect. 2 of, *JD*, 666; and human rights covenants, 620, 621-2, 625, 627, 630-1; legislative veto and Art. I, Sect. 7 of, *CP*, 646; protection of aliens under Fourteenth Amendment to, *JD*, 159, 923; ratification of treaties under Art. II, sect. 2 of, 917; regulation of foreign commerce and Art. I, Sect. 3 of, 650; rights of Micronesians to due process under Fifth Amendment to, *JD*, 668; sovereign immunity and Fifth Amendment to, 157; Supremacy clause (Art. VI, Sect. 2) and violations of GATT, *JD*, 415-6; transfer of property under, *CP*, 123-9
- United States Customs Court, jurisdiction under Tariff Act of, *JD*, 670
- United State Department of State: and act of state doctrine, 22; and compensation for taking of US-owned property, 17; and guidelines for expropriations, 35; and waivers of expropriation claims, 26-7
- United States Export-Import Bank, human rights and financial assistance through, 887
- United States Foreign Claims Settlement Commission: and Cuban expropriations, 11-2; and settlement of World War II and postwar nationalization claims, 23
- United States Micronesian Claims Commission, *JD*, 667-70
- United States National Security Council: Interagency Group on Human Rights and Foreign Assistance of, *CP*, 887-90; 892; Special Coordination Committee of, 884
- United States National War College, teaching of international law in, *NC*, 112
- United States President: emergency economic powers of, *CP*, 645-8; reports to Congress under Arms Export Control Act and War Powers resolution by, 920-2
- Uruguay, applicability of Geneva Conventions to conflict in, 275
- Usher, J. A., H. J. Eversen, & H. Sperl. *Compendium of Case Law Relating to the European Communities*, 1975, *BN*, 963
- Usufruct: under Art. 55 of 1907 Hague Regulations, 562-5, 574-5, 578-9, 584; under Brussels code of 1874 on Laws and Customs of War, 565-6; under modern European civil codes, 569-74; and Nuremberg Tribunal, 580-4; under Roman law, 567-9; under US and British military manuals, 576, 581
- Utton, Albert E. *BN*, Arnaud, 962
- Universal Declaration of Human Rights: general welfare under Art. 29(2) of, 612-3; right to leave and return under Art. 13 of, 46, 122, 612-4; and sex discrimination, 420

- Vambery, Joseph T. & Rose V. Cumulative List and Index of Treaties and International Agreements Registered or Filed and Recorded with the Secretariat of the United Nations, Vol. I, December 1969—December 1974, *BN*, 962
- Venezuela: Calvo clause in Constitution of, 410; nationalization of oil concessions by, 7-9, 15, 19, 27, *JD*, 410-1
- Verdier, Bernard, et al. L'entreprise multinationale face au droit, *BR*, 690
- Verdross, Alfred & Bruno Simma. Universelles Völkerrecht. Theorie und Praxis, *BR*, 167
- Vienna Conference on the Law of Treaties: Declaration on Economic Coercion by, 118; Soviet attitudes on unequal treaties in, 117-8
- Vienna Convention on the Law of Treaties (1969): belligerent rights and Art. 31(3)(c) of, 556; effect of Art. 21(3) of, 102; interpretation of "force" in Art. 52 of, 118; and regulation of international agreements, 876
- Vienna Conference on Succession of States in Respect of Treaties (1977), 324
- Vienna Convention on Succession of States in Respect of Treaties (1978), *OD*, 971
- Vierdag, E. W. & H. Meijers. Essays on International Law and Relations in Honour of A. J. P. Tammes, *BR*, 189
- Vignes, Daniel & Georges Fischer. L'Inspection Internationale. Quinze Etudes de la Pratique des Etats et des Organisations Internationales, *BN*, 216
- Vietnam, Socialist Republic of: absorption of South Vietnam by, 153; expulsion of UN representative of, *CP*, 880-2; US nonrecognition of, 153; US veto of UN membership for, 341
- Vietnam, Republic of: suits by unrecognized governments and, *JD*, 152-3; and US generalized system of preferences, 532-3, 539
- Vietnam war, applicability of Geneva Conventions to, 274, 275-6, 292
- Vlasic, Ivan A. *BR*, Marcoff, 687
- Volken, Paul. Konventionskonflikte im internationalen Privatrecht, *BN*, 441
- Von Glahn, Gerhard. *BN*, Berber, 442; Simmonds & Sarup, 204; *BR*, Guggenheim, 197
- Von Lucius, Robert. *Corr.* on status of Germany, 116-7; Grzybowski reply, 117
- Von Mehren, Arthur T. *BN*, Picone & Wengler, 221
- Waelbroeck, Michel, Eric Stein, & Peter Hay. European Community Law and Institutions in Perspective, Text, Cases and Reading; Documents for European Community Law and Institutions in Perspective, *BR*, 678
- Wallace, Don, Jr. & Helga Escobar. The Future of International Economic Organizations, *BN*, 446
- Wallenstein, Gerd D. International Telecommunications Agreements, Vol. I, *BR*, 689
- Walsh, Don (ed.). The Law of the Sea: Issues in Ocean Resource Management, *BR*, 933
- War crimes: definition by Nuremberg Tribunal of, 580; individual responsibility for, 254; prisoner-of-war status and, 405; and use of mercenaries, 54-5
- Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air (1929): amendment of Art. 25 of, 148; application of Art. 17 of, *JD*, 666-7; carrier liability under, *JD*, 147-9; Guatemala Protocol to (1971), *JD*, 667; Hague Protocol (1955) to, 148; interpretation of Arts. 17, 22, and 24 of, *JD*, 147-9. *See also* Montreal (IATA) Agreement
- Washington Committee of Jurists, and ICJ Statute, 838
- Weber, Nikolaus. Die Richtlinie im EWG-Vertrag, *BR*, 192
- Webster, R. Dan. *BR*, Kahn-Freund, 196
- Weed, Frederic S. *BN*, Moreno López, 965
- Weis, Paul. *BN*, Giese, 213; *BR*, Mutharika, 680
- Weissberg, Guenter. *BR*, Arndt, 194
- Wengler, Wilhelm & Paolo Picone (eds.). Internationales Privatrecht, *BN*, 221
- West Bank: application of Chicago Convention to, 551-7; application of ILO conventions to, 544-51; application of Jordanian labor law to, 548-9; legality of Israeli settlements in, *CP*, 138, 908-11; status of, 143, 907-8, 910

- Western Sahara, ICJ and, 845
- Weston, Burns H. & W. Michael Reisman. *Toward World Order and Human Dignity. Essays in Honor of Myres S. McDougal*, *BR*, 161
- Wilk, Kurt. *BN*, Keeton & Schwarzenberger, 222
- Witt, William H. *International Law in War College Perspective*, *NC*, 112
- Women, UN Declaration on the Elimination of Discrimination against (1967), 420
- World Health Organization (WHO): administration of trust funds by, 859; amendments to Arts. 24, 25, 34, and 35 of Constitution of, 323
- World War I, US sea defense zones during, 873
- World War II: settlement of claims arising from, 22-4, 34, 667-70; US sea defense zones during, 873
- Wrangell (Wrangel) Island, claims to, *CP*, 894-5
- Yemen: applicability of Geneva Conventions to conflict in, 275; use of mercenaries in, 48
- Yugoslavia, and US generalized system of preferences, 539
- Zaire: US assistance to meet attack on, *CP*, 917-20. *See also* Congo
- Zimbabwe. *See* Rhodesia
- Zivier, Ernst R. *Der Rechtsstatus des Landes Berlin*, *BN*, 449

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1978

[No. 1, January 1978, pp. 1-246; No. 2, April 1978, pp. 247-511;
No. 3, July 1978, pp. 513-745; No. 4, October 1978, pp. 747-1020.]

	PAGE
Of Missionaries, Fanatics, and Lawyers: Some Thoughts on Investment Disputes in the Americas <i>William D. Rogers</i>	1
Coercion and Foreign Investment Rearrangements <i>Detlev F. Vagts</i>	17
The Recruitment and Use of Mercenaries in Armed Conflict <i>H. C. Burmester</i>	37
The Third United Nations Conference on the Law of the Sea: The 1977 New York Session <i>Bernard H. Oxman</i>	57
The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices <i>Joel Davidow & Lisa Chiles</i>	247
Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflict <i>David P. Forsythe</i>	272
A Formula for Tax-Sparing Credits in the U.S. Tax Treaties with Developing Countries <i>Howard M. Liebman</i>	296
The People's Republic of China and the Charter-Based International Legal Order <i>Samuel S. Kim</i>	317
The U.S. Generalized System of Preferences for Developing Countries: International Innovation and the Art of the Possible <i>Thomas R. Graham</i>	513
Applicability of Multilateral Conventions to Occupied Territories <i>Theodor Meron</i>	542
May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez <i>Brice M. Clagett and O. Thomas Johnson, Jr.</i>	558
The Palestinian Refugees: The Right to Return in International Law <i>Kurt René Radley</i>	586
The Jurisprudence of International Trade: The DISC Case in GATT <i>John H. Jackson</i>	747
International Protection of the Baltic Sea Environment Against Pollution <i>Boleslaw A. Boczek</i>	782
The Function of the Oath in the Ancient Near Eastern International Treaty <i>Donald L. Magnetti</i>	815
Declarations by Judges of the International Court of Justice <i>Farrokh Jhabvala</i>	830

	PAGE
Editorial Comments	
Foreign Policy and the 1977 Soviet Constitution - <i>John N. Hazard</i>	350
Brunson MacChesney <i>R. R. Baxter</i>	615
Notes and Comments	
Law of the Sea—The Integration of the System of Settlement of Disputes under the Draft Convention as a Whole <i>A. O. Adede</i>	84
The United Kingdom—France Continental Shelf Arbitration <i>David A. Colson</i>	95
International Law in War College Perspective <i>William H. Witt</i>	112
The Research and Study Activities of the American Society of International Law: Report of the Director of Studies, 1975–1977 <i>John Lawrence Hargrove</i>	356
Trust Funds in International Law <i>Joseph Gold</i>	856
The 50-Mile Military Boundary Zone of North Korea <i>Choon-ho Park</i>	866
A New Restatement of the Foreign Relations Law of the United States <i>R. R. Baxter</i>	875
Correspondence	116, 373, 616, 878
Contemporary Practice of the United States Relating to International Law <i>John A. Boyd & Marian L. Nash</i>	119, 375, 620, 879
Judicial Decisions <i>Alona E. Evans</i>	147, 410, 662, 923
Book Reviews and Notes <i>Edited by Leo Gross</i>	161, 422, 675, 929
Books Received	223, 453, 709, 966
Official Documents	
Panama-United States	
Panama Canal Treaty	225
Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal	238
Protocol to the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal	241
Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts	
Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I)	457
Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)	502
United States	
Nuclear Non-Proliferation Act of 1978	712
United Nations Conference on Succession of States in Respect of Treaties	
Vienna Convention on Succession of States in Respect of Treaties	971
International Legal Materials. Contents, Vol. XVI, Nos. 5–6 (1977); Vol. XVII, Nos. 1–4 (1978)	
	243, 510, 743, 970
Table of Cases	
Index	

The views expressed in the articles, editorial comments, book reviews, and notes, and other contributions which appear in AJIL are those of the individual authors and are not to be taken as representing the views of the Board of Editors or of The American Society of International Law.

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Table of Contents

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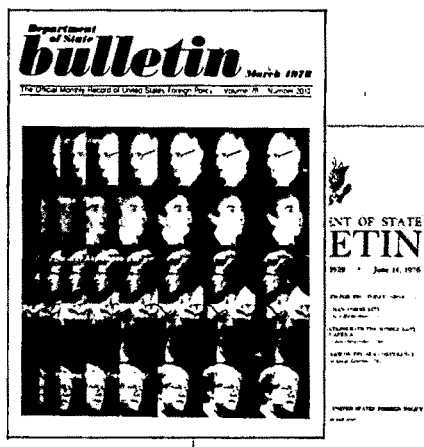
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